MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 18, 2007 to August 10, 2007

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
CLIFFORD W. TAYLOR, Laingsburg	2009
Justices	
MICHAEL F. CAVANAGH, East Lansing	2015
ELIZABETH A. WEAVER, Glen Arbor	2011
MARILYN KELLY, Bloomfield Hills	2013
MAURA D. CORRIGAN, Grosse Pointe Park	2015
ROBERT P. YOUNG, Jr., Grosse Pointe Park	2011
STEPHEN J. MARKMAN, Mason	2013

Commissioners

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KATHLEEN A. FOSTER	RICHARD B. LESLIE
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ANNE-MARIE HYNOUS VOICE	RUTH E. ZIMMERMAN
DON W. ATKINS	SAMUEL R. SMITH
JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO
Reporter of Decisions: DANILO ANSELMO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
BRIAN K. ZAHRA, Northville	2013
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2013
MARK J. CAVANAGH, Royal Oak	2009
JANET T. NEFF, Grand Rapids	2013[1]
KATHLEEN JANSEN, St. Clair Shores	2013
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
HENRY WILLIAM SAAD, Bloomfield Hills	2009
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2013
MICHAEL R. SMOLENSKI, Grand Rapids	2013
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
JESSICA R. COOPER, Beverly Hills	2013[2]
KIRSTEN FRANK KELLY, Grosse Pointe Park	2013
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
PAT M. DONOFRIO, Macomb Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2013
ALTON T. DAVIS, Grayling	2009
DEBORAH A. SERVITTO, Mt. Clemens	2013

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

[1]To August 3, 2007.

[2]To July 27, 2007.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,	2013
	JOHN M. DONAHUE, St. Joseph,	2011
	CHARLES T. LaSATA, Benton Harbor,	2011
	PAUL L. MALONEY, St. Joseph,	2009[1]
3.	DEBORAH ROSS ADAMS, Detroit,	2013
	DAVID J. ALLEN, Detroit,	2009
	WENDY M. BAXTER, Detroit,	2013
	ANNETTE J. BERRY, Plymouth,	2013
	GREGORY D. BILL, Northville Twp.,	2013
	SUSAN D. BORMAN, Detroit,	2009
	ULYSSES W. BOYKIN, Detroit,	2009
	MARGIE R. BRAXTON, Detroit,	2011
	MEGAN MAHER BRENNAN, Grosse Pointe Park,	2009
	HELEN E. BROWN, Grosse Pointe Park,	2009
	BILL CALLAHAN, Detroit,	2009
	JAMES A. CALLAHAN, Grosse Pointe,	2011
	MICHAEL J. CALLAHAN, Belleville,	2009
	JEROME C. CAVANAGH, Hamtramck,	2013
	JAMES R. CHYLINSKI, Grosse Pointe Woods,	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,	2013
	DAPHNE MEANS CURTIS, Detroit,	2009
	CHRISTOPHER D. DINGELL, Trenton,	2009
	GERSHWIN ALLEN DRAIN, Detroit,	2011
	PRENTIS EDWARDS, Detroit,	2013
	CHARLENE M. ELDER, Dearborn,	2009
	VONDA R. EVANS, Dearborn,	2009
	EDWARD EWELL, Jr., Detroit,	2013
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
	SHEILA ANN GIBSON, Detroit,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009

[1] To July 30, 2007.

		Term Expires January 1 of
	DAVID ALAN GRONER, Grosse Pointe Park,	2011
	RICHARD B. HALLORAN, Jr., Detroit,	2013
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2013
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	MURIEL D. HUGHES, Grosse Pointe Woods,	2009
	THOMAS EDWARD JACKSON, Detroit,	2013
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2013
	WADE H. McCREE, Detroit,	2009
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Twp.,	2011
	MARIA L. OXHOLM, Detroit,	2013
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2013
	MICHAEL F. SAPALA, Grosse Pointe Park,	2013
	RICHARD M. SKUTT, Detroit,	2009
	MARK T. SLAVENS, Canton,	2011
	LESLIE KIM SMITH, Northville Twp.,	2013
	VIRGIL C. SMITH, Detroit,	2013
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2013
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2013
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2013
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	EDWARD J. GRANT, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHAD C. SCHMUCKER, Jackson,	2011
	THOMAS D. WILSON, Grasslake,	2013
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	LEO BOWMAN, Pontiac,	2009

		Term Expires January 1 of
	RAE LEE CHABOT, Franklin,	2011
	MARK A. GOLDSMITH, Huntington Woods,	2013
	NANCI J. GRANT, Bloomfield Hills,	2009
	DENISE LANGFORD-MORRIS, West Bloomfield,	2013
	CHERYL A. MATTHEWS, Sylvan Lake,	2011
	JOHN JAMES McDONALD, Farmington Hills,	2011
	FRED M. MESTER, Bloomfield Hills,	2009
	RUDY J. NICHOLS, Clarkston,	2009
	COLLEEN A. O'BRIEN, Rochester Hills,	2011
	DANIEL PATRICK O'BRIEN, Troy,	2011
	WENDY LYNN POTTS, Birmingham,	2013
	EDWARD SOSNICK, Bloomfield Hills,	2013
	MICHAEL D. WARREN, Jr., Beverly Hills,	2013
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2013
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2013
	GEOFFREY L. NEITHERCUT, Flint,	2013
	DAVID J. NEWBLATT, Linden,	2011
	MICHAEL J. THEILE, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	GARY C. GIGUERE Jr., Portage,	2009
	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2011
	PAMELA L. LIGHTVOET, Kalamazoo,	2013
10.	FRED L. BORCHARD, Saginaw,	2011
	WILLIAM A. CRANE, Saginaw,	2011
	LYNDA L. HEATHSCOTT, Saginaw,	2013
	DARNELL JACKSON, Saginaw,	2013
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2013
	TIMOTHY G. HICKS, Montague,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009

		Term Expires January 1 of
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Shelby Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2009
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2013
	EDWARD A. SERVITTO, Jr., Warren,	2013
	MARK S. SWITALSKI, Ray Twp.,	2013
	MATTHEW S. SWITALSKI, Clinton Twp.,	2009
	ANTONIO P. VIVIANO, Clinton Twp.,	2011
	DAVID VIVIANO, Sterling Heights,	2013
	TRACEY A. YOKICH, St. Clair Shores,	2013
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Rockford,	2009
	DONALD A. JOHNSTON, III, Grand Rapids,	2013
	DENNIS C. KOLENDA, Rockford,	2013
	DENNIS B. LEIBER, Grand Rapids,	2013
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011
	PAUL J. SULLIVAN, Grand Rapids,	2009
	MARK A. TRUSOCK, Comstock Park,	2013
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2013
	JOSEPH K. SHEERAN, Essexville,	2009
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2013
	MELINDA MORRIS, Ann Arbor,	2013
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009
25.	THOMAS L. SOLKA, Marquette,	2011
	JOHN R. WEBER, Marquette,	2009

		Term Expires January 1 of
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2013
	TERRENCE R. THOMAS, Newaygo,	2009
28.	WILLIAM M. FAGERMAN, Cadillac,	2009
29.	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2013
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2013
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009
31.	JAMES P. ADAIR, Port Huron,	2013
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Owosso,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2013
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2013
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2013
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2013
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	PAUL J. CLULO, Midland,	2009[2]
	JONATHAN E. LAUDERBACH, Midland,	2013
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2013
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2013

[2] To August 6, 2007.

		Term Expires January 1 of
46.	JANET M. ALLEN, Gaylord,	2011
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	WILLIAM A. BAILLARGEON, Saugatuck,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH, Monroe,	2009
	TERRENCE P. BRONSON, Monroe,	2013
	JACK VITALE, Monroe,	2011
2A.	NATALIA M. KOSELKA, Adrian,	2011
	JAMES E. SHERIDAN, Adrian,	2009
2B.	DONALD L. SANDERSON, Hillsdale,	2009
3A.	DAVID T. COYLE, Coldwater,	2009
3B.	JEFFREY C. MIDDLETON, Three Rivers,	2009
	WILLIAM D. WELTY, Three Rivers,	2013
4.	PAUL E. DEATS, Edwardsburg,	2009
5.	GARY J. BRUCE, St. Joseph,	2011
	ANGELA PASULA, Stevensville,	2009
	SCOTT SCHOFIELD, Niles,	2009
	LYNDA A. TOLEN, Stevensville,	2013
	DENNIS M. WILEY, St. Joseph,	2011
7.	ARTHUR H. CLARKE, III, South Haven,	2009
	ROBERT T. HENTCHEL, Paw Paw,	2011
8-1.	QUINN E. BENSON, Kalamazoo,	2009
	ANNE E. BLATCHFORD, Kalamazoo,	2011
	PAUL J. BRIDENSTINE, Kalamazoo,	2013
	CAROL A. HUSUM, Kalamazoo,	2011
8-2.	ROBERT C. KROPF, Portage,	2009
8-3.	RICHARD A. SANTONI, Kalamazoo,	2009
	VINCENT C. WESTRA, Kalamazoo,	2011
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	2011
	JOHN R. HOLMES, Battle Creek,	2013
	FRANKLIN K. LINE, Jr., Marshall,	2009
	MARVIN RATNER, Battle Creek,	2009
12.	JOSEPH S. FILIP, Jackson,	2011
	JAMES M. JUSTIN, Jackson,	2013
	MICHAEL J. KLAEREN, Jackson,	2009[1]
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009
	J. CEDRIC SIMPSON, Ypsilanti,	2013

[1] From August 6, 2007.

	KIRK W. TABBEY, SALINE,	2011
14B.	JOHN B. COLLINS, YPSILANTI,	2009
15.	JULIE CREAL, ANN ARBOR,	2013
	ELIZABETH POLLARD HINES, ANN ARBOR,	2011
	ANN E. MATTSON, ANN ARBOR,	2009
16.	ROBERT B. BRZEZINSKI, LIVONIA,	2009
	KATHLEEN J. MCCANN, LIVONIA,	2013
17.	KAREN KHALIL, REDFORD,	2011
	CHARLOTTE L. WIRTH, REDFORD,	2009
18.	C. CHARLES BOKOS, WESTLAND,	2009
	SANDRA A. CICIRELLI, WESTLAND,	2013
19.	WILLIAM C. HULTGREN, DEARBORN,	2011
	MARK W. SOMERS, DEARBORN,	2009
	RICHARD WYGONIK, DEARBORN,	2013
20.	MARK J. PLAWECKI, DEARBORN HEIGHTS,	2009
	DAVID TURFE, DEARBORN HEIGHTS,	2013
21.	RICHARD L. HAMMER, JR., GARDEN CITY,	2009
22.	SYLVIA A. JAMES, INKSTER,	2013
23.	GENO SALOMONE, TAYLOR,	2013
	WILLIAM J. SUTHERLAND, TAYLOR,	2009
24.	JOHN T. COURTRIGHT, ALLEN PARK,	2009
	RICHARD A. PAGE, ALLEN PARK,	2011
25.	DAVID A. BAJOREK, LINCOLN PARK,	2009
	DAVID J. ZELENAK, LINCOLN PARK,	2011
26-1.	RAYMOND A. CHARRON, RIVER ROUGE,	2009
26-2.	MICHAEL F. CIUNGAN, ECORSE,	2009
27.	RANDY L. KALMBACH, WYANDOTTE,	2013
28.	JAMES A. KANDREVAS, SOUTHGATE,	2009
29.	LAURA REDMOND MACK, WAYNE,	2013
30.	BRIGETTE R. OFFICER, HIGHLAND PARK,	2011
31.	PAUL J. PARUK, HAMTRAMCK,	2009
32A.	ROGER J. LA ROSE, HARPER WOODS,	2009
33.	JAMES KURT KERSTEN, TRENTON,	2009
	MICHAEL K. MCNALLY, TRENTON,	2013
	EDWARD J. NYKIEL, GROSSE ILE,	2011
34.	TINA BROOKS GREEN, NEW BOSTON,	2013
	BRIAN A. OAKLEY, ROMULUS,	2011
	DAVID M. PARROTT, BELLEVILLE,	2009
35.	MICHAEL J. GEROU, PLYMOUTH,	2011
	RONALD W. LOWE, CANTON,	2013
	JOHN E. MACDONALD, NORTHVILLE,	2009
36.	LYDIA NANCE ADAMS, DETROIT,	2011
	ROBERTA C. ARCHER, DETROIT,	2013
	MARYLIN E. ATKINS, DETROIT,	2013
	JOSEPH N. BALTIMORE, DETROIT,	2009
	NANCY MCCAUGHAN BLOUNT, DETROIT,	2009
	IZETTA F. BRIGHT, DETROIT,	2011
	RUTH C. CARTER, DETROIT,	2011

	DONALD COLEMAN, DETROIT,	2013
	NANCY A. FARMER, DETROIT,	2013
	DEBORAH GERALDINE FORD, DETROIT,	2011
	RUTH ANN GARRETT, DETROIT,	2013
	RONALD GILES, DETROIT,	2013
	JIMMYLEE GRAY, DETROIT,	2009
	KATHERINE HANSEN, DETROIT,	2011
	BEVERLY J. HAYES-SIPES, DETROIT,	2009
	PAULA G. HUMPHRIES, DETROIT,	2011
	PATRICIA L. JEFFERSON, DETROIT,	2009
	VANESA F. JONES-BRADLEY, DETROIT,	2013
	KENNETH J. KING, DETROIT,	2009
	DEBORAH L. LANGSTON, DETROIT,	2013
	WILLIE G. LIPSCOMB, JR., DETROIT,	2009
	LEONIA J. LLOYD, DETROIT,	2011
	MIRIAM B. MARTIN-CLARK, DETROIT,	2011
	DONNA R. MILHOUSE, DETROIT,	2013
	B. PENNIE MILLENDER, DETROIT,	2011
	CYLENTHIA L. MILLER, DETROIT,	2011
	JEANETTE O'BANNER-OWENS, DETROIT,	2009[2]
	MARK A. RANDON, DETROIT,	2009
	KEVIN F. ROBBINS, DETROIT,	2013
	DAVID S. ROBINSON, JR., DETROIT,	2013
	C. LORENE ROYSTER, DETROIT,	2013
37.	JOHN M. CHMURA, WARREN,	2013
	JENNIFER FAUNCE, WARREN,	2009
	DAWNN M. GRUENBURG, WARREN,	2011
	WALTER A. JAKUBOWSKI, JR., WARREN,	2013
38.	NORENE S. REDMOND, EASTPOINTE,	2009
39.	JOSEPH F. BOEDEKER, ROSEVILLE,	2009
	MARCO A. SANTIA, FRASER,	2013
	CATHERINE B. STEENLAND, ROSEVILLE,	2011
40.	MARK A. FRATARCANGELI, ST. CLAIR SHORES,	2013
	JOSEPH CRAIGEN OSTER, ST. CLAIR SHORES,	2009
41A.	MICHAEL S. MACERONI, STERLING HEIGHTS,	2009
	DOUGLAS P. SHEPHERD, MACOMB TWP.,	2013
	STEPHEN S. SIERAWSKI, STERLING HEIGHTS,	2011
	KIMBERLEY ANNE WIEGAND, STERLING HEIGHTS,	2013
41B.	LINDA DAVIS, CLINTON TWP.,	2009
	SEBASTIAN LUCIDO, CLINTON TWP.,	2013
	SHEILA A. MILLER, CLINTON TWP.,	2011
42-1.	DENIS R. LEDUC, WASHINGTON,	2009
42-2.	PAUL CASSIDY, NEW BALTIMORE,	2013
43.	KEITH P. HUNT, FERNDALE,	2013
	JOSEPH LONGO, MADISON HEIGHTS,	2011
	ROBERT J. TURNER, FERNDALE,	2009

[2] To July 27, 2007.

44.	TERRENCE H. BRENNAN, ROYAL OAK,	2009
	DANIEL SAWICKI, ROYAL OAK,	2013
45A.	WILLIAM R. SAUER, BERKLEY,	2009
45B.	MICHELLE FRIEDMAN APPEL, HUNTINGTON WOODS,	2009
	DAVID M. GUBOW, HUNTINGTON WOODS,	2009
46.	SHEILA R. JOHNSON, SOUTHFIELD,	2009
	SUSAN M. MOISEEV, SOUTHFIELD,	2013
	WILLIAM J. RICHARDS, BEVERLY HILLS,	2009
47.	JAMES BRADY, FARMINGTON HILLS,	2009
	MARLA E. PARKER, FARMINGTON HILLS,	2011
48.	MARC BARRON, BIRMINGHAM,	2011
	DIANE D'AGOSTINI, BLOOMFIELD HILLS,	2013
	KIMBERLY SMALL, WEST BLOOMFIELD,	2009
50.	MICHAEL C. MARTINEZ, PONTIAC,	2009
	PRESTON G. THOMAS, PONTIAC,	2011
	CYNTHIA THOMAS WALKER, PONTIAC,	2009
51.	RICHARD D. KUHN, JR., WATERFORD,	2009
	PHYLLIS C. MCMILLEN, WATERFORD,	2013
52-1.	ROBERT BONDY, MILFORD,	2013
	BRIAN W. MACKENZIE, NOVI,	2009
	DENNIS N. POWERS, HIGHLAND,	2013
52-2.	DANA FORTINBERRY, CLARKSTON,	2009
	KELLEY RENAE KOSTIN, CLARKSTON,	2011
52-3.	LISA L. ASADOORIAN, ROCHESTER HILLS,	2013
	NANCY TOLWIN CARNIAK, ROCHESTER HILLS,	2011
	JULIE A. NICHOLSON, ROCHESTER HILLS,	2009
52-4.	WILLIAM E. BOLLE, TROY,	2009
	DENNIS C. DRURY, TROY,	2013
	MICHAEL A. MARTONE, TROY,	2011
53.	THERESA M. BRENNAN, BRIGHTON,	2009
	L. SUZANNE GEDDIS, BRIGHTON,	2011
	CAROL SUE READER, HOWELL,	2013
54A.	LOUISE ALDERSON, LANSING,	2011
	PATRICK F. CHERRY, LANSING,	2009
	FRANK J. DELUCA, LANSING,	2013
	CHARLES F. FILICE, LANSING,	2009
	AMY R. KRAUSE, LANSING,	2011
54B.	RICHARD D. BALL, EAST LANSING,	2011
	DAVID L. JORDON, EAST LANSING,	2013
55.	ROSEMARIE ELIZABETH AQUILINA, EAST LANSING,	2011
	THOMAS P. BOYD, OKEMOS,	2009
56A.	HARVEY J. HOFFMAN, GRAND LEDGE,	2011
	JULIE H. REINCKE, EATON RAPIDS,	2009
56B.	GARY R. HOLMAN, HASTINGS,	2013
57.	STEPHEN E. SHERIDAN, SAUGATUCK,	2013
	JOSEPH S. SKOCELAS, PLAINWELL,	2009
58.	SUSAN A. JONAS, SPRING LAKE,	2009
	RICHARD J. KLOOTE, GRAND HAVEN,	2013

	BRADLEY S. KNOLL, HOLLAND,	2009
	KENNETH D. POST, ZEELAND,	2011
59.	PETER P. VERSLUIS, GRAND RAPIDS,	2011
60.	HAROLD F. CLOSZ, III, NORTH MUSKEGON,	2009
	MARIA LADAS HOOPES, NORTH MUSKEGON,	2009
	MICHAEL JEFFREY NOLAN, TWIN LAKE,	2013
	ANDREW WIERENGO, MUSKEGON,	2011
61.	PATRICK C. BOWLER, GRAND RAPIDS,	2009
	DAVID J. BUTER, GRAND RAPIDS,	2009
	J. MICHAEL CHRISTENSEN, GRAND RAPIDS,	2011
	JEANINE NEMESI LAVILLE, GRAND RAPIDS,	2013
	BEN H. LOGAN, II, GRAND RAPIDS,	2013
	DONALD H. PASSENGER, GRAND RAPIDS,	2011
62A.	PABLO CORTES, WYOMING,	2009
	STEVEN M. TIMMERS, GRANDVILLE,	2013
62B.	WILLIAM G. KELLY, KENTWOOD,	2009
63-1.	STEVEN R. SERVAAS, ROCKFORD,	2009
63-2.	SARA J. SMOLENSKI, EAST GRAND RAPIDS,	2009
64A.	RAYMOND P. VOET, IONIA,	2009
64B.	DONALD R. HEMINGSEN, SHERIDAN,	2009
65A.	RICHARD D. WELLS, DEWITT,	2009
65B.	JAMES B. MACKIE, ALMA,	2009
66.	WARD L. CLARKSON, CORUNNA,	2013
	TERRANCE P. DIGNAN, OWOSSO,	2009
67-1.	DAVID J. GOGGINS, FLUSHING,	2009
67-2.	JOHN L. CONOVER, DAVISON,	2009
	RICHARD L. HUGHES, OTISVILLE,	2011
67-3.	LARRY STECCO, FLUSHING,	2009
67-4.	MARK C. MCCABE, FENTON,	2009
	CHRISTOPHER ODETTE, GRAND BLANC,	2013
68.	WILLIAM H. CRAWFORD, II, FLINT,	2013
	HERMAN MARABLE, JR., FLINT,	2013
	NATHANIEL C. PERRY, III, FLINT,	2009
	RAMONA M. ROBERTS, FLINT,	2011
70-1.	TERRY L. CLARK, SAGINAW,	2013
	M. RANDALL JURRENS, SAGINAW,	2011
	M. T. THOMPSON, JR., SAGINAW,	2009
70-2.	CHRISTOPHER S. BOYD, SAGINAW,	2011
	ALFRED T. FRANK, SAGINAW,	2009
	KYLE HIGGS TARRANT, SAGINAW,	2013
71A.	LAURA CHEGER BARNARD, METAMORA,	2009
	JOHN T. CONNOLLY, LAPEER,	2013
71B.	KIM DAVID GLASPIE, CASS CITY,	2009
72.	RICHARD A. COOLEY, JR., PORT HURON,	2011
	JOHN D. MONAGHAN, PORT HURON,	2013
	CYNTHIA SIEMEN PLATZER, LAKEPORT,	2009
73A.	JAMES A. MARCUS, APPLEGATE,	2009
73B.	KARL E. KRAUS, BAD AXE,	2009

		Term Expires January 1 of
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2013
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	STEVEN CARRAS, Midland,	2011
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2013
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2008
CARL F. JARBOE, Grosse Pointe Park,	2010
LYNNE A. PIERCE, Grosse Pointe Woods,	2008
MATTHEW R. RUMORA, Grosse Pointe Farms,	2010

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	WILLIAM W. CARMODY	2013
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	JACK WILLIAM SCULLY	2013
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	MICHAEL F. SKINNER	2013
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2009
Genesee	ROBERT E. WEISS	2013
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	CHARLES R. GOODMAN	2013

Huron	DAVID L. CLABUESCH	2013
Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2009
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	JOSEPH E. DEEGAN	2013
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2013
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	LaVAIL E. HULL	2013
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	JOHN A. HOHMAN, JR.	2013
Monroe	PAMELA A. MOSKWA	2009
Montcalm	CHARLES W. SIMON, III	2013
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013
Ogemaw	SHANA A. LAMBOURN	2013

Ontonagon	JOSEPH D. ZELEZNIK	2013
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN TOMLINSON	2013
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2013
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2009
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
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	5
Emmet	Petoskey	33
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	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
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	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

TABLE OF CASES REPORTED

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RULES AMENDED

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Amended July 18, 2007 (File No. 2002-09)—REPORTER.

On order of the Court, the order of February 14, 2007 is amended to correct a clerical error by correcting subrule 3.904(B)(1) to read as follows:

(B) Hearings.

(1) Delinquency Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.

In all other respects, the order is unchanged.

SUPREME COURT CASES

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71

Docket No. 130589. Argued November 13, 2006 (Calendar No. 1). Decided July 18, 2007.

The House of Representatives, pursuant to Const 1963, art 3 § 8, requested the opinion of the Supreme Court regarding the constitutionality of 2005 PA 71, MCL 168.523, which requires that, before voting, voters either present photo identification or sign an affidavit averring that the voter lacks photo identification. The Supreme Court entered an order granting the request and requesting the Attorney General to submit separate briefs arguing that the photo identification requirements of 2005 PA 71 are, and are not, constitutional. 474 Mich 1230 (2006).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The photo identification requirement contained in the statute is facially constitutional and withstands scrutiny under both the Michigan Constitution and the United States Constitution. The requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and prevent abuses of the electoral franchise, as demanded by Const 1963, art 2, § 4, thereby helping to ensure that votes cast by lawful voters are not diluted by votes cast by fraudulent voters. The identification obligation imposed by MCL 168.523(1) cannot properly be characterized as an unconstitutional poll tax under US Const, Am XXIV because no voter is required to incur the costs of obtaining a photo identification card as a condition of voting.

1. The request for an advisory opinion in this matter was timely under Const 1963, art 3, § 8 because it was made after 2005 PA 71 was enacted but before its effective date.

2. An elector voting without photo identification faces the possibility of challenge under MCL 168.727, but the challenge procedure is not compulsory.

3. Although a citizen's right to vote is fundamental, this right is not without limits. The right to vote competes with the state's

compelling interest in preserving the integrity of its elections and the Legislature's explicit obligation under Const 1963, art 2, § 4 to preserve the purity of elections and to guard against abuses of the elective franchise.

4. Under the balancing test articulated in *Burdick v Takushi*, 404 US 428 (1992), the first step in determining whether an election law contravenes the Michigan Constitution is to determine the nature and the magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be narrowly drawn to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. Each inquiry is fact- and circumstance-specific.

5. The photo identification requirement in the statute does not impose a severe burden on an elector's right to vote. The statute compels a registered voter to take only one of two actions in order to cast an in-person ballot—either present photo identification or sign an affidavit. Requiring an elector to sign an affidavit as an alternative to presenting photo identification does not impose a severe burden on the right to vote. The photo identification provision in MCL 168.523 imposes only a reasonable, nondiscriminatory restriction on the right to vote that is warranted by the precise interest identified by the state—the prevention of voter fraud and enforcement of the constitutional directive to preserve the purity of elections and guard against abuses of the elective franchise by ensuring that lawful voters not have their votes diluted. The requirement applies evenhandedly to every registered voter without making distinctions with regard to any class or characteristic.

6. The state is not required to provide any proof of in-person voter fraud before it may permissibly take steps to prevent it. The constitutional equal protection guarantee does not require the Legislature to address at once every point at which voter fraud might occur.

7. The Michigan Constitution does not require that every election law be subject to strict scrutiny review. The flexible test articulated in *Burdick* is applicable to resolving an equal protection challenge to an election law under the Michigan Constitution.

8. MCL 168.523(1) does not provide for an unconstitutional poll tax because the statute does not condition the right to vote upon the payment of any fee. The statute's requirement that a person sign an affidavit in the presence of an election inspector, as an alternative to presenting photo identification, is not an onerous

procedural requirement that handicaps the exercise of the franchise and does not erect a real obstacle to voting. No voter need ever incur any secondary costs because of the affidavit alternative contained in MCL 168.523; therefore, any incidental costs incurred by a voter who elects to obtain the optional identification card cannot be held to constitute a poll tax.

The photo identification provisions of 2005 PA 71, MCL 168.523, are constitutional.

Justice CAVANAGH, dissenting, stated that the legislation at issue is unconstitutional and significantly impairs the fundamental right to vote for thousands of Michigan citizens. While the state has the authority, pursuant to Const 1963, art 2, § 4, to regulate elections, the state cannot enact a law that violates the Equal Protection Clause by unduly burdening the right to vote. The compelling state interest test must be applied in this case because voting involves the assertion of a fundamental constitutional right. The majority errs in holding that the state is not obligated to provide any evidence to support its asserted interest. The state interest claimed in this case is the prevention of in-person voter fraud when there is no evidence that in-person voter fraud actually exists. The photo identification requirement at issue is not narrowly tailored to meet a compelling state interest because there is no evidence of in-person voter fraud and, therefore, no need to impose the requirement. Because the photo identification requirement will significantly affect the voting rights of thousands of Michigan citizens and have discriminatory effects, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the state's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions. An examination of the photo identification requirement in a realistic light clearly indicates that, rather than applying evenhandedly to every registered voter, distinct populations in Michigan will be uniquely and substantially burdened by the requirement. The requirement does not affect all citizens equally. A penalty cannot be imposed on a citizen who chooses to exercise the right to vote merely because the citizen does not have photo identification. The practical, real-world effect of the requirement can be used to substantially penalize and harass those without photo identification. Given the numerous statutes that criminalize voter fraud and the state's comprehensive statutory scheme for the management of all aspects of voting, the state's actions in mandating photo identification are not narrowly tailored or even reasonable. The photo identification requirement will do nothing to actually prevent in-person voter fraud. The state's interest in imposing the photo

identification requirement must be sufficiently weighty to justify the restriction. Here, the state's interest has no weight because there is absolutely no evidence that a problem with in-person voter fraud even exists. The statute should be held to be unconstitutional.

Justice KELLY, dissenting, stated that 2005 PA 71 infringes on an individual's right to cast a ballot; therefore, under the federal constitution, strict scrutiny analysis should be applied in determining the constitutionality of the act. The majority's decision to follow what it mistakenly believes is the federal standard renders our state's constitutional provisions nugatory. The majority errs in determining that pursuant to *Burdick v Takushi,* numerous past decisions of the United States Supreme Court are no longer good law. *Burdick* did not signal a change in the law or overrule past decisions of the United States Supreme Court that hold that infringements on an individual's right to cast a ballot that cannot withstand strict scrutiny are unconstitutional. The conditions placed by the act on a voter's access to the polling place fail the strict scrutiny test because no compelling state interest in them has been demonstrated. Significant in-person voter fraud has not been shown to exist in Michigan. But, even if it had been shown, less burdensome methods exist to combat whatever voter fraud may threaten to erupt. And, even if the Fourteenth Amendment did not require it, the Michigan Constitution demands that the act pass the strict scrutiny test in order to be pronounced constitutional. The state constitution affords greater protection against infringement on the right to vote then does the federal constitution. 2005 PA 71 should be declared unconstitutional.

1. CONSTITUTIONAL LAW — ELECTIONS — PHOTOGRAPHIC IDENTIFICATION.

The photographic identification requirement contained in 2005 PA 71, MCL 168.523, which requires voters, before voting, to present photo identification or sign an affidavit averring that the voter lacks photo identification, is constitutional; the identification obligation imposed by the statute is not an unconstitutional poll tax under US Const, Am XXIV because no voter is required to incur the costs of obtaining a photo identification card as a condition of voting.

2. CONSTITUTIONAL LAW — ELECTIONS — EQUAL PROTECTION.

A flexible text is applicable to resolving an equal protection challenge to an election law under the Michigan Constitution; the first step is to determine the nature and the magnitude of the claimed restriction inflicted by the election law on the right to vote,

> weighed against the precise interest identified by the state; if the burden on the right to vote is severe, the regulation must be narrowly drawn to further a compelling state interest; if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, and *Susan Leffler* and *Heather S. Meingast,* Assistant Attorneys General, for the Attorney General in support of the constitutionality of 2005 PA 71.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, *Henry J. Boynton,* Assistant Solicitor General, and *Ron D. Robinson,* Assistant Attorney General, for the Attorney General opposing the constitutionality of 2005 PA 71.

Amici Curiae:

Kelly G. Keenan and *Steven C. Liedel* for Governor Jennifer M. Granholm.

Dickinson Wright PLLC (by *Peter H. Ellsworth, Jeffery V. Stuckey*, and *Allen L. Lanstra*) for the Michigan House of Representatives.

Mark McWilliams and *Veena Rao* for Michigan Protection & Advocacy Service, Inc.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, and *Ron D. Robinson* and *Genevieve Dwaihy Tusa*, Assistant Attorneys General, for the Michigan Civil Rights Commission and the Michigan Department of Civil Rights.

Sheila C. Cummings for the Michigan House Democratic Caucus.

Sachs Waldman, P.C. (by *Andrew Nickelhoff*), *John Wm. Mulcrone*, and *Sheila C. Cummings* for the Michigan Democratic Party, the Michigan House Democratic Caucus, the Michigan Senate Democratic Caucus, and the Michigan Legislative Black Caucus.

Lathrop & Gage L.C. (by *Mark F. (Thor) Hearne, II*, and *Stephen K. Dexter*) for the American Center for Voting Rights Legislative Fund and Kevin Fobbs.

Foster, Swift, Collins & Smith, P.C. (by *Eric E. Doster*), for the Michigan Republican Party.

Kelley Cawthorne, PLLC (by *Frank J. Kelley*), for Frank J. Kelley, Attorney General Emeritus.

Melvin B. Hollowell, Jr., Reginald M. Turner, Jr., Kary L. Moss, Zenna Elhasan, Rima Elzein, John Johnson, Corporation Counsel, and *Ruben Acosta* for the National Association for the Advancement of Colored People-Detroit Branch, the Michigan State Conference National Association for the Advancement of Colored People, the National Bar Association, the American Civil Liberties Union of Michigan, the League of Women Voters Detroit, the American-Arab Anti-Discrimination Committee, Project Vote, the Michigan Association of Communities for Reform Now, Latin Americans for Social and Economic Development, Inc., the city of Detroit, the Detroit Urban League, and the National Coalition for Community and Justice-Michigan.

Jaffe Raitt Heuer & Weiss, P.C. (by *Harold D. Pope, Brian G. Shannon*, and *Erika Butler-Akinyemi*), and *Ben Blustein, Jonah Goldman, Jon Greenbaum, Marcia Johnson-Blanco*, and *Daniel B. Kohrman* for the Lawyers' Committee for Civil Rights Under Law and the American Association for Retired Persons.

Sachs Waldman, P.C. (by *Mary Ellen Gurewitz*), for various Michigan county clerks, city clerks, and township clerks.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, and *Patrick O'Brien*, Assistant Attorney General, for the Michigan Department of State, Bureau of Elections.

YOUNG, J. Article 3, § 8 of the Michigan Constitution allows the Governor or either house of the Legislature to request the opinion of this Court "on important questions of law upon solemn occasions as to the constitutionality of legislation . . . ." We granted the House of Representatives' request to opine on the constitutionality of 2005 PA 71, MCL 168.523. Of concern to the House is the constitutionality of the requirement that voters either present photo identification or sign an affidavit averring that the voter lacks photo identification before voting.

We hold that the photo identification requirement contained in the statute is facially constitutional under the balancing test articulated by the United States Supreme Court in *Burdick v Takushi*.[1] The identification requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise, as demanded by art 2, § 4 of the Michigan Constitution, thereby preventing lawful voters from having their votes diluted by those cast by fraudulent voters. Moreover, as no voter is required to incur the costs of obtaining a photo identification card as a condition of voting, the identification obligation imposed by MCL 168.523(1) cannot properly be characterized as an un-

[1] 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

constitutional poll tax under the Twenty-fourth Amendment of the United States Constitution.

I. UNDERLYING BACKGROUND FACTS

In 1996, our Legislature amended the Michigan Election Law, MCL 168.1 *et seq.*, to include § 523, which required a voter to present photo identification before voting. The 1996 amendment was nearly identical to the statutory provision at issue in this case.[2] However, before the amendment became effective, an opinion of the Attorney General issued, concluding that the photo identification requirement in § 523 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[3] Specifically, the Attorney General opinion indicated that the photo identification requirement was "not necessary to further a compelling state interest" in the absence of evidence of "substantial voter fraud in Michigan" and that the requirement imposed "economic and logistical burdens" on those without photo identification.[4] Therefore, although the law was passed by both houses and signed by the Governor, the Secretary of State has never complied with or enforced this validly enacted law.[5]

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[2] See 1996 PA 583.

[3] See OAG, 1997-1998, No 6930, p 1 (January 29, 1997). We note in passing that OAG, No 6930 appears not to have been initiated in accordance with MCL 14.32, which requires the Attorney General to issue opinions only in response to "questions of law submitted to him by the legislature, or by either branch thereof . . . ."

[4] OAG No 6930, pp 3, 5.

[5] Relying on obiter dictum found in *Traverse City School Dist v Attorney General*, 384 Mich 390, 407 n 2; 185 NW2d 9 (1971), both the supporting and the opposing Attorney General maintain that opinions issued by the Attorney General are "binding upon state agencies." Because the effect of an Attorney General opinion is beyond the scope of the advisory opinion, we decline to address the statutory or constitutional

Subsequent events brought renewed interest in election reform. The 2000 presidential election revealed highly publicized alleged deficiencies in the electoral system in several states.[6] In an effort to address these deficiencies, Congress passed the Help America Vote Act (HAVA) in 2002, which imposed minimum administration standards on state elections.[7] HAVA requires that first-time voters who register by mail present proof of identity in the form of photo identification or other alternative documentation.[8] In addition, HAVA specifically indicates that its provisions establish *minimum* requirements, explicitly authorizing states to institute consistent "administration requirements that are *more strict*" than the federal requirements.[9]

After the enactment of HAVA, the Commission on Federal Election Reform was formed to "assess HAVA's implementation" and to "offer recommendations for further improvement."[10] The findings and recommendations of the commission were released in September 2005. One recommendation proposed that voters pro-

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basis for the claim that opinions of the Attorney General are binding in the present opinion. Cf. *East Grand Rapids School Dist v Kent Co Tax Allocation Bd*, 415 Mich 381; 330 NW2d 7 (1982).

[6] See the report of the National Commission on Federal Election Reform (Ford-Carter Commission), *To Assure Pride and Confidence in the Electoral Process* (August 2001). The commission was "formed in the wake of the 2000 election crisis" to "offer a bipartisan analysis" of election reform. <http://www.reformelections.org/ncfer.asp> (accessed December 19, 2006).

[7] 42 USC 15301 through 15545.

[8] See 42 USC 15483(b)(2). The statute permits a voter to present "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."

[9] 42 USC 15484 (emphasis added).

[10] See Commission on Federal Election Reform (hereinafter Carter-Baker Commission), *Building Confidence in U.S. Elections*, p 1 (September 19, 2005). This 21-member bipartisan commission was cochaired by

vide photo identification in order to deter fraud and enhance ballot integrity.[11] The commission noted that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important."[12]

MCL 168.523, with its photo identification requirement, was amended by 2005 PA 71. Concerned by the adverse Attorney General opinion regarding the previous enactment of § 523, the Michigan House of Representatives adopted a resolution requesting that this Court issue an advisory opinion regarding whether the photo identification requirements contained in 2005 PA 71 violate either the Michigan Constitution or the United States Constitution.[13] We granted the request, asking the Attorney General to submit briefs and argue as both opponent and proponent of the issue.[14]

II. APPLICABLE STANDARDS AND JURISDICTIONAL ISSUES

The question presented in this original proceeding, whether MCL 168.523 is facially violative of either the

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former President Jimmy Carter and former United States Secretary of State James A. Baker, III. <http://www.american.edu/ia/cfer/> (accessed December 19, 2006).

[11] Carter-Baker Commission, *supra* at 21. The Carter-Baker Commission recommended that states require voters to use the "REAL ID card" to vote. The Real ID Act of 2005, PL 109-13, 2005 HR 1268, was enacted on May 11, 2005. The act requires that federal agencies accept only state-issued driver's licenses and identification cards that meet stringent information requirements.

[12] Carter-Baker Commission, *supra* at 18.

[13] See 2006 House Journal 17 (Resolution No. 199, February 21, 2006).

[14] 474 Mich 1230 (2006). To prevent confusion, the terms "supporting Attorney General" and "opposing Attorney General" will be used throughout this opinion to identify the briefs and argument submitted by the Attorney General as the proponent and opponent, respectively, of the constitutionality of 2005 PA 71.

Michigan Constitution or the United States Constitution, is purely a question of law. To the degree the provisions are congruous, this Court has previously construed Michigan's equal protection provision[15] to be coextensive with the Equal Protection Clause of the federal constitution.[16]

A statute challenged on a constitutional basis is "clothed in a presumption of constitutionality,"[17] and the burden of proving that a statute is unconstitutional rests with the party challenging it.[18] A party challenging the facial constitutionality of a statute "faces an extremely rigorous standard,"[19] and must show that " ' "no set of circumstances exists under which the [a]ct would be valid." ' "[20]

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[15] Const 1963, art 1, § 2.

[16] US Const, Am XIV. *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000), citing *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996), and *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992). However, in *Lind v Battle Creek*, 470 Mich 230, 235; 681 NW2d 334 (2004) (YOUNG, J., concurring), it was noted that Const 1963, art 1, § 2 contained specific antidiscrimination provisions not found in its federal counterpart.

[17] *Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 127; 247 NW2d 764 (1976).

[18] *DeRose v DeRose*, 469 Mich 320; 666 NW2d 636 (2003); *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001); *In re Trejo Minors*, 462 Mich 341; 612 NW2d 407 (2000).

[19] *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 310; 586 NW2d 894 (1998) (TAYLOR, J., dissenting).

[20] *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987) (citation omitted). A facial challenge is a claim that the law is "invalid *in toto*—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974).

The other type of constitutional challenge is an "as applied" challenge. An "as applied" challenge considers the specific application of a facially valid law to individual facts. *Crego v Coleman*, 463 Mich 248; 615

As a preliminary matter, the opposing Attorney General claims that this Court lacks the constitutional authority to issue an advisory opinion in this case because the request for the advisory opinion was untimely. Const 1963, art 3, § 8 provides that either house of the Legislature or the Governor may request an advisory opinion regarding the constitutionality of legislation "after [the legislation] has been enacted into law but before its effective date."

The opposing Attorney General maintains that, because 2005 PA 71 was an amendment of 1996 PA 583, MCL 8.3u dictates that the effective date of 2005 PA 71 was March 31, 1997, the effective date of 1996 PA 583.[21] Essentially, the opposing Attorney General claims that Const 1963, art 3, § 8 cannot be satisfied because the effective date of the public act occurred eight years before 2005 PA 71 existed. This misconstrues MCL 8.3u, which merely requires that once a reenacted, amended, or revised law becomes operational, it is treated as a continuation of the prior law. It is axiomatic that a statute becomes operational only upon its effective date.[22] Moreover, MCL 8.3 indicates that MCL 8.3u is to be observed "unless such construction would be

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NW2d 218 (2000); *Boddie v Connecticut*, 401 US 371; 91 S Ct 780; 28 L Ed 2d 113 (1971). An "as applied" challenge is not possible at this juncture, as the statute has yet to be enforced.

[21] MCL 8.3u provides:

> The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. If any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the re-enacted provision.

[22] Const 1963, art 4, § 27 ("No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the

inconsistent with the manifest intent of the legislature." The manifest intent of the Legislature indicates that the effective date of 2005 PA 71 was January 1, 2007. Because the House of Representatives requested an advisory opinion well before that date, this Court indisputably has jurisdiction under art 3, § 8 to render an advisory opinion in this matter.

III. RELEVANT STATUTORY PROVISIONS

The statute at issue, MCL 168.523, provides in relevant part:

> (1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card . . . , an operator's or chauffeur's license . . . , or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official. . . . If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.

The statutory provision requires that a registered elector perform two distinct acts before being given a ballot. First, the elector must present photo identification in the form of a driver's license, state identification card, or "other generally recognized picture identification card."[23]

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legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.").

[23] Because, in reliance on OAG No 6930, the Secretary of State has never enforced the statute or promulgated rules and regulations, there is

Second, the elector must execute, in the presence of an election official, an application bearing the elector's signature and address. The statute specifically provides that in the event that an elector does not have the necessary photo identification, an elector need only "sign an affidavit to that effect" before the elector shall "be allowed to vote." The statute indicates, however, that an elector voting without identification is "subject to challenge" under the challenge procedures outlined in MCL 168.727.[24]

The opposing Attorney General maintains that voters without photo identification are impermissibly bur-

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no basis for this Court to speculate regarding what type of identification might eventually constitute "generally recognized picture identification . . . ." The duty to promulgate rules and regulations concerning acceptable alternate photo identification lies exclusively with the Secretary of State under MCL 168.31(1).

[24] Any voter, including those voters presenting photo identification, may be challenged pursuant to MCL 168.727. The statute imposes differing requirements on different challengers. An election inspector is *required* to challenge a ballot applicant "if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book." A registered elector *may* challenge an applicant "if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1). Those who challenge voters may not "challenge indiscriminately" or "without good cause," and face criminal sanctions if qualified voters are challenged for the purpose of annoyance or delay. MCL 168.727(3).

Once challenged, a voter is required to swear to answer truthfully and answer questions "concerning his qualifications as an elector . . . ." MCL 168.729. If the challenged voter answers qualification questions satisfactorily, the challenged voter "shall be entitled to receive a ballot and vote." The ballot cast by a challenged voter is marked (and the mark subsequently concealed) with a number corresponding to the voter's poll list number, and is counted as a regular ballot. MCL 168.745; MCL 168.746. The marked ballot becomes relevant only in the event of litigation surrounding a contested election, where the challenged voter's qualifications to vote are disputed. MCL 168.747; MCL 168.748.

dened because the phrase "subject to" indicates that the challenge procedure is not discretionary, but is compulsory whenever a voter seeks to vote without photo identification. However, this claim is not supported by the language of the statute. The plain meaning of the phrase "subject to" connotes possibility, and in this context is appropriately defined as meaning "open or exposed to."[25] Moreover, another provision of § 523(1), a mere three sentences from the provision at issue, describes a situation in which the application of the challenge procedure is clearly mandatory, as indicated by use of the phrase "*shall* be challenged."[26] Here, the Legislature chose to use the particular phrase "subject to challenge" rather than the mandatory phrase "shall be challenged." The fact that the Legislature used both the mandatory and permissive language concerning challenges of electors within the same statutory provision suggests that there is no basis for concluding that it intended "subject to" to be the equivalent to "shall." We presume that the Legislature intended the meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature.[27] Therefore, we interpret the last sentence of § 523(1) to indicate that an elector voting without photo identification faces the *possibility* of challenge under § 727, but that the challenge procedure is not compulsory. Rather, utilizing the plain language of

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[25] *Webster's New Universal Dictionary*, *Unabridged Edition* (1996), p 1893.

[26] "If the signature or an item of information [from the voter registration list] does not correspond, the vote of the person *shall be challenged,* and the same procedure shall be followed as provided in this act for the challenging of an elector." MCL 168.523(1) (emphasis added).

[27] *People v Crucible Steel Co of America*, 150 Mich 563; 114 NW 350 (1907); *Helder v Sruba*, 462 Mich 92; 611 NW2d 309 (2000); *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002).

§ 727, *any voter*, including those without photo identification, may be challenged, but *only* if the person challenging the voter "knows or has good reason to suspect" that the voter is not a registered elector of that precinct.[28]

IV. CONSTITUTIONAL CHALLENGE

A. NATURE OF THE COMPETING INTERESTS

The "right to vote" is not expressly enumerated in either our state constitution or the federal constitution.[29] Rather, it has been held that the right to vote is an implicit " 'fundamental political right' " that is " 'preservative of all rights.' "[30] As the United States Supreme Court noted, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[31] However, "[t]his 'equal right to vote' is not absolute . . . ."[32]

Balanced against a citizen's "right to vote" are the constitutional commands given by the people of Michigan to the Legislature in Const 1963, art 2, § 4, which states in relevant part:

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[28] There is no basis to conclude that a voter who merely executes an affidavit, without more, presents a challenger with "good reason to suspect" that the voter is not a registered elector of a precinct.

[29] See *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 35 n 78; 93 S Ct 1278; 36 L Ed 2d 16 (1973) ("[T]he right to vote, *per se*, is not a constitutionally protected right . . . .").

[30] *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (citation omitted).

[31] *Dunn v Blumstein,* 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972).

[32] *Id*. (States may "impose voter qualifications," and "regulate access to the franchise in other ways.") See also *Carrington v Rash*, 380 US 89, 91; 85 S Ct 775; 13 L Ed 2d 675 (1965) (noting that states have historically possessed " 'broad powers to determine the conditions under which the right of suffrage may be exercised,' " quoting *Lassiter v Northampton Co Bd of Elections*, 360 US 45, 50; 79 S Ct 985; 3 L Ed 2d 1072 [1959]).

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. *The legislature shall enact laws to preserve the purity of elections*, to preserve the secrecy of the ballot, *to guard against abuses of the elective franchise*, and to provide for a system of voter registration and absentee voting. [Emphasis added.]

Under art 2, § 4, in addition to the legislative responsibility of regulating the "time, place and manner" of elections, the Legislature has been specifically commanded by the people of Michigan to "preserve the purity of elections" and "to guard against abuses of the elective franchise." These provisions have been a part of our constitution for almost as long as Michigan has been a state.[33]

As this Court noted in the nineteenth century, the purpose of a law enacted pursuant to these constitutional directives "is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting*." [34] Under the Legislature's authority to "preserve the purity of elections" and "to guard against

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[33] The constitutional authority to prevent fraudulent voting was first given to the Legislature in the 1850 Michigan Constitution. See Const 1850, art 7, § 6 ("Laws may be passed to preserve the purity of elections and guard against abuses of the elective franchise."). The 1908 Constitution altered the language of the provision to make clear that the duty was obligatory, explicitly providing that "[l]aws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise . . . ." Const 1908 art 3, § 8. When the 1963 Constitution was ratified by the people, the responsibility to pass laws preventing fraudulent voting was explicitly vested in the Legislature, and the Address to the People pointedly stated that "[t]he legislature is *specifically directed* to enact corrupt practices legislation." 2 Official Record, Constitutional Convention 1961, p 3366 (emphasis added).

[34] *Attorney General ex rel Conely v Detroit Common Council*, 78 Mich 545, 559; 44 NW 388 (1889) (emphasis added).

abuses of the elective franchise," the Legislature may "regulate, but cannot *destroy*, the enjoyment of the elective franchise."[35]

In addition to the specific legislative mandate to prevent fraudulent voting contained in the Michigan Constitution, federal jurisprudence has long recognized that a state has the authority to regulate elections under the federal constitution as well as a "compelling interest in preventing voter fraud."[36] Article I, § 4 of the federal constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives . . . ."[37] In *Smiley v Holm*,[38] the United States Supreme Court discussed the scope of state authority to regulate federal elections under art 1, § 4:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; *in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.*

Federal jurisprudence has likewise recognized that states retain the power to regulate state and local

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[35] *Brown v Kent Co Bd of Election Comm'rs*, 174 Mich 477, 479; 140 NW 642 (1913) (emphasis added).

[36] *Purcell v Gonzalez*, 549 US ___, ___; 127 S Ct 5, 7; 166 L Ed 2d 1, 4 (2006). See also *Burson v Freeman*, 504 US 191, 199; 112 S Ct 1846; 119 L Ed 2d 5 (1992); *Rosario v Rockefeller*, 410 US 752; 93 S Ct 1245; 36 L Ed 2d 1 (1973).

[37] US Const, art I, § 4, cl 1.

[38] 285 US 355, 366; 52 S Ct 397; 76 L Ed 795 (1932) (emphasis added).

elections, subject to federal constitutional and statutory limitations.[39]

In addition to possessing the constitutional authority to regulate elections, the United States Supreme Court has also recognized that states have a compelling interest in preserving the integrity of their election processes, including an interest in "ensuring that an individual's right to vote is not undermined by fraud in the election process."[40] As the Supreme Court observed in *Purcell*:[41]

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Thus, fraudulent voting effectively dilutes the votes of lawful voters. By instituting requirements to guard against abuse of the elective franchise, a state protects the right of lawful voters to exercise their full share of this franchise.

In order to protect that compelling interest, a state may enact "generally applicable and evenhanded re-

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[39] *Burdick*, supra at 433; *Tashjian v Republican Party of Connecticut*, 479 US 208, 217; 107 S Ct 544; 93 L Ed 2d 514 (1986); *Sugarman v Dougall*, 413 US 634; 93 S Ct 2842; 37 L Ed 2d 853 (1973); *Boyd v Nebraska ex rel Thayer*, 143 US 135, 161; 12 S Ct 375; 36 L Ed 103 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen . . . .").

[40] *Burson*, *supra* at 199.

[41] *Purcell*, *supra*, 549 US at ___; 127 S Ct at 7; 166 L Ed 2d at 4, quoting *Reynolds v Sims*, *supra* at 555. Voter disenfranchisement through vote dilution is a problem that is also addressed by the Voting Rights Act, 42 USC 1973.

strictions that protect the integrity and reliability of the electoral process,"[42] because

> [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[43]

In sum, while a citizen's right to vote is fundamental, this right is not unfettered. It competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, including ensuring that lawful voters not have their votes diluted.

B. STANDARD OF SCRUTINY

i. FEDERAL JURISPRUDENCE

Generally, where a law classifies by a suspect category, or "where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required."[44] However, in the context of assessing a challenge to the constitutionality of an election law, the United States Supreme Court has rejected the notion

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[42] *Anderson v Celebrezze*, 460 US 780, 788 n 9; 103 S Ct 1564; 75 L Ed 2d 547 (1983).

[43] *Burdick*, *supra* at 433 (citation omitted). See also *Timmons v Twin Cities Area New Party*, 520 US 351, 358; 117 S Ct 1364; 137 L Ed 2d 589 (1997) (holding that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election and campaign-related disorder").

[44] *Attorney General of New York v Soto-Lopez*, 476 US 898, 906 n 6; 106 S Ct 2317; 90 L Ed 2d 899 (1986). Suspect categories include race, alienage, or national origin.

that every election law must be evaluated under strict scrutiny analysis.[45] The Court recognized that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[46] Rather, the Court has held that a "flexible standard" is applicable:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. [47]

Thus, the first step in determining whether an election law contravenes the constitution is to determine

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[45] Under a strict scrutiny standard of constitutional review, "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson*, *supra* at 198 (quoting *Perry Ed Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45; 103 S Ct 948; 74 L Ed 2d 794 [1983]).

[46] *Burdick*, *supra* at 433.

[47] *Id.* at 434 (internal citation omitted).

the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. The United States Supreme Court has stressed that each inquiry is fact and circumstance specific, because "[n]o bright line separates permissible election-related regulation from unconstitutional infringements . . . ."[48]

Like every election regulation, MCL 168.523(1) imposes to some degree a burden on an elector.[49] However, the photo identification requirement contained in the statute does not impose a severe burden upon an

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[48] *Timmons*, *supra* at 359. See also *Storer v Brown*, 415 US 724, 730; 94 S Ct 1274; 39 L Ed 2d 714 (1974) (noting that there is "no litmus-paper test for separating those [election] restrictions that are valid from those that are invidious under the Equal Protection Clause").

[49] As the Supreme Court has observed, *all* election laws "invariably impose some burden upon individual voters." *Burdick*, *supra* at 433. In Michigan, a voter is required to meet minimum age and residency qualifications to register as an elector and must register to vote by executing a registration affidavit in accordance with MCL 168.495. The voter is required to vote at the correct polling place during the hours the polls are open (unless they qualify for an absentee ballot), wait in line, execute an application with the voter's signature and residence, and utilize whatever voting machine is available at the polling place. Moreover, the voter may not have his write-in vote counted unless the candidate has filed a declaration of intent under MCL 168.737a. Michigan's various election requirements invariably impose some burden on the voter. However, as the Supreme Court noted in *Marston v Lewis*, 410 US 679, 680; 93 S Ct 1211; 35 L Ed 2d 627 (1973), "a person does not have a [state or] federal constitutional right to walk up to a voting place on election day and demand a ballot." Rather, Michigan has a compelling interest in ensuring that its election processes are honest, orderly, and efficient.

elector's right to vote. For the overwhelming majority of registered voters in Michigan, the statute merely requires the presentation of photo identification that the voter already possesses.[50] The opposing Attorney General does not claim that requiring an elector to identify himself imposes a severe burden on the right to vote, nor claims that the act of reaching into one's purse or wallet and presenting photo identification before being issued a ballot imposes a severe burden on the right to vote.[51]

Rather, the opposing Attorney General maintains that the statute is facially unconstitutional because an impermissibly severe burden falls on those registered voters who, for whatever reason, do not possess the necessary photo identification. According to this argument, those without photo identification, particularly the "poor, racial and ethnic minorities, elderly, and the disabled," are unable to "gain free and unfettered access to the ballot box."[52] However, the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being "allowed to vote." The opposing Attorney General fails to explain why the act of signing an affidavit in lieu of presenting photo

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[50] According to an affidavit submitted by the Director of the Bureau of Driver and Vehicle Records for the Michigan Department of State, approximately 95 percent of registered voters in the state of Michigan already possess either a driver's license or a state identification card. Of the remaining five percent of registered voters, it is unknown how many possess "other generally recognized picture identification . . . ." As previously indicated, see n 23, the Secretary of State has not promulgated rules regarding what kind of "alternative" photo identification will satisfy this requirement.

[51] Historically, some mechanism of voter identification has been an integral part of the voting process. Harris, *Election Administration in the United States* (Brookings Institution Press, 1934), ch 6, pp 221-222.

[52] Opposing Attorney General brief, p 12.

identification imposes a severe burden on the right to vote.[53] Surely, affixing a signature to such an affidavit is no greater a burden than affixing a signature to the required election application under MCL 168.523. Moreover, the affidavit alternative to the photo identification requirement imposes *less* of a burden than is imposed on those voters who are required to execute a sworn statement before casting a provisional ballot.[54] While both voters are required to execute sworn statements, a provisional ballot "is not tabulated on election day";[55] instead, the ballot is not tabulated until the provisional voter's eligibility is verified within six days after the election.[56] There is simply no basis to conclude that requiring an elector to sign an affidavit as an alternative to presenting photo identification imposes a *severe* burden on the right to vote. Furthermore, the application of a "strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger."[57] This is so because fraudulent voting dilutes the vote of legitimate voters.[58]

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[53] We have already considered and rejected the opposing Attorney General's argument that the challenge procedure delineated in MCL 168.727 is required to be applied to every voter who utilizes the affidavit alternative. All voters, without regard to whether they possess photo identification, face the *possibility* of challenge pursuant to the statute. See n 24 of this opinion.

[54] A provisional ballot is cast when "an individual who is not listed on the voter registration list" seeks to cast a ballot. MCL 168.523a(2). HAVA requires that a voter sign a sworn statement as a condition of casting a provisional ballot. 42 USC 15482(a)(2); 42 USC 15483(b)(2)(B).

[55] MCL 168.523a(5).

[56] MCL 168.813(1). By contrast, a vote cast pursuant to the affidavit provision of MCL 168.523 is tabulated on the day of the election like every other vote.

[57] *Crawford v Marion Co Election Bd*, 472 F3d 949, 952 (CA 7, 2007).

[58] *Purcell, supra* 549 US at ___; 127 S Ct at 7; 166 L Ed 2d at 4-5.

The photo identification provision contained in MCL 168.523 imposes only a "reasonable, nondiscriminatory restriction" on the right to vote that is warranted by the precise interest identified by the state—Michigan's compelling regulatory interest in preventing voter fraud as well as enforcement of the constitutional directive contained in art 2, § 4 to "preserve the purity of elections" and "to guard against abuses of the elective franchise." The identification requirement applies evenhandedly to every registered voter in the state of Michigan without making distinctions with regard to any class or characteristic. In every circumstance, a registered voter need only take one of two actions in order to cast an in-person ballot–either present photo identification or sign an affidavit. The affidavit alternative is equally available to a voter who chooses not to obtain identification, a voter whose faith precludes him from obtaining photo identification, a voter who cannot obtain identification, or a voter who simply lost his identification.

Moreover, the statute is a reasonable means to *prevent* the occurrence of in-person voter fraud. As our Secretary of State has indicated, "without a personal identification requirement it is nearly impossible to detect in-person voter fraud."[59] In-person voter fraud is, by its very nature, covert.[60] In order to prevent in-person voter fraud, it is reasonable to require the person seeking to cast a ballot to provide reliable identification that he is, in fact, the individual regis-

[59] Letter from Secretary of State Terri Lynn Land to Attorney General Michael A. Cox, dated April 20, 2006. See also *Crawford*, *supra* at 953, describing in detail the "extreme difficulty of apprehending a voter impersonator."

[60] See *Burson*, *supra* at 208. "Voter intimidation and election fraud are successful precisely because they are difficult to detect."

tered to vote.[61] The prevention of fraud in the first instance is critical, because it is impossible to remedy the harm inflicted by the fraudulently cast ballot by correcting the vote count, as our constitution requires that ballots remain secret.[62] Conducting the election anew is the only remedy available to purge the taint of a fraudulently cast ballot, a solution described as "imperfect" and having a "negative impact on voter turnout."[63]

The opposing Attorney General argues that MCL 168.523(1) fails even under a lower standard of scrutiny because in-person voter fraud "is very rare"; thus, the state's interest in preventing fraud is "illusory" because there is no significant evidence of in-person voter fraud.[64] Moreover, the opposing Attorney General argues that the statute does nothing to address or prevent fraudulent absentee voting, "where fraud is known to exist." However, there is no requirement that the Legislature "prove" that significant in-person voter fraud exists before it may permissibly act to prevent it. The United States Supreme Court has explicitly stated that "elaborate, empirical verification of the weighti-

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[61] In-person voter fraud could include impersonation of a registered voter, casting a vote in the name of a deceased voter, or casting a vote in the name of a fictional registered voter.

[62] See Const 1963, art 2, § 4. In fact, a voter's ballot is required to be rejected if any part of the ballot is exposed to any person. MCL 168.738(2). If the voter's ballot is rejected for exposure, the "elector shall not be allowed to vote at the election." *Id.*

[63] *Burson*, *supra* at 209.

[64] Opposing Attorney General brief, pp 20, 21. See also Overton, *Voter identification*, 105 Mich L R 631 (2007) (urging on policy grounds that lawmakers await better empirical studies before imposing potentially antidemocratic measures and that the judiciary should demand statistical data.). Given that voter fraud is both covert and criminal, it is hard to imagine how an "empirical study" of the kind demanded by the opponents of voter identification requirements could be designed or executed.

ness of the State's asserted justifications" is *not required*.[65] Rather, a state is permitted to take prophylactic action to respond to potential electoral problems:

> To require States to prove actual [harm] as a predicate to the imposition of reasonable . . . restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.[66]

Therefore, the state is not required to provide *any* proof, much less "significant proof," of in-person voter fraud before it may permissibly take steps to prevent it.

Furthermore, the Legislature is not obligated under the Equal Protection Clause to address at once every point at which fraud might occur.[67] Even in the context of voting regulations, the Legislature is "allowed to take reform 'one step at a time,' " and is not required "to cover every evil that might conceivably have been attacked."[68] Rather, the Legislature is given the discretion to weigh the perceived harm and determine ame-

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[65] *Timmons*, *supra*, 520 US at 364.

[66] *Munro v Socialist Workers Party*, 479 US 189, 195-196; 107 S Ct 533; 93 L Ed 2d 499 (1986).

[67] The Equal Protection Clause "does not compel . . . legislatures to prohibit all like evils, or none." *United States v Carolene Products Co*, 304 US 144, 151; 58 S Ct 778; 82 L Ed 1234 (1938).

[68] *McDonald v Chicago Bd of Election Comm'rs*, 394 US 802, 809; 89 S Ct 1404; 22 L Ed 2d 739 (1969) (citation omitted).

liorative priorities without running afoul of equal protection guarantees:[69]

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause *goes no further* than the invidious discrimination.[70]

Because we conclude that the obligation imposed by the statute of either presenting photo identification or signing an affidavit is not a severe burden on the right to vote, and that the statute imposes only a reasonable, nondiscriminatory restriction on the election process in furtherance of Michigan's compelling regulatory interest in preventing voter fraud and enforcing art 2, § 4 to "preserve the purity of elections" and "to guard against abuses of the elective franchise" by ensuring that lawful voters not have their votes diluted, we conclude that the statute is facially constitutional under the flexible standard articulated in *Burdick*, *supra*.

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[69] The opposing Attorney General also argues that MCL 168.523(1) is not justified because "an effective framework for detecting and deterring voter fraud is already in place in Michigan." Opposing Attorney General brief, p 21. In support of this argument, counsel cites MCL 168.932a. This statute, which was enacted by 1996 PA 583, imposes criminal penalties for those who assume a fictitious name or impersonate another for the purposes of voting. However, that Michigan criminalizes in-person voter fraud does not address Michigan's undisputed interest in *preventing* fraud in the first instance, nor do criminal sanctions provide a means of *detecting* fraud. Moreover, it is unclear how the imposition of criminal penalties could remedy the harm inflicted on our electoral system by a fraudulently cast ballot.

[70] *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483, 489; 75 S Ct 461; 99 L Ed 563 (1955) (emphasis added; internal citations omitted).

ii. MICHIGAN CONSTITUTION

The opposing Attorney General argues that the Michigan Constitution grants a higher level of protection and that the "flexible test" articulated in *Burdick* is not consistent with Const 1963, art 1, § 2. First, the opposing Attorney General notes that, in contrast to its federal counterpart, the Michigan equal protection provision contains an express recognition of "political rights." Thus, counsel maintains that any regulation affecting "political rights" necessitates strict scrutiny analysis. Second, citing *Wilkins v Ann Arbor City Clerk*[71] and *Michigan State UAW Community Action Program Council v Secretary of State*,[72] the opposing Attorney General maintains that the Michigan Constitution requires that every law that applies even a *de minimis* burden on the right to vote must be analyzed under strict scrutiny.

While Const 1963, art 1, § 2 does contain the term "political rights," that term does not stand in isolation.[73] We have discovered no authority, and counsel has revealed none, holding that the term "political rights" has *ever* been interpreted as providing an unfettered right to vote divorced from any type of time, place, or manner restriction. Rather, reading the constitutional provision in context, it provides that no person shall be

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[71] 385 Mich 670; 189 NW2d 423 (1971).

[72] 387 Mich 506; 198 NW2d 385 (1972).

[73] The term "political rights" is found in the nondiscrimination clause of art 1, § 2 rather than the Equal Protection Clause. Const 1963, art 1, § 2 states in full:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

denied "the enjoyment of his civil or political rights or be discriminated against in the exercise thereof *because of* religion, race, color or national origin." (Emphasis added.) However, as the opposing Attorney General acknowledges in its brief, the distinction made in MCL 168.523(1) is between "those who possess photo identification and those who do not."[74] Nothing in the statute denies an elector the right to vote, and certainly does not do so *because of* religion, race, color, or national origin. Accordingly, Const 1963, art 1, § 2 provides no support for the claim that strict scrutiny must be applied to every election regulation.

Likewise, the cases cited by the opposing Attorney General do not support the claim that the Michigan Constitution requires that every election law be subject to strict scrutiny review. In *Wilkins*, *supra*, this Court considered the constitutionality of MCL 168.11(b), a statute that precluded students from establishing residency for the purposes of voter registration. Previous caselaw construing the statute held that a student could register to vote by overcoming a rebuttable presumption that the student was not a resident in the locale of the institution of learning.[75] Relying *exclusively* on federal authority, *Wilkins* held that the statute violated both federal and state due process and equal protection provisions. The Court held that the statute violated due process because there were no consistently applied standards by which a student could overcome the presumption of nonresidency.

In its equal protection analysis, *Wilkins* held that strict scrutiny was the applicable review standard,

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[74] Opposing Attorney General brief, p 8.

[75] *Wolcott v Holcomb*, 97 Mich 361; 56 NW 837(1893); *People v Osborn*, 170 Mich 143; 135 NW 921 (1912); *Attorney General ex rel Miller v Miller*, 266 Mich 127; 253 NW 241 (1934).

noting that the "compelling interest test has been applied with one exception to all of the recent [federal] voting cases . . . ."[76] Rejecting the argument that an absolute denial of the right to vote was required to invoke strict scrutiny, the *Wilkins* Court held that strict scrutiny was appropriate because it was sufficient that the students could show "a burden" on their right to vote.[77] Applying the heightened standard, the *Wilkins* Court declared the statutory provision unconstitutional because it was not necessary to advance the state's interest in "promoting a concerned and interested electorate" and in "insuring that students will not vote twice."[78]

In *Michigan State UAW, supra,* this Court considered the constitutionality of MCL 168.509. The statute required that electors who had not voted or taken other specified action within the previous two years have their voter registration suspended, unless the elector completed an "application for continuation," bearing the elector's signature, address, and mother's maiden name.[79] In resolving the case, the Court dealt "with only one issue"–whether the statute violated Const 1963, art 2, § 1 by imposing an additional voter qualification.[80] Inexplicably, the *Michigan State UAW* Court utilized

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[76] *Wilkins*, *supra* at 681.

[77] *Id.* at 684.

[78] *Id.* at 687, 685.

[79] *Michigan State UAW*, *supra* at 522 (BRENNAN, J., dissenting). A notice of suspension, along with the application for continuation, was mailed to the elector's address 30 days before the elector's registration was suspended.

[80] *Michigan State UAW, supra* at 513. Const 1963, art 2, § 1, provides:

> Every citizen of the United States who has attained the age of 21 years, who had resided in this state six months, and who meets the requirements of local residence provided by law, shall be an

the strict scrutiny standard applicable in the equal protection context, art 1, § 2, in analyzing the art 2, § 1 question.[81]

In *Michigan State UAW*, the Attorney General argued that the statutory provision was permissible under art 2, § 4 of the Michigan Constitution, discussed *supra*. However, in analyzing this constitutional provision, the Court addressed only the Legislature's authority to provide for voter registration, and did not address the explicit directive to preserve the purity of elections and guard against abuses of the elective franchise. The Attorney General also argued that the act of returning the application for continuation was a "small price to pay." In response, the Court cited *Wilkins* and two United States Supreme Court cases in support of the conclusion that "[a]ny burden, however small, will not be permitted unless there is demonstrated a compelling state interest."[82] The Court concluded by holding that, because the Legislature had other statutes in place that served to prevent fraudulent voting, the state "failed to demonstrate a compelling state interest" and the statute was "unconstitutional under Const 1963, art 2, § 1," as adding an additional elector qualification.[83]

Properly read, neither *Wilkins* nor *Michigan State UAW* stands for the proposition that Michigan's Equal Protection Clause, in contrast to the federal Equal Protection Clause, requires the application of strict

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elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.

[81] In support of the application of strict scrutiny to art 2, § 1, a provision setting forth voter qualifications, the *Michigan State UAW* Court exclusively cited equal protection cases, including *Wilkins, supra.*

[82] *Michigan State UAW, supra* at 516.

[83] *Id*. at 520.

scrutiny review to every election law. *Wilkins* relied *exclusively* on United State Supreme Court jurisprudence in construing the Michigan equal protection provision as requiring the application of a strict scrutiny standard whenever "a burden" was placed on the right to vote. Notably, *nothing* in the *Wilkins* decision purported to differentiate between the state and federal equal protection provisions; rather, the provisions were read as coterminous for the purposes of the *Wilkins* analysis. However, as *Burdick* subsequently clarified, blanket application of strict scrutiny review to every election law was not constitutionally required under the federal Equal Protection Clause; rather, strict scrutiny review was constitutionally required *only* where an election law imposed a severe burden on the right to vote. Because *Wilkins* relied on a construction of the federal Equal Protection Clause that was subsequently repudiated by *Burdick*, its analytical underpinning has been destroyed and is of no utility in construing the Michigan Constitution.

Similarly, *Michigan State UAW* does not support the opposing Attorney General's claim that the Michigan Constitution requires strict scrutiny review of all election regulations. The *Michigan State UAW* opinion did not purport to examine or rely on the Michigan Equal Protection Clause in its analysis *at all*. At issue in *Michigan State UAW* was the constitutionality of a voter registration regulation. It is unclear why the Court analyzed the voter registration regulation as an elector qualification issue under art 2, § 1, because the Legislature unquestionably possesses explicit constitutional authority over voter registration pursuant to art 2, § 4.[84] Regardless, the Court borrowed the strict

[84] Const 1963, art 2, § 1 sets forth the minimum characteristics that electors must possess before they become qualified to vote "except as

scrutiny standard, a doctrine rooted in equal protection principles, and applied it to the issue of whether a voter registration provision imposed an additional elector qualification under art 2, § 1.[85]

Of significance, neither *Wilkins* nor *Michigan State UAW* considered or examined the effect of the constitutional directive found in art 2, § 4, requiring the Legislature to "enact laws to preserve the purity of elections" and to "guard against abuses of the elective franchise." This oversight is of critical importance, because "every [constitutional] provision must be interpreted in the light of the document as a whole . . . ."[86] Because our

otherwise provided"—citizenship, age, and residency. Const 1963, art 2, § 4 vests in the Legislature the exclusive authority to regulate the time, place, and manner of elections, as well as the authority to provide for a system of voter registration. Thus, contrary to Justice KELLY's assertions, *both* constitutional provisions play a vital and necessary role in a citizen's right to cast a ballot on election day.

[85] Justice KELLY also relies on *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982), to argue that Const 1963, art 1, § 2 requires strict scrutiny. However, *Socialist Workers Party* never concludes that the Michigan Constitution independently requires strict scrutiny. Instead, this Court determined that strict scrutiny would apply under the First and Fourteenth amendments of the federal constitution, citing federal caselaw. See *id*. at 587-590. After concluding that the law at issue violated the First and Fourteenth amendments, this Court summarily held that art 1, § 2 had been violated as well, relying on the " 'frequent past expressions of this Court that the Michigan Constitution "secures the same right of equal protection" as is secured by the Equal Protection Clause of the Fourteenth Amendment.' " *Id*. at 600 n 21, quoting *Governor v State Treasurer*, 390 Mich 389, 395; 212 NW2d 711 (1973) (T.G. KAVANAGH, J., concurring), quoting *Fox v Employment Security Comm*, 379 Mich 579, 588; 153 NW2d 644 (1967). Because *Socialist Workers Party* expressly stated that it did not rely on the independent force of the Michigan Constitution, *Socialist Workers Party* does not indicate that art 1, § 2 requires strict scrutiny.

[86] *Lapeer Co Clerk* v *Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW 2d 452 (2003). See also *Sault Ste Marie City Comm* v *Sault Ste Marie City Attorney*, 313 Mich 644; 21 NW2d 906 (1946); *City of Lansing* v *Ingham Co Clerk*, 308 Mich 560; 14 NW2d 426 (1944).

constitutional provisions " 'are of equal dignity,' "[87] having been adopted simultaneously, " 'neither can logically trump the other.' "[88] Therefore, every effort should be made to construe constitutional provisions harmoniously, and no provision "should be construed to nullify or impair another."[89]

Thus, as noted above, the Michigan Constitution does not compel that every election regulation be reviewed under strict scrutiny. Given that the appropriate standard by which to evaluate election laws must be compatible with our *entire* constitution, and must not nullify or impair any other constitutional provision, we adopt the "flexible test" articulated in *Burdick* when resolving an equal protection challenge to an election law under the Michigan Constitution. The *Burdick* test strikes the appropriate balance between protecting a citizen's right to vote under art 1, § 2 and protecting against fraudulent voting under art 2, § 4.[90] Therefore, where an election law subjects the right to vote to "severe restrictions," strict scrutiny review is applicable, and the regulation must be narrowly drawn to advance a compelling state interest.[91] However, when an election law imposes only "reasonable, nondiscriminatory restrictions" on the right to vote, the law is

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[87] *In re Probert*, 411 Mich 210, 232-233 n 17; 308 NW2d 773 (1981) (citation omitted).

[88] *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999) (citation omitted).

[89] *Lapeer Co Clerk, supra* at 156.

[90] Contrary to Justice KELLY's assertions, we are not "simply follow[ing] federal precedent in lockstep." *Post* at 109. As the preceding analysis demonstrates, we have carefully considered the requirements of art 1, § 2 in light of art 2, § 4, and determined that the test enunciated in *Burdick* gives proper meaning and effect to both constitutional provisions. Justice KELLY, on the other hand, fails to adequately address the impact of art 2, § 4.

[91] *Burdick*, *supra* at 434.

upheld as advancing the important regulatory interest identified by the state. As we have previously concluded, MCL 168.523(1) does not impose a severe burden on the right to vote; rather, it imposes only a reasonable, nondiscriminatory restriction that furthers Michigan's compelling regulatory interest in preventing voter fraud as well as enforcing the constitutional directive contained in art 2, § 4 to "preserve the purity of elections" and "to guard against abuses of the elective franchise" by ensuring that lawful voters not have their votes diluted. Therefore, the statute is valid under the Michigan Constitution.

V. MCL 168.523(1) IS NOT AN UNCONSTITUTIONAL POLL TAX

The opposing Attorney General argues that by requiring voters to purchase a state-issued identification card, MCL 168.523(1) is "tantamount to a poll tax," and violates the Twenty-fourth Amendment of the United States Constitution. US Const, Am XXIV provides:

> The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The opposing Attorney General argues that the fee charged by the Secretary of State to obtain a state identification card ($10) or a driver's license ($25) constitutes an impermissible poll tax. Moreover, counsel argues that the "real costs" incurred in obtaining photo identification are "much higher," and are properly considered when determining whether the statute imposes an unconstitutional poll tax. Such "real costs" include the cost of transportation to reach the local Secretary of State office, the cost of taking time off work to go to the Secretary of State office, and the cost of

procuring supporting documentation necessary to obtain state-issued photo identification, such as a copy of a birth certificate.

The seminal case concerning poll taxes is *Harper v Virginia Bd of Elections*.[92] There, the United States Supreme Court struck down a Virginia law that imposed an annual poll tax of $1.50 on every resident over the age of 21 as "a precondition for voting."[93] Virginia argued that if it could "demand from all an equal fee for a driver's license," then it could "demand from all an equal poll tax for voting."[94] The Court held that the Virginia law was unconstitutional because the law made "the affluence of the voter or payment of any fee an electoral standard."[95] Regarding any "familiar form of taxation," the *Harper* Court stated the opinion did nothing to "impair its validity so long as" payment of fees is not "made *a condition to the exercise* of the franchise."[96]

In *Harman v Forssenius*,[97] the Court considered the constitutionality of a Virginia law that required, as a condition of voting, an elector to either pay a poll tax or file an annual certificate of residence no later than six months before the election. Holding that the Twenty-fourth Amendment prohibited " 'onerous procedural requirements which effectively handicap exercise of the

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[92] 383 US 663; 86 S Ct 1079; 16 L Ed 2d 169 (1966).

[93] *Id*. at 665 n 1.

[94] *Id*. at 668.

[95] *Id*. at 666.

[96] *Id*. at 669 (emphasis added). The *Harper* opinion overruled *Breedlove v Suttles*, 302 US 277; 58 S Ct 205; 82 L Ed 252 (1937), where the Court had previously held that it was constitutionally permissible "[t]o make payment of poll taxes a prerequisite of voting . . . ." *Id.* at 283.

[97] 380 US 528; 85 S Ct 1177; 14 L Ed 2d 50 (1965).

franchise,' "[98] the Court struck down the certificate of residence requirement because it imposed "a real obstacle to voting" for those "who assert their constitutional exemption from the poll tax."[99] The Court noted that the certificate of residence had to be filed every election year, at least six months before the election, and had to be witnessed or notarized. Unlike poll tax bills, which were sent directly to a voter's residence, a certificate of residence had to be obtained from local officials or prepared by the voter, and filed "in person, or otherwise" with the city or county treasurer. The Court noted that the statute imposed "a cumbersome procedure," and that it seemed "far preferable to mail in the poll tax payment upon receipt of the bill."[100]

In this case, MCL 168.523(1) is not an unconstitutional poll tax under *Harper* because the statute does not condition the right to vote on the payment of any fee. A voter who does not otherwise possess adequate photo identification is not required to incur the costs of obtaining photo identification as a condition of voting. Instead, a voter may simply sign an affidavit in the presence of an election inspector. Nothing in the statute contemplates that a voter is required to incur any costs in the execution of an affidavit.

Moreover, the statute is not unconstitutional under *Harman* because signing an affidavit in the presence of an election inspector, as an alternative to presenting photo identification, is simply not an onerous procedural requirement that handicaps the exercise of the franchise. The procedure in MCL 168.523 bears no resemblance to the "cumbersome procedure" depicted in *Harman*. Fulfilling the requirement of MCL

[98] *Id*. at 541 (citation omitted).

[99] *Id*.

[100] *Id*. at 541, 542.

168.523(1) requires only as much penmanship as is necessary to execute the affidavit, which is readily available at the election precinct. In *Harman*, the fact that the residency certificate was required to be "filed six months before the election" was significant, because such a requirement "perpetuat[es] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate."[101] Here, there is no requirement that an affidavit be executed in advance of the election; rather, an affidavit is executed on the day of the election. Because MCL 168.523(1) does not "erect[] a real obstacle to voting,"[102] there is no constitutional infirmity under *Harman*.

Although no voter is ever *compelled* to procure photo identification as a condition for exercising his right to vote under the statute, we observe that our law provides a mechanism for some voters to receive a state identification card at no cost. Our law requires that the Secretary of State waive the customary fee for a state identification card if an applicant meets any of the conditions listed in MCL 28.292(14).[103] Thus, any voter

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[101] *Harman*, *supra* at 542.

[102] *Id.* at 541.

[103] MCL 28.292 (14) provides:

> The secretary of state shall waive the fee under this section if the applicant is any of the following:
>
> (a) A person 65 years of age or older.
>
> (b) A person who has had his or her operator's or chauffeur's license suspended, revoked, or denied under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, because of a mental or physical infirmity or disability.
>
> (c) A person who presents evidence of statutory blindness as provided in 1978 PA 260, MCL 393.351 to 393.368.
>
> (d) A person who presents other good cause for a fee waiver.

who *elects* to obtain photo identification for use at the polls is entitled to have the $10 fee waived entirely if he is elderly, disabled, or presents good cause to have the fee waived. Therefore, many of the categories of voters that the opposing Attorney General claims are disproportionately affected by the cost of procuring the entirely *optional* photo identification can in fact obtain it for free.[104]

Regarding the secondary costs cited by the opposing Attorney General—time, transportation, and the expense of procuring supporting documentation—we agree with the reasoning of the United States District Court for the Southern District of Indiana in rejecting a similar poll tax claim:[105]

> This argument represents a dramatic overstatement of what fairly constitutes a "poll tax." It is axiomatic that "(e)lection laws will invariably impose some burden upon individual voters." Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because these

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(e) Beginning January 1, 2007, a person who wishes to add or remove a heart insignia described in subsection (1)(f).

[104] Additionally, the elderly and the disabled are entitled to cast absentee ballots pursuant to MCL 168.758(1), alleviating the need to vote at an election precinct and either present photo identification or execute an affidavit.

[105] *Indiana Democratic Party v Rokita*, 458 F Supp 2d 775, 827 (SD Ind, 2006) (internal citation omitted), aff'd sub nom *Crawford v Marion Co Election Bd*, 472 F3d 949 (CA 7, 2007).

In *Rokita*, the Indiana statute at issue required a voter to present valid photo identification issued either by the federal government or the state of Indiana. In the event a voter did not possess the requisite identification, the voter was required to be challenged, and could only cast a provisional ballot after executing an affidavit. In order to have the provisional ballot counted, the voter was required to provide proof of identity by noon on the second Monday following the election.

> same "costs" also result from voter registration and in-person voting requirements, which one would not reasonably construe as a poll tax. Plaintiffs provide no principled argument in support of this poll tax theory.[106]

Noting that the "only incidental cost which might plausibly approach being a poll tax is the fee assessed to obtain a birth certificate," the *Rokita* court ultimately rejected the claim because the birth certificate fees were not "sufficiently tied to the requirements of voting as to constitute a 'poll tax.' "[107] Here, even less of a burden is imposed on voters, since no voter need ever incur any secondary costs because of the affidavit alternative contained in MCL 168.523. Therefore, any incidental costs incurred by a voter who elects to obtain the optional identification card cannot be held to constitute a "poll tax."

VI. RESPONSE TO THE DISSENTS

We are content to rest on the strength of the constitutional analysis we have made, but pause here briefly to address some of the more inflammatory and emo-

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[106] We acknowledge that in *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326, 1370 (ND Ga, 2005), the court held that a statute requiring voter photo identification constituted a poll tax because a voter had to "arrange for transportation," wait in line, and sign a fee waiver affidavit that "may require the voter to swear or affirm to facts that simply are not true" in order to obtain photo identification at no cost. However, less than one year later, the same federal judge adopted the poll tax analysis of *Rokita*, thereby undercutting the prior holding *sub silentio*. See *Common Cause/Georgia v Billups*, 439 F Supp 2d 1294, 1354-1355 (ND Ga, 2006).

[107] *Rokita, supra* at 827, 828. The *Rokita* court noted that the plaintiff had "provided no evidence" that anyone would actually have to incur the costs of obtaining a birth certificate in order to obtain identification. Moreover, other forms of documentation that could be used to obtain photo identification were issued by the federal government, whose requirements and incidental fees were outside the control of the state.

tional arguments made in Justice CAVANAGH's dissent.[108] It is clear that he passionately dislikes the enacted voter photo identification requirement and believes it to be "ill-advised" and founded on no empirical data showing that Michigan has a voter fraud problem. Whether the statute is an "ill-advised" *policy choice* is not a judgment open to the judiciary, this Court, or any member of it. For the reasons we have stated, whatever its policy merits, this enacted legislative policy choice is not one that is facially unconstitutional as the dissenters maintain. We turn now to some of the specific emotional arguments advanced by the dissent.

A. MICHIGAN HAS NO VOTER FRAUD PROBLEM

> The interest in this case is more accurately presented as preventing *in-person* voter fraud when there is *no* evidence that *in-person* fraud actually exists.[109]

The sting of the dissent's contention here is that the photo identification statute serves *no* purpose and therefore surely cannot serve a constitutionally significant one that could justify even the slightest burden that it might impose on a Michigan voter. Not even the opposing Attorney General argues that "no evidence" of such voter fraud exists; the opposing Attorney General suggests only that in-person voter fraud is "rare."[110]

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[108] Because the arguments made in Justice KELLY's dissenting opinion overlap with the arguments made in Justice CAVANAGH's opinion, there is no need to address her arguments separately unless otherwise indicated.

[109] *Post* at 57 (emphasis in original). See also Justice KELLY's dissent, *post* at 94. ("[T]hose arguing in favor of the photo identification requirements have not come forward with any documented instances of in-person voter fraud.").

[110] Interestingly, amicus curiae supporting the constitutionality of the statute have presented certified death certificates of 46 persons who "voted" in the November 2004 election, despite the ordinarily indisposing condition of being dead at the time. All these persons died well in advance

However, whether the incidence of in-person voter fraud is believed to be rare or frequent, the fact of the matter is that no voter identification was required before the enactment of MCL 168.523 and no one knows—or could possibly know—the frequency with which in-person voter fraud occurs at the polls.[111] More relevant to our constitutional inquiry is the fact that a legislature—particularly one given a constitutional mandate to "preserve the purity of elections"—is not required to wait for an electoral calamity before it may act to fulfill its obligation to preserve.[112] And while the dissent purports to focus on the *right* to vote, it does so by considering only one side of that right without reckoning with the obvious object of art 2, § 4—that the right to vote includes the assurance that one's vote will not be diluted by the votes of fraudulent voters. The statute at issue is clearly designed to promote this state constitutional value by requiring those who desire to cast in-person ballots to present identification establishing that they are the registered voters who they claim to be.

B. THE STATUTE IMPOSES A SEVERE BURDEN

> The reality is that not all of our citizens live a life in which they have photo identification and obtaining photo identification solely to vote causes a severe burden.[113]

In a statutory regime that *compels* the state to issue free Michigan photo identification to its disabled, its

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of the election, with dates of death ranging from 16 months to more than 12 years prior to the November 2004 election. A surprising number of these deceased "voters" apparently voted at their precinct.

[111] See n 59 of this opinion.

[112] *McDonald v Chicago Bd of Election Comm'rs, supra* n 68.

[113] *Post* at 63.

seniors, and its most impecunious citizens,[114] the dissent's argument that the photo identification statute imposes a *severe* burden on anyone is simply facetious. But the argument is even more wrongheaded on another ground: Under this statute, no one need have or present photo identification at the poll; a voter need only *sign an affidavit* to vote and have that vote counted like those of every other voter appearing at the polls.[115]

Justice CAVANAGH contends that the ability of voters without photo identification to sign an affidavit in order to vote does not lessen the burden imposed by MCL 168.523 because a "likely scenario is that the challenge process will be used in some situations to harass and intimidate citizens" who sign an affidavit.[116] Although he conjures up images of voters being denied their right to vote at the whim of election officials, he ignores the clear statutory prohibition against such harassment in MCL 168.727(3), which provides that "[a] challenger shall not make a challenge indiscriminately and without good cause." Moreover, a person who challenges a voter for the purpose of annoyance or delay is guilty of a misdemeanor. Thus, contrary to the assertions of Justice CAVANAGH, the use of the challenge process to

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[114] See n 103 of this opinion.

[115] While Justice KELLY maintains that the "affidavit option itself" "interferes" with the right to vote, *post* at 91, she does not explain how the "minor obstacle" of signing one's signature is any different that affixing a signature to the required election application under MCL 168.523. Justice KELLY also suggests that "signature matching" would be a "less restrictive alternative" than either showing photo identification or signing an affidavit. *Post* at 95. However, it should be noted that signature matching necessarily requires a signature, and does not obviate the necessity of confirming that the person at the poll is the person he claims to be. Thus, it would appear that Justice KELLY objects to the legislative choice in determining the identity of a potential voter.

[116] *Post* at 73.

harass voters is deterred by subjecting the challenger to criminal penalties. For these reasons, the dissent errs by concluding that MCL 168.523 imposes a severe burden on the right to vote.

C. THE STATUTE WILL HAVE A DISPARATE IMPACT ON MINORITIES

> The photo identification requirement will have a disparate impact on racial and ethnic populations, as well as poor voters, elderly voters, and disabled voters . . . . [T]he statute at issue will diminish the opportunity for thousands of citizens to participate in the political process.[117]

When all other arguments are unavailing, resorting to a claim of racial discrimination is a frequent substitute. Unfortunately, Justice CAVANAGH has chosen this tack.[118]

Since the act of signing one's name to an affidavit is too trivial an act to sustain the weight of Justice CAVANAGH's overwrought burden argument, he has been forced to ignore the fact that this case involves a *facial* challenge to the statute and argues that the statute, *as it will be applied in the future*, will be subject to abuses that will be discriminatorily visited upon some Michigan citizens.[119] We simply note that, whatever may happen once the statute is enforced, our task in *this* case is to determine only whether the statute is capable of *any* valid application.[120] We conclude that it passes constitutional muster under a facial challenge because

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[117] *Id*. at 64.

[118] Indeed, Justice CAVANAGH appears to have come perilously close to suggesting that the Legislature was motivated in enacting this statute by the desire to suppress minority voters. *Post* at 57-59.

[119] *Post* at 63-66.

[120] See *Steffel* cited in n 20 of this opinion. Should it occur that the statute is discriminatorily applied when it is enforced, the constitutionality of its enforcement will then be at issue and can be challenged at that time.

the voter photo identification statute imposes no significant, much less "severe," burden on Michigan's voters.

VII. CONCLUSION

In this advisory opinion, we have carefully considered the arguments advanced by the Attorney General both challenging and defending the constitutionality of 2005 PA 71. For the reasons previously articulated, the photo identification requirement in MCL 168.523(1) is facially constitutional and withstands scrutiny under both the Michigan Constitution and the United States Constitution. Under the balancing test articulated by *Burdick, supra,* the photo identification requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise, as demanded by art 2, § 4 of the Michigan Constitution, thereby ensuring that lawful voters not have their votes diluted. Moreover, because no voter is required to incur the costs of obtaining a photo identification card as a condition of voting, the statute does not impose the payment of a fee as "a condition to the exercise of the franchise"[121] and therefore is not an unconstitutional poll tax under the Twenty-fourth Amendment of the United States Constitution.

TAYLOR, C.J., and WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*dissenting*). This case is not about preventing voter fraud, it is not about thwarting abuses of the electoral franchise, and it is certainly not about preserving the purity of elections. This case is simply about protecting the right to vote for all Michigan

[121] *Harper*, *supra* at 669.

citizens. As our Michigan Constitution provides: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. Today's decision ignores this constitutional principle and endorses misguided legislation that significantly impairs the fundamental right of thousands of our citizens to vote. The statute at issue and the majority's approval of this statute ignore the fact that the government does not bestow the right to vote on our citizens. The right to vote is inherent, and the government's role is simply to protect this right. Today, our government has failed its citizens. Because I believe this ill-advised legislation is unconstitutional, I respectfully dissent.

I. THE RIGHT TO VOTE IS FUNDAMENTAL

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v Sims*, 377 US 533, 555; 84 S Ct 1362; 12 L Ed 2d 506 (1964); see also *Kramer v Union Free School Dist No 15*, 395 US 621, 626; 89 S Ct 1886; 23 L Ed 2d 583 (1969). The fundamental right to vote encompasses the right to actually have those votes counted. *Reynolds*, *supra* at 554. In Michigan, our citizens' right to vote is protected by the Michigan Constitution, as well as the Equal Protection Clause of the United States Constitution.[1]

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[1] Our Michigan Constitution provides:

This Court has long recognized that the "right to vote has always received a preferred place in our constitutional system. The importance of this right cannot be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens." *Michigan State UAW Community Action Program Council v Secretary of State*, 387 Mich 506, 514; 198 NW2d 385 (1972). "[T]he right to vote is accorded extraordinary treatment because, it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler v Doe*, 457 US 202, 233; 102 S Ct 2382; 72 L Ed 2d 786 (1982) (Marshall, J. concurring). While the state has the authority to regulate elections pursu-

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> Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes. [Const 1963, art 2, § 1.]

Under the United States Constitution, the voting age requirement has been changed to 18 years. US Const, Am XXVI.

The Equal Protection Clause of the Michigan Constitution provides, in relevant part, the following:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. [Const 1963, art 1, § 2.]

The Equal Protection Clause of the United States Constitution provides:

> 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, § 1.]

ant to Const 1963, art 2, § 4, the state cannot pass a law that violates the Equal Protection Clause. See *Williams v Rhodes*, 393 US 23, 29; 89 S Ct 5; 21 L Ed 2d 24 (1968).

This Court has been asked to issue an advisory opinion pursuant to Const 1963, art 3, § 8, addressing the constitutionality of § 523 of 2005 PA 71, which requires voters to provide an official state identification card, a driver's license, or other generally recognized picture identification card to vote. The statute also provides that a voter who does not have one of these forms of identification must sign an affidavit to that effect before being allowed to vote. The statute provides, in relevant part, the following:

> (1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual . . . , an operator's or chauffeur's license issued to that individual . . . , or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official. If an elector's signature contained in the qualified voter file is available in the polling place, the election official shall compare the signature upon the application with the digitized signature provided by the qualified voter file. If an elector's signature is not contained in the qualified voter file, the election official shall process the application in the same manner as applications are processed when a voter registration list is used in the polling place. If voter registration lists are used in the precinct, the election inspector shall determine if the name on the application to vote appears on the voter registration list. If the name appears on the voter registration list, the elector shall provide further identification by giving his or her date of birth or other information stated upon the voter registration list. In precincts using voter registration lists, the date of birth may be required to be placed on the application to

> vote. If the signature or an item of information does not correspond, the vote of the person shall be challenged, and the same procedure shall be followed as provided in this act for the challenging of an elector. If the person offering to vote has signed the registration card or application by making a mark, the person shall identify himself or herself by giving his or her date of birth, which shall be compared with the date of birth stated upon the registration card or voter registration list, or shall give other identification as may be referred to upon the registration card or voter registration list. If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727. [MCL 168.523.]

A photo identification requirement was previously passed by the Legislature in 1996, but the Attorney General issued an opinion that the photo identification requirement in 1996 PA 583 violated the Equal Protection Clause of the Fourteenth Amendment. OAG, 1997-1998, No 6930, p 1 (January 29, 1997). The legislation passed in 1996 was identical in every relevant respect to the legislation at issue in this case, and the photo identification requirement has not been enforced since that time.

The Attorney General stated: "For the poor, those who do not drive, especially the elderly, the handicapped and those who, for whatever reason, do not possess a picture identification card, this requirement imposes economic and logistical burdens." *Id*. at 3. The Attorney General acknowledged that the prevention of voter fraud is, of course, a valid governmental interest, but the prevention of nonexistent voter fraud did not sur-

vive the required strict constitutional scrutiny. The Attorney General stated that "as the chief law enforcement official of the State of Michigan, I am not aware of any substantial voter fraud in Michigan's elections. I have not received complaints regarding voter fraud." *Id*. The Attorney General also relied on confirmation from the state's chief elections official, then-Secretary of State Candice Miller, for further evidence of the fact that Michigan does not have a voter fraud problem. *Id*. The Attorney General concluded that because the state of Michigan does not have an issue with voter fraud, the photo identification requirement "is simply not necessary to promote a compelling governmental interest." *Id*. Thus, because the photo identification requirement was not necessary to promote a compelling governmental interest and it denied the right to vote to our state's citizens, the earlier statute that required photo identification to vote was never implemented.

II. THE PHOTO IDENTIFICATION REQUIREMENT IMPOSES A SEVERE BURDEN ON MICHIGAN'S CITIZENS

The photo identification requirement violates the Equal Protection Clause because it unduly burdens our citizens' right to vote. As this Court has stated, any law that affects elections places a burden on the right to vote. *Michigan State UAW*, *supra* at 516. The United States Supreme Court has also held that when a statute places a condition on the exercise of the right to vote, an exacting test is required. *Dunn v Blumstein*, 405 US 330, 337; 92 S Ct 995; 31 L Ed 2d 274 (1972). If a challenged statute grants the right to vote to some citizens and denies the right to vote to other citizens, the court must determine whether the exclusions are necessary to promote a compelling state interest. *Id*. "Any burden, however small, will not be permitted unless there is demonstrated a compelling state inter-

est." *Michigan State UAW*, *supra* at 516, citing *Lane v Wilson*, 307 US 268, 275-277; 59 S Ct 872; 83 L Ed 1281 (1939). When restrictions are enacted on the basis of race or wealth, the restriction is highly suspect and demands exacting judicial scrutiny. *McDonald v Bd of Election Comm'rs of Chicago*, 394 US 802, 807; 89 S Ct 1404; 22 L Ed 2d 739 (1969). Notably, the Equal Protection Clause "guards against subtle restraints on the right to vote, as well as outright denial." *Wilkins v Ann Arbor City Clerk*, 385 Mich 670, 684; 189 NW2d 423 (1971).

To determine whether a restriction indeed compels strict scrutiny, the extent to which a requirement burdens a citizen's rights must be examined. *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992). When a restriction is reasonable and nondiscriminatory, the state's important regulatory interests are generally sufficient to justify the restriction. *Id*. But when a restriction is severe, the regulation must be narrowly tailored to advance only a compelling governmental interest. *Id*.; see also *Illinois Bd of Elections v Socialist Workers Party*, 440 US 173, 184; 99 S Ct 983; 59 L Ed 2d 230 (1979). When a statute will deny some citizens the right to vote, the general presumption of constitutionality is not applicable. *Kramer*, *supra* at 628. "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Id*. But "when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." *Id*.

While *Kramer* dealt with legislation that explicitly denied certain citizens the right to vote in school

district elections, this fundamental premise is equally as sound in the case before us. The challenge to the photo identification requirement is that it will disproportionately deny the right to vote to racial and ethnic populations, as well as to the elderly, the poor, and citizens who are disabled. The government—which should be the voice of fairness in providing protection to all citizens—is the very entity that has enacted the legislation that is allegedly discriminatory. The government cannot now shield itself from strict scrutiny because it provides only a purported rational basis for the requirement while simultaneously failing to provide *any* evidence to support its purported rationale. Our Legislature—even one that has been fairly elected—"can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting." *Id*.

"[T]he State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Clingman v Beaver*, 544 US 581, 603; 125 S Ct 2029; 161 L Ed 2d 920 (2005) (O'Connor, J., concurring); see also *Tashjian v Republican Party of Connecticut*, 479 US 208, 225; 107 S Ct 544; 93 L Ed 2d 514 (1986) (The Court recognized that the interests of the state represented, to some extent, the views of the one political party enjoying majority power.). Recognizing the basic fact that the government is not always wholly independent and unbiased does not mean that reasonable and genuinely neutral and *necessary* requirements cannot be imposed. But it does mean that an intellectually honest examination of a requirement must begin with recognizing this basic political fact and examining what role this has played in the enactment of the requirement at issue. See, e.g., *Crawford v Marion Co*

Election Bd, 472 F3d 949, 954 (CA 7, 2007) (*Crawford I*) (Evans, J., dissenting). As requirements "become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition." *Clingman*, *supra* at 603 (O'Connor, J., concurring).[2]

"[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v Virginia Bd of Elections*, 383 US 663, 670; 86 S Ct 1079; 16 L Ed 2d 169 (1966). Thus, to determine if a law violates the Equal Protection Clause, the court must weigh the character and magnitude of the burden caused against the interests that justify the burden. See *Timmons v Twin Cities Area New Party*, 520 US 351,

[2] The majority claims that I "come perilously close to suggesting that the Legislature was motivated in enacting this statute by the desire to suppress minority voters." *Ante* at 45 n 118. Yet I advocate no such position. The majority distorts my view because it believes that this will have the most shock value and because it has no response for the realistic position that I do espouse. When a political party—*any* political party—is in power and enacts legislation that will affect our citizens' fundamental right to vote, it is the job of the courts to realistically examine the legislation, if it is challenged, to determine the effect it will have on our citizens. If those who are likely to be negatively affected are viewed as often not voting for the party in power, that is certainly one factor that *must* be considered. This is not a shocking principle; it is a rational one. The majority chooses to pretend that it is a scandalous concept that political motivations may actually affect the legislative votes of *politicians*. Yet this is a basic concept that I think few reasonable people, including our elected officials, would even try to counter. This does not mean that the Legislature acted with any untoward motivations when enacting this statute, but it does mean that a reasonable person should not be blind to considering the possibility that politics may have played a role. One need only look at the continued inquiries being made on the national level to see the disingenuous nature of the position being taken by the majority.

358; 117 S Ct 1364; 137 L Ed 2d 589 (1997). Specifically, the court looks at three areas: "[T]he character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn*, *supra* at 335. In examining the character of the classification, the court must consider the facts and circumstances behind the law. *Williams*, *supra* at 30. While there is no bright-line test to separate permissible election-related regulations from unconstitutional infringements on our citizens' right to vote, the court must consider the extent to which the state's concerns make the burden necessary. *Timmons*, *supra* at 358. But "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote . . . ." *Tashjian*, *supra* at 217. Because voting involves the assertion of a fundamental constitutional right and this case deals with the actual right to vote, and not merely a minor regulation regarding the time, place, or manner of elections, the compelling state interest test must be applied. See *Wilkins*, *supra* at 681. Thus, if the state is unable to demonstrate a compelling interest for the significant impairment it seeks to implement, then the statute must be deemed unconstitutional. *Id*. at 682.

The majority purports that "the state is not required to provide *any* proof, much less 'significant proof,' of in-person voter fraud before it may permissibly take steps to prevent it." *Ante* at 27. But the majority ignores a critical aspect of the caselaw it cites. A state can respond to a potential deficiency *only if* "the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v Socialist Workers Party*, 479 US 189, 196; 107 S Ct 533; 93 L Ed 2d 499 (1986). In *Dunn*, *supra* at 346, the United States

Supreme Court specifically noted that the record was "totally devoid of any evidence" to support a durational residency requirement. The restriction, in this case a photo identification requirement, must be reasonable *given the interest the restriction allegedly serves*. See *Burdick*, *supra* at 434; *Timmons*, *supra* at 358-359. Deciding if a restriction is constitutional depends very much on "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams*, *supra* at 30; see also *Storer v Brown*, 415 US 724, 731; 94 S Ct 1274; 39 L Ed 2d 714 (1974). Thus, I disagree with the majority that the state is not obligated to provide any evidence to support its asserted interest.

I also disagree with the majority's characterization of the asserted interest. The majority alleges that the interest to be served is preventing voter fraud, but I disagree that the interest in this case can be presented so broadly. "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons*, *supra* at 364. But that does not mean that by merely making the broad claim of addressing voter fraud, a state has no limits on its actions. See *Dunn*, *supra* at 345-346. It is *the circumstances of the case* that determine the weight that must be afforded a stated interest. *California Democratic Party v Jones*, 530 US 567, 584; 120 S Ct 2402; 147 L Ed 2d 502 (2000). A court must determine the legitimacy and strength of the "precise interest" asserted by the state as its justification for the enacted restriction. *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983). And the restriction must precisely and specifically address the state's interest. *Kusper v Pontikes*, 414 US 51, 59; 94 S Ct 303; 38 L Ed 2d 260 (1973).

"If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id*.

Of course preventing voter fraud is an important interest in the abstract, but the relevant inquiry is whether, and to what degree, *in-person voter fraud* would be addressed by the photo identification requirement. See *California Democratic Party*, *supra* at 584; see also *American Civil Liberties Union of New Mexico v Santillanes*, 2007 US Dist LEXIS 17087 *98-*99 (D NM, February 12, 2007). Using a broad interest such as preventing voter fraud would allow almost *any* restriction to be deemed constitutional, and this would effectively nullify any true test for constitutionality, thus allowing the government to enact almost any constraint on voting that it chooses, all in the name of preventing "voter fraud." See Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (September 2005) (Comments by Tom Daschle, Spencer Overton, and Raul Yzaguirre) ("The mere fear of voter fraud should never be used to justify denying eligible citizens their fundamental right to vote.").[3] But the interest in this case cannot be so simplistically deemed. The interest in this case is more accurately presented as preventing *in-person* voter fraud when there is *no* evidence that *in-person* voter fraud actually exists.

Not only is there no evidence or history of any problem with in-person voter fraud in Michigan, but Kelly Chesney, a spokesperson for Secretary of State Terri Lynn Land, has stated: " 'We have a number of checks and balances inherent in the process to prevent "fake people" from voting . . . . We do believe the safe-

[3] <http://www.american.edu/ia/cfer/report/report.html> (accessed May 14, 2007).

guards in place will protect the integrity of the election.' " Chad Selweski, *Flood of voter registrations raises specter of election fraud*, Macomb Daily, September 30, 2004[4]; see also *Bay Co Democratic Party v Land*, 347 F Supp 2d 404, 437 (ED Mich, 2004). Former Attorney General Frank J. Kelley has also stated that Director of Michigan Elections Christopher Thomas recently informed him "that he had never observed or heard of a single case of a voter using fake identification at the time of voting." Amicus brief at 3. The reality is that the issue of access to the voting polls can unfortunately be turned into a political issue. As reported earlier this year, a federal panel—the Election Assistance Commission—downplayed the findings of experts who conducted election research and found there was little voter fraud around the nation. Ian Urbina, *U.S. Panel is Said to Alter Finding on Voter Fraud*, N.Y. Times, April 11, 2007.[5] Instead, the panel "issued a report that said the pervasiveness of fraud was open to debate." *Id*. The panel also changed the original report's findings that evidence of continued outright intimidation and suppression existed and that registration forms had not been used in polling place fraud. *Id*. Just weeks earlier, the panel had also refused to release another report that it had commissioned that found that voter identification laws reduce turnout, particularly among minority group members. *Id*. Thus, I believe it is clear that the prevalence—or lack thereof—of voter fraud is critical to whether photo identification laws are necessary.

Moreover, when viewed objectively, the claim of "voter fraud" has repeatedly been exposed as a tactic

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[4] <http://macombdaily.com/stories/093004/loc_fraud001.shtml>(accessed May 30, 2007).

[5] Available through purchase at <http://select.nytimes.com/gst/abstract.html?res=FB0713FF395B0C728DDDAD0894DF404482> (accessed May 30, 2007).

used to suppress the votes of minorities and the poor. See Editorial, *Phony Fraud Charges*, N.Y. Times, March 16, 2007.[6] In partisan political circles, "the pursuit of voter fraud is code for suppressing the votes of minorities and poor people." *Id*. Congress is also investigating allegations that over a dozen officials in the Department of Justice used their positions for partisan purposes by enacting policies and actively supporting legislation that would impose a photo identification requirement for the purpose of suppressing the votes of minority voters. See Greg Gordon, *Congress eyes alleged suppression of minority votes*, Lansing State Journal, May 21, 2007, p 3A. There is mounting evidence that Justice Department officials used their positions to clear "the way for laws designed to disenfranchise minority voters . . . ." Editorial, *Why This Scandal Matters*, N.Y. Times, May 21, 2007.[7]

But as *The New York Times* reported, "There is no evidence of rampant voter fraud in this country." *Id*. Instead, these allegations have been used as an excuse to pass legislation that will suppress the votes of the poor, the elderly, and minorities. *Id*. "The claims of vote fraud used to promote these measures usually fall apart on close inspection." *Id*. For example, allegations that African-American voters in St. Louis listed addresses that were vacant lots have been determined to be unfounded. *Id*. When a local newspaper looked into these allegations, "it found that thousands of people lived in buildings on lots that the city had *erroneously* classified as vacant." *Id*. (emphasis added).

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[6] Available through purchase at <http://select.nytimes.com/gst/abstract.html?res=F10C15FE34550C758DDDAA0894DF404482> (accessed May 30, 2007).

[7] Available through purchase at <http://select.nytimes.com/gst/abstract.html?res=F7081FF635550C728EDDAC0894DF404482> (accessed May 30, 2007).

The majority seeks to buttress its position by arguing that the requirement is constitutional because there is evidence that 46 "dead" people voted in the November 2004 election. See *ante* at 42 n 110. This makes a snappy sound bite, but a more thoughtful examination of this allegation results in the finding that administrative problems and clerical errors are likely at the root of these "dead" people voting. For example, one newspaper article stated that it appeared that approximately 40 people who are dead cast votes in the primary election in August 2006 out of 134,629 votes cast in Detroit. *Many Names on City's Voter Lists may not Belong*, Detroit Free Press, November 3, 2006, 1B. But of these 40 people, 25 died within six weeks before the election, so those votes may have been validly cast by absentee ballot before the citizen died.

But, even more importantly, another article indicated that the city of Detroit's election records are "plagued with mistakes and inconsistencies." *In Mich., Even Dead Vote*, Detroit News, February 26, 2006.[8] Many voting "errors" were the result of clerical errors—incorrect birthdates and addresses being recorded, as well as election workers recording votes under a similar name or confusing voters with a relative. *Id*. The article further stated that there was no evidence of voter fraud, although allegations of fraud had been made, particularly related to *absentee ballots*. *Id*. And in articles cited by the Attorney General who filed a brief *in support of the requirement*, the problem with voting errors is again identified as being because of administrative problems with the voter rolls. See, e.g., Kathleen Gray, John Bebow, and Ben Schmitt, *Detroit's Flawed Registry:*

[8] Available through purchase at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20060226/METRO/602260301&temp1> (accessed July 5, 2007).

Many Erroneous Names Found on City's Voter Rolls, Detroit Free Press, November 3, 2005; *In Mich., Even Dead Vote*, *supra*.[9] An analysis of voting by *The Detroit News* found, "Clerical errors so pervasive that it is difficult to determine in many instances who actually voted. Incorrect addresses, wrong birthdates and expired residencies; typographical errors in names and addresses; and garbled spellings are regularly recorded and kept on the city's active voter list." *In Mich., Even Dead Vote*, *supra*. "Among the most common mistakes occur when election workers record a vote under a similar name, or confuse voters with their parents or other relatives." *Id*.; see also Spencer Overton, Article: *Voter identification*, 105 Mich L R 631, 645-647 (2007). Current statutory provisions already deal with these administrative issues, including MCL 168.510, which requires that the county clerk forward monthly a list of those who have died to the clerk of each city or township within the county. "The city or township clerk shall compare this list with the registration records and cancel the registration of all deceased electors." *Id*. If the concern truly is about "dead" people voting, the simple solution is an *administrative* one—do what the law requires and properly purge the voting rolls.

The photo identification requirement at issue is not narrowly tailored to meet a compelling state interest because there is *no evidence* of in-person voter fraud. Thus, there is no evidence of any documented need to impose a photo identification requirement. But an examination of whether the photo identification requirement violates the Equal Protection Clause does not just stop with identifying the state's interest—in

[9] Available at <http://72.14.203.104/search?q=cache:WoHvRHJJ6i0:www.freep.com/news/locway/voters> (accessed July 5, 2007).

this case, nonexistent in-person voter fraud. The Court must also consider the character and magnitude of the burden, as well as the interests affected by the burden. *Dunn*, *supra* at 335. This Court has declared: "It can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights." *Wilkins*, *supra* at 680. "The right to vote has been considered to be the most vital of our constitutional rights." *Id*. at 694. Voting is a fundamental right because it is preservative of all other rights. *Yick Wo v Hopkins*, 118 US 356, 370; 6 S Ct 1064; 30 L Ed 220 (1886). And this basic fundamental right cannot be infringed merely because the government seeks to assert its power over supervising elections. *Kusper*, *supra* at, 414 US at 57.

In this case, the requirement deals with actual *access* to the ballot box. In cases dealing with direct ballot access, such as cases that deal with a residency requirement or a property ownership requirement, the most exacting level of scrutiny is required. *Dunn*, *supra* at 335; *Kramer*, *supra* at 626-627. Likewise, the requirement at issue in this case goes to the very heart of a citizen's ability to vote *at all*. As the United States Supreme Court has recognized, not all cases dealing with election regulations are reviewed the same and cases that deal with actual *voting* rights are quite different than those that deal with other regulations. See *California Democratic Party*, *supra* at 573. Because the photo identification requirement will significantly affect the voting rights of thousands of Michigan citizens and have discriminatory effects, "applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman*, *supra* at 603 (O'Connor, J., concurring).

Contrary to the majority's assertion that the photo identification requirement "applies evenhandedly to every registered voter," *ante* at 25, this legislation does *not* affect all Michigan citizens equally, and it is disingenuous—at best—to claim that it does. As the United States Supreme Court stated in *Anderson*, *supra* at 786 (citation omitted), it is important to examine a restriction " 'in a realistic light' " to determine the extent and nature of the restriction's impact on voters. In *Bullock v Carter*, 405 US 134, 144; 92 S Ct 849; 31 L Ed 2d 92 (1972), the United States Supreme Court determined that a filing fee requirement for primary elections was unconstitutional because of "the obvious likelihood that [the] limitation would fall more heavily on the less affluent segment of the community . . . ." The Court stated that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id*. The "practical difficulties" of a restriction on those who will be affected must be considered in any constitutional analysis. See, e.g, *Lane*, *supra* at 277.

Examining the photo identification requirement "in a realistic light" clearly indicates that distinct populations in Michigan will be uniquely and substantially burdened by the photo identification requirement. The reality is that not all our citizens live a life in which they have photo identification, and obtaining photo identification solely to vote causes a severe burden. To many, it may seem unimaginable to live a life in which a person has no photo identification, but to thousands of Michigan citizens, it is indeed a reality.

Proponents of the photo identification requirement argue that photo identification is a standard practice in today's world and that photo identification is needed to

board an airplane, rent a hotel room, or open an account at a bank. But these arguments ignore that there are segments of our population that do not have the means to board an airplane or rent a hotel room. There are numerous Michigan citizens who do not live a life in which photo identification is a necessity, yet this does not mean that they should be subjected to obstacles when exercising their fundamental right to vote. See, e.g., *Crawford I*, *supra* at 955-956. The failure to recognize that many Michigan citizens live a life in which photo identification is not needed is the reason that proponents fail to recognize that the photo identification requirement will create a substantial obstacle to voting for thousands of Michigan citizens. This classification does not truly apply "evenhandedly" to every citizen because those without photo identification will more likely be the poor and the disenfranchised.

The photo identification requirement will have a disparate impact on racial and ethnic populations, as well as poor voters, elderly voters, and disabled voters; thus, the photo identification requirement does not affect all citizens equally. Just as the registration scheme in *Lane*, *supra* at 271, inherently operated discriminatorily, the statute at issue will diminish the opportunity for thousands of citizens to participate in the political process. The fact that the photo identification requirement contains no overt statement of discrimination does mean that the requirement will not succeed in disproportionately keeping away members of Michigan's most disenfranchised groups. See, e.g., *Carrington v Rash*, 380 US 89, 92-93; 85 S Ct 775; 13 L Ed 2d 675 (1965). The discrimination that exists in the photo identification requirement is dangerous because of its façade as a "reasonable" requirement to combat voter fraud, but the "Equal Protection Clause likewise guards against subtle restraints on the right to

vote, as well as outright denial." *Wilkins*, *supra* at 684. Our citizens' fundamental right to vote cannot be denied or abridged, whether the restriction seeks to directly or indirectly infringe on this right. *Harman v Forssenius*, 380 US 528, 540-542; 85 S Ct 1177; 14 L Ed 2d 50 (1965).

The majority's dismissive attempt to trivialize the effect that this legislation will have on Michigan's citizens is unconvincing because of the majority's choice to ignore the realities associated with the photo identification requirement. The majority belittles any argument that this legislation will negatively affect racial and ethnic populations by claiming that "[w]hen all other arguments are unavailing, resorting to a claim of racial discrimination is a frequent substitute." *Ante* at 45. Notably, the majority ignores that the poor, the elderly, and disabled voters will also be negatively affected by this legislation. Members of Congress, as well as numerous nonprofit organizations, have expressed the same concerns expressed in this dissent. See 148 Cong Rec S10488 (2002). Even the Commission on Federal Election Reform recognizes that concerns about the photo identification requirement, including that the requirement could disenfranchise voters and have an adverse effect on minorities, are "serious and legitimate." *Building Confidence in U.S. Elections*, *supra*. And it is certainly relevant to consider the effect that photo identification requirements have had in states that have enacted identification requirements. See, e.g., *Crawford v Marion Co Election Bd*, 2007 US App LEXIS 7804 at *7 (CA 7, 2007) (Wood, J., dissenting) ("The New York Times recently reported that overall voter turnout in these states decreases by about three percent, and by two to three times that much for minorities.") (citing Christopher Drew, *Low Voter Turnout is Seen in States That Require ID*, NY Times, February 21, 2007).

Yet the majority chooses to ignore this information simply because it could then not flippantly respond that the dissent is raising a hollow claim of racism. But no matter how much the majority engages in figurative eye-rolling, the majority cannot revise history and it cannot change the realities of the society in which we live. Unfortunately, the historical and current reality is that racism exists and voting regulations have been used for discriminatory reasons. The Voting Rights Act of 1965 and the Voting Rights Act amendments of 1982 were enacted to protect against racial discrimination in voting. See 42 USC 1971 and 42 USC 1973 *et seq*. The United States Supreme Court has recognized that certain groups of people have historically been relegated to a position of political powerlessness. *Plyler*, *supra* at 218; *South Carolina v Katzenbach*, 383 US 301, 308-313; 86 S Ct 803; 15 L Ed 2d 769 (1966). "The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups." *Id*.; see also *Bone Shirt v Hazeltine*, 336 F Supp 2d 976, 1018-1023, 1026-1027, 1028-1034 (D SD, 2004) ("[T]here is substantial evidence that South Dakota officially excluded Indians from voting and holding office."); *Bone Shirt v Hazeltine*, 200 F Supp 2d 1150, 1152 (D SD, 2002). The majority's steadfast refusal to recognize this fact and consider even the *possibility* that it may affect the real-world implications of the photo identification requirement results in a condescending response to the concerns raised by numerous amici that the constitutional rights of hundreds of thousands of Michigan citizens may be negatively affected by this legislation.

The photo identification requirement may not be as obviously discriminatory as a poll tax, but its effect will be the same.[10] The photo identification requirement is merely a more sophisticated device that will disenfran-

[10] The United States Constitution provides:

chise our citizens by denying and abridging their fundamental right to vote, and a restriction that places even a minimal price on a citizen's exercising his right to vote constitutes invidious discrimination. See *Bullock*, *supra* at 142; see, e.g., *Building Confidence in U.S. Elections*, *supra* (Comments by Tom Daschle, Spencer Overton, and Raul Yzaguirre) (The photo identification requirement suggested by the Commission on Federal Election Reform is "nothing short of a modern day poll tax."). "[A] state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, *supra* at 666. A proper examination of the photo identification requirement demands that this Court look at the true and cumulative effect of the statute's requirement and the state's overall regulations governing photo identification. See, e.g., *Clingman*, *supra* at 599 (O'Connor, J., concurring). This Court must not simply accept the cursory allegation that the photo identification requirement affects everyone equally. It does not. According to the Secretary of State, approximately 370,000 registered Michigan voters do not have photo identification. Dawson Bell, *Court Jumps into Dispute over Voter ID Checks*, Detroit Free Press, April 27, 2006.[11] While some argue that this number is actually much higher, the fact that hundreds of thousands of Michigan citizens will be affected by

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax. [US Const, Am XXIV, § 1.]

[11] Available through purchase at <http://nl.newsbank.com/ml_search/we/Archives?s_site=freep&f_sitename=Detroit+Free+P (accessed May 30, 2007).

this legislation indicates that the requirement is a serious impediment on the fundamental right to vote for these citizens. See, e.g., *Michigan State UAW*, *supra* at 516-517.[12]

As numerous amici curiae have attested, the impact that this law will have on numerous citizens will be substantial. Governor Jennifer M. Granholm; Frank J. Kelley, Attorney General Emeritus; the city of Detroit; the National Association for the Advancement of Colored People (NAACP)-Detroit Branch; the Michigan State Conference NAACP; the National Bar Association; the American Civil Liberties Union of Michigan; the League of Women Voters Detroit; the American-Arab Anti-Discrimination Committee; Project Vote; the Association of Communities for Reform Now; the Latin Americans for Social and Economic Development, Inc.; the Detroit Urban League; the National Conference Community and Justice-Michigan; the Michigan Civil

[12] A study by the University of Wisconsin-Milwaukee of the driver's license status of those of voting age in Wisconsin found "[m]any adults do not have either a drivers license or photo ID." John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, Employment and Training Institute, University of Wisconsin-Milwaukee, June 2005, at 1, available at <http://eti.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf> (accessed May 30, 2007). Twenty-three percent of people aged 65 or older did not have a driver's license or state photo identification card. *Id*. "Minorities and poor populations are the most likely to have drivers license problems." *Id*. In one county, only 47 percent of African-American adults and 43 percent of Hispanic adults had a valid driver's license, compared to 85 percent of Caucasian adults in the rest of the state. *Id*. at 1-2. When examining young adults aged 18-24 in the same county, only 26 percent of African-American young adults and 34 percent of Hispanic young adults had a valid driver's license, compared to 71 percent of Caucasian young adults in the rest of the state. *Id*. at 2.

Further, a report by the Commission on Federal Election Reform indicates that 12 percent of the voting age population lack a driver's license. *Building Confidence in U.S. Elections*, *supra* (Comments by Tom Daschle, Spencer Overton, and Raul Yzaguirre).

Rights Commission; the Michigan Department of Civil Rights; Michigan Protection & Advocacy Service, Inc.; the Michigan Democratic Party; the Michigan House Democratic Caucus; the Michigan Senate Democratic Caucus; the Michigan Legislative Black Caucus; the Lawyers' Committee for Civil Rights Under Law; and the American Association of Retired Persons (AARP) all provided compelling arguments and information about how the photo identification requirement will truly affect our citizens, and this information should not be ignored. Notably, the amici brief submitted by Michigan county clerks, who are responsible for election administration throughout the state, recognizes, "Voters who do not have these common forms of photo identification [a driver's license, state photo identification card, or possibly a passport] are most likely to be those who do not drive and these, in turn, are most likely to be older, and/or lower income voters, or immigrants." Amici brief at 7. Even the United States Court of Appeals for the Seventh Circuit has recognized that "[n]o doubt most people who don't have photo ID are low on the economic ladder . . . ." *Crawford I*, *supra* at 951.[13]

The photo identification requirement will present a monetary and logistical burden for thousands of our citizens. There is a cost associated with obtaining a driver's license or state identification card. While the state identification card fee can be waived for some people, there are many people who will be required to

[13] The concerns of the amici are further supported by various studies that indicate that a photo identification requirement has a statistically significant effect on voting. Timothy Vercelotti and David Anderson, *Protecting the franchise, or restricting it? The effects of voter identification requirements on turnout*, Rutgers University, 2006, at 1, available at <http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf> (accessed July 3, 2007).

pay the fee. But this is not the only cost associated with the photo identification requirement. See, e.g., *Weinschenk v State*, 203 SW3d 201, 213-214 (Mo, 2006) (After examining the costs associated with obtaining photo identification required for voting, the Missouri Supreme Court stated that "all fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law."). Procuring the documents required to obtain a driver's license or other acceptable state-issued identification also costs money. Multiple documents must be obtained, at a monetary cost, as well as a logistical cost, to then acquire acceptable photo identification. For example, to use a birth certificate as one of the three documents necessary to obtain a state identification card, only a certified birth certificate with a raised seal or a true copy of the birth certificate are acceptable; hospital birth certificates are not acceptable.[14] This, of course, costs even more money than just that required outright for a driver's license or state identification card. But an interesting and important fact to note is that *photo identification is required to request a copy of one's birth certificate*. So a person who needs a birth certificate to obtain photo identification must present photo identification to receive the birth certificate. Further, any documents issued by another country that are not written in English must be translated before they can be used. Translations are only acceptable from a limited number of organizations, such as a college,

[14] Older African-American citizens may experience particular difficulties as many were never issued birth certificates because they were born at home. Leighton Ku, Donna C. Ross, and Matt Broaddus, *Survey Indicates Deficit Reduction Act Jeopardizes Medicaid Coverage for 3 to 5 Million Citizens*, Center on Budget and Policy Priorities, revised February 17, 2006, available at <http://www.cbpp.org/1-26-06health.htm> (accessed June 26, 2007). One study found that 1/5 of African-Americans adults born in 1939 and 1940 lacked birth certificates. *Id*.

government agency, or translation-related business, and the translation must provide detailed information about the translator. Not only must a person spend money to get the necessary documents to then travel to a Secretary of State office to get the necessary photo identification, but a person must navigate the government system and spend *time* doing so.[15]

The Michigan county clerks—again the very government officials who administer elections—recognize, "It is clear from examining these requirements for obtaining a personal identification card that it will be a very time consuming matter." Amici brief at 8-9. As the Michigan county clerks further note, "It must be recognized that the very fact that these voters do not drive may make it more difficult for them to travel to the locations where the identification cards are obtained." *Id*. at 7. And to obtain a driver's license or state photo identification card a person *must* travel to an office of the Secretary of State. See, e.g., MCL 28.291. For many citizens, taking the time to do so, which may also mean taking time off work without pay, will create a substantial burden to exercising the citizens' right to vote.

What appears lost on the proponents of the photo identification requirement is that encouraging citizens to vote is an essential state objective, and our government should be trying to promote voting, not passing

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[15] Traveling the required distance to a Secretary of State office may indeed be too burdensome for many citizens, including those in rural areas. For example, Chippewa County has only one Secretary of State office. Secretary of State office locations, available at <http://services.sos.state.mi.us/servicelocator/branchofficelocator.aspx> (accessed July 2, 2007). Yet Chippewa County occupies 1,561.06 square miles, which means that a person may have to travel a significant distance merely to get the identification needed to vote. United States Census Bureau, available at <http://quickfacts.census.gov/qfd/states/26/26033.html> (accessed July 2, 2007).

legislation that will actually discourage participation by throwing up unnecessary roadblocks. "[T]he constitutional order must be preserved by a strong, participatory democratic process." *California Democratic Party*, *supra* at 587 (Kennedy, J., concurring); see also *Building Confidence in U.S. Elections*, *supra* (Comments by Tom Daschle, Spencer Overton, and Raul Yzaguirre) ("Election reform must be about empowerment, not disenfranchisement. Raising needless impediments to voting or creating artificial requirements to have one's vote counted are steps backward."). But the photo identification requirement is yet another obstacle that a citizen must overcome as he proceeds along the path to exercise his fundamental right to vote. Now that citizen is less likely to exercise his fundamental right to vote because of the photo identification requirement. And the affidavit exception—if a citizen even knows of its existence—is not helpful because of the harassment and intimidation that a voter may face through the challenge process.

Merely being allowed into a polling place does not mean that a citizen's right to vote has been protected. See, e.g., *United States v Saylor*, 322 US 385, 387-388; 64 S Ct 1101; 88 L Ed 1341 (1944). A citizen's right to vote must also be protected throughout the challenge process. The burden of the photo identification requirement must be realistically viewed in light of what this means to the citizen who does not have photo identification but still wants to vote. The burden for a citizen without photo identification is not "simply" a matter of signing an affidavit and then voting. Contrary to the majority's belief, the Michigan county clerks, who will actually administer the election, admit, "It is not yet clear whether an affidavit is a sufficient means for a voter without photo identification to attest that he is who he purports to be but lacks the requisite identifi-

cation." Amici brief at 10. While the majority presents the affidavit process as an insignificant inconvenience, it is actually much more burdensome to the actual voters.

The lack of photo identification makes it much more likely that a voter will be challenged because the statute explicitly references the challenge process in relation to those signing the affidavit. MCL 168.523. During the challenge process, there is the distinct possibility that a citizen may be denied the right to vote if an election inspector believes that the citizen's answers indicate that he is not a qualified elector or if the citizen chooses not to sign the affidavit. For some citizens with disabilities, the affidavit may be too difficult to sign or understand. However, unfortunately, another likely scenario is that the challenge process will be used in some situations to harass and intimidate citizens who seek to exercise their right to vote. The statute explicitly invites a challenge to a citizen who is voting without photo identification by stating that a citizen "being allowed to vote without the identification required under this subsection is subject to challenge . . . ." *Id*. The challenge process subjects those who are voting without photo identification to delay, intimidation, and harassment to a greater degree than those who have photo identification.[16] Notably, a citizen being challenged must "stand to one side until after unchallenged

[16] The majority argues that the use of the challenge process to harass voters will be deterred because it is a misdemeanor to do so. See *ante* at 44. But it is a *felony* to impersonate another person to vote, yet the majority apparently does not give credence to the fact that this criminal penalty already serves to deter in-person voter fraud. Notably, I again point out that there is *no* evidence of in-person voter fraud, while there *is* evidence of voters having been harassed at the polls. See amici brief of the National Association for the Advancement of Colored People et al, at 16-17, 24-25; exhibits 3-6.

voters have had an opportunity to vote, when his case shall [then] be taken up and disposed of." MCL 168.728. Waiting for long periods at the polls is not uncommon, and now voters who are challenged because they do not have photo identification must wait indefinitely longer to resolve the challenge. This practical, real-world effect can be used to substantially penalize and harass those without photo identification.[17]

But a penalty cannot be imposed on a citizen who chooses to exercise his right to vote merely because he does not have photo identification. See *Dunn*, *supra* at 341, citing *Harman*, *supra* at 540. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, *supra* at 567. As this Court has recognized, the fundamental right to vote cannot be left to the whim or impulse of an election official. *Wilkins*, *supra* at 677. It certainly is beyond dispute that certain voters in our country—and even our state—have been intimidated and harassed to keep those citizens from voting. See, e.g., Note: *Eradicating racial discrimination in voter registration: Rights and remedies under the voting rights act amendments of 1982*, 52 Fordham L R 93 (1983). The Commission on Federal Election Reform reports that during the 2004 elections, there were "improper requests for voter ID" and there were reports "of voter intimidation and suppression tactics." See *Building Confidence in U.S. Elections*, *supra*. Of 55,000 calls made to a MYVOTE1 hotline on election day in 2004, 4.9 percent of the calls were about coercion and intimidation and 43.9 percent of the calls were about registration issues and poll access. Notably, elec-

[17] See, e.g., Berry, Comment: *Take the money and run: Lame-ducks "quack" and pass voter identification*, 74 U Det Mercy L R 291, 297 (1997) (citing Jeff Gerritt, *Long Waits Prove Vote System Dated*, Detroit Free Press, November 7, 1996) (The wait was so long at some polls that some voters walked in, turned around, and walked out.).

tion challengers in Michigan can be appointed by political parties, which may provide an added incentive for challenges to be made. If a challenge is successful and a citizen is deemed unqualified, there is no appeal from this decision, so a citizen's denial of his fundamental right is absolute. See MCL 168.729. The photo identification requirement and the challenge process now again leave those who do not have photo identification at the whim of election officials as our challenged citizens are required to wait an indefinite length of time merely to exercise their fundamental right to vote.

Notably, there are already numerous statutes that criminalize voter fraud. To name just a few, it is a felony to falsely impersonate another person to vote or attempt to vote, and it is also a felony to try to induce a person to impersonate another person to vote or attempt to vote. MCL 168.932a(a). It is a felony to assume a false or fictitious name to vote. MCL 168.932a(b). It is a misdemeanor for an elector to make a material statement that is false in answering a question asked by a clerk or assistant clerk or in a registration affidavit. MCL 168.499(1). And it is perjury to give an untrue answer concerning a material matter when challenged. MCL 168.729.

Given these statutes that criminalize voter fraud, as well as the state's comprehensive statutory scheme that manages all aspects of voting, the state's actions in mandating photo identification are certainly not narrowly tailored or even reasonable. See *Dunn*, *supra* at 345-346; *Bay Co Democratic Party*, *supra* at 437. Any concerns about preventing voter fraud must examine the current system to determine its completeness. *Wilkins*, *supra* at 687. In *Dunn*, a durational residency requirement, even assuming it had once been necessary, was no longer required because of the state's compre-

hensive statutory scheme. Similarly, Michigan's statutory scheme is comprehensive when dealing with voter regulations. For example, when a citizen appears at the polls to vote, the citizen must complete an application that includes his signature and address. MCL 168.523(1). If voter registration lists are used, then the citizen must provide his date of birth or other information that appears on the voter registration list. *Id*. Also, if the qualified voter file is available at the polling place, the election official must compare the signature on the voter's application that was completed at the polling place with the signature in the qualified voter file. *Id*.

There are also numerous laws that address the qualifications of voters, MCL 168.492; the contents of registration affidavits, MCL 168.495; ascertaining whether a voter is already registered, MCL 168.505; changes of a voter's residence, MCL 168.506, MCL 168.507, MCL 168.507a, and MCL 168.507b; verifying the correctness of registration records by conducting a house-to-house canvas, MCL 168.515; and even registering voters confined in jail, MCL 168.492a, to name just a few. Thus, there are "a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." *Dunn*, *supra* at 353. When there is such a comprehensive statutory design to prevent, address, and punish in-person voter fraud, imposing a photo identification requirement that will restrict our citizens' fundamental right to vote is unnecessary and certainly not the least restrictive means to prevent voter fraud. See *id*. at 353-354.

Further, the photo identification requirement will do nothing to actually prevent in-person voter fraud, even if an incident were to occur in the future. The majority makes much of the exception to the photo identification requirement that allows a citizen to sign an affidavit

attesting that he is who he says he is. This affidavit allows a person to vote without showing photo identification. But if a person is willing to break the law and commit in-person voter fraud, then signing this affidavit will do nothing to deter the fraud from occurring. A person willing to risk committing a felony and being sent to prison to commit in-person voter fraud is not going to be affected by having to sign a piece of paper. "[F]alse swearing is no obstacle to one intent on fraud . . . ." *Dunn*, *supra* at 346. As the United States Supreme Court recognized when striking down a durational residency requirement: "The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident." *Id*. The oath swearing "becomes an effective voting obstacle only to residents who tell the truth and have no fraudulent purposes." *Id*. at 346-347. Likewise, the only citizens in Michigan who will be affected will be legitimate voters who stay away from the polls because they do not know there is an exception to the photo identification requirement or those voters who fear they will suffer harassment and intimidation through the affidavit challenge process.

III. THE PHOTO IDENTIFICATION REQUIREMENT IS NOT EVEN JUSTIFIED BY A REASONABLE RATIONALE

Even if the photo identification requirement is examined under a lesser standard, the photo identification requirement is an unconstitutional burden nonetheless, because it is not a reasonable and nondiscriminatory restriction justified by an important state interest. See *Burdick*, *supra* at 434. The government's interest in mandating the photo identification requirement must be sufficiently weighty to justify the restriction. See *Timmons*, *supra* at 365. But here the government's

interest has *no* weight because there is absolutely *no* evidence that a problem with in-person voter fraud even exists.

I join my colleagues in their desire to prevent voter fraud, but I am unwilling to do so at any cost. No matter how many times the majority argues that the photo identification requirement is necessary to prevent vote dilution, it does not change the fact that there is *no evidence* of in-person voter fraud. Merely making the claim does not make it so. When there is *no* evidence of in-person voter fraud that will be corrected by the photo identification requirement and no credible evidence of this problem existing *nationwide*, I cannot join the majority in finding that this requirement is constitutional. See 148 Cong Rec S 10488 (October 16, 2002); see also *Common Cause/League of Women Voters of Georgia, Inc v Billups*, 439 F Supp 2d 1294, 1350 (ND Ga, 2006). "There is nothing in the Constitution which permits the Legislature, under the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise." *Attorney General v Bd of Councilmen of the City of Detroit*, 58 Mich 213, 216; 24 NW 887 (1885). "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Anderson*, *supra* at 806 (internal quotation marks and citations omitted).

It is *not reasonable* to impose a photo identification requirement when the alleged interest is *nonexistent* in-person voter fraud, especially when the requirement will significantly impinge on the rights of thousands of Michigan's citizens. The majority cannot dismiss the argument that there is no evidence of in-person voter

fraud by stating that it just does not matter. It certainly matters when our citizens will have their fundamental voting rights restricted. To ascertain whether the restriction is warranted, it is indeed essential to factor into the analysis the fact that no in-person voter fraud has been shown to exist. A bald assertion is insufficient—a state's asserted interest in a restriction must bear some sort of plausible relationship to the burden the restriction will place on its citizens. See *Timmons*, *supra* at 374-375 (Stevens, J., dissenting). And "[i]f the State has open to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson*, *supra* at 806 (internal quotation marks and citation omitted). The photo identification requirement that is being touted as a solution to a nonexistent problem is indeed unconstitutional because it addresses an imaginary problem while significantly undermining and burdening our citizens' constitutional rights.

IV. CONCLUSION

The constitution demands that the government vigorously protect our citizens' fundamental right to vote. Our citizens must be able to exercise their right to vote without encumbrances that are unconstitutional and have the practical effect of limiting this right. Today's decision is alarming because it ignores the reality of the photo identification requirement and validates the Legislature's shortsighted attempt to restrict the rights of our citizens. It trivializes the effect that this ill-advised legislation will have on our poorest and, in many cases, most disenfranchised citizens. It appears to stem from a belief that the government gives rights to its citizens and can take these rights away on a whim and with the

flimsiest of excuses. But a significant impairment of our citizens' fundamental right to vote requires justification. While this Court has abdicated its responsibility to require this justification, I believe that our citizens must demand more. Thus, I respectfully dissent.

KELLY, J. (*dissenting*). This case involves the constitutionality of mandating that registered voters show photographic identification before being allowed access to the voting booth. Under 2005 PA 71, if a voter is unable to show the required identification, he or she must sign an affidavit swearing to that fact in order to vote.

This new law impinges on the fundamental right to vote. Before today, this Court consistently applied a strict scrutiny analysis to any law or regulation that impinged on that right. But, in upholding the constitutionality of 2005 PA 71, the majority announces that strict scrutiny is now the wrong test. Relying on the United States Supreme Court's decision in *Burdick v Takushi,*[1] it concludes that a number of this Court's past voters' rights decisions no longer are good law. Because I disagree, I respectfully dissent.

First, *Burdick* did not signal a change in the law. It was simply a clear articulation of the rule that emerges from synthesizing earlier United States Supreme Court decisions in this area. *Burdick* also did not overrule past decisions of either the United States Supreme Court or this Court. A proper application of the law declared in these decisions convinces me that 2005 PA 71 is unconstitutional. It is a serious error for the Michigan Supreme Court to ignore this long-revered caselaw.

Second, the majority of this Court has uncritically adopted what it believes is a rule mandated by the

[1] 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

federal constitution. In so doing, it essentially confers on the United States Supreme Court the functional ability to amend our state constitution. The majority's decision to adopt in lockstep what it mistakenly believes is the federal standard renders our state constitutional provisions nugatory. And it represents a failure of this Court to fulfill its constitutional duty.

In reliance on the Michigan Constitution and the caselaw interpreting it, I would hold that infringements on the right to vote that cannot withstand the most exacting scrutiny are unconstitutional. Because 2005 PA 71 infringes on the right to vote and is not narrowly tailored to achieve a compelling governmental interest, it is unconstitutional under both the federal and the state constitutions.

I. THE FACTS

The legal question that we are considering here has its genesis in MCL 168.523, § 523 of the Michigan Election Law,[2] which was enacted by the Legislature in 1996 PA 583. Section 523(1) requires that each voter identify himself or herself by

> presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card . . . .

Section 523(1) also provides:

> If the elector does not have an official state identification card, operator's or chauffeur's license as required in

[2] MCL 168.1 *et seq.*

> this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.

Pursuant to these requirements, before being given a ballot, each registered voter would have to identify himself or herself by presenting (1) an official state identification card, (2) an operator's or chauffeur's license, or (3) another generally recognized picture identification card. If the voter did not have the required photo identification, the voter would have to sign an affidavit swearing to his or her identity. If the voter complied, he or she would be allowed to vote, but would be subject to challenge under MCL 168.727, in which case, the right to vote might be denied. It is not clear what would happen if a registered voter had photo identification but was not in possession of it at the polling place.

Before the requirements of § 523 became effective, then-Attorney General Frank J. Kelley evaluated it pursuant to MCL 14.32 and found that the photo identification requirements violated the Equal Protection Clause of the United States Constitution, US Const, Am XIV. OAG, 1997-1998, No 6930, p 1 (January 29, 1997). As a result, § 523 was never implemented or enforced.

Nine years later, the Legislature enacted 2005 PA 71. The new act essentially repeated the same requirements that were in the version of § 523 enacted in 1996 PA 583. In February of the next year, the Michigan House of Representatives, by resolution, asked this Court to issue an opinion on the constitutionality of

2005 PA 71. See 2006 House Journal 17 (Resolution No. 199, February 21, 2006). We granted the request. 474 Mich 1230 (2006).

As a consequence, the question before us is the constitutionality of 2005 PA 71. It is beyond argument that the photographic identification requirements of the act infringe on the paramount and fundamental right to vote. Nonetheless, a majority of this Court has decided that these requirements will pass constitutional muster if they can withstand only a minimal level of scrutiny. I do not agree. For the reasons that follow, I would hold that the requirements of the act violate both the federal and state constitutions.

II. THE UNITED STATES CONSTITUTION

The United States Supreme Court has stated on many occasions that the right to vote is fundamental. E.g., *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983); *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); *Yick Wo v Hopkins,* 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964). Because this right is so precious, federal courts have consistently applied the most demanding level of scrutiny to governmental action that interferes with access to the voting booth. See, e.g., *Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972); *Kramer v Union Free School Dist No 15*, 395 US 621; 89 S Ct 1886; 23 L Ed 2d 583 (1969).

The majority acknowledges that the right to vote is of fundamental importance. But it has decided that, be-

cause of the United States Supreme Court's decision in *Burdick,* a more relaxed standard now applies to governmental measures that limit the right to cast a ballot. The majority is badly mistaken.

A. *BURDICK v TAKUSHI*

At issue in *Burdick* was Hawaii's prohibition on write-in voting. *Burdick*, 504 US at 430. Under Hawaii election law, write-in votes were simply ignored. *Id.* at 436. The plaintiff filed suit, claiming that the prohibition violated his rights under the First and Fourteenth amendments. *Id.* at 430.

The Court stated the standard to be applied in analyzing whether a voting regulation unconstitutionally infringes on these rights:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." [*Id.* at 434 (citations omitted).]

The Court explained that the rigorousness of the Court's scrutiny depends on the degree to which voting restrictions burden the right to vote. If that right is severely restricted, the restrictions, to be constitutional, must be drawn narrowly so as to advance a state interest of compelling importance. *Id.* But, when the restrictions impose only " 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (citations omitted). The Court

found that Hawaii's prohibition did not violate the plaintiff's constitutional rights because it created a minor burden while promoting the state's legitimate interest. *Id.* at 430.

A majority of this Court has concluded that the decision in *Burdick* worked a dramatic shift in the law. In fact, it asserts that *Burdick* repudiated a previous construction of the federal Equal Protection Clause that was erroneous.

The majority has misread *Burdick*. The case broke no new ground. Rather than create a new rule or signal a shift in the law, *Burdick* simply announced a rule that synthesized past decisions of the United States Supreme Court and articulated, in one test, already established legal principles.[3]

Contrary to the majority's claim, the federal constitution has never required that every law regulating elections must withstand strict scrutiny. E.g., *Jenness v Fortson*, 403 US 431, 440-442; 91 S Ct 1970; 29 L Ed 2d 554 (1971);[4] *Storer*, 415 US at 730;[5] *Anderson*, 460 US

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[3] *Burdick* was not the first case to articulate the standard that emerges from blending United States Supreme Court decisions in the area of voting rights. The balancing test set forth in *Burdick* seems to have originated in *Storer v Brown,* 415 US 724; 94 S Ct 1274; 39 L Ed 2d (1974), and *American Party of Texas v White*, 415 US 767; 94 S Ct 1296; 39 L Ed 2d 744 (1974). In these two cases, the Court applied a type of intermediate scrutiny to the regulations under consideration. Zywicki, *Federal judicial review of state ballot access regulations: Escape from the political thicket*, 20 T Marshall L R 87, 113-114 (1994). It appears that it is this intermediate level of scrutiny that led to the balancing test that the United States Supreme Court first clearly expressed in *Anderson,* 460 US at 789, and the majority attributes to *Burdick*. See Zywicki, *supra,* pp 114-116. See also Note: *Better late than never: The John Anderson cases and the constitutionality of filing deadlines*, 11 Hofstra L R 691, 703-704 (1983).

[4] In *Jenness*, in a perfunctory fashion that is inconsistent with strict scrutiny review, the Court upheld a petition nominating requirement because it was not unduly burdensome. *Id.* at 440-442.

[5] In *Storer*, the Court stated that "the rule fashioned by the Court to

at 788.[6] Rather, the federal constitution has consistently been interpreted to require application of a strict scrutiny analysis only if the right to vote has been subjected to a severe restriction. Cases both predating and postdating *Burdick* illustrate that statutes that impair an individual's right to *cast a ballot*, as 2005 PA 71 does, are severe restrictions.[7]

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pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree . . . .' " 415 US at 730.

[6] In *Anderson*, the Court set forth the test that the majority attributes to *Burdick*.

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmuspaper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [460 US at 789 (citation omitted).]

[7] A closer look at the *Burdick* opinion reveals the error of the majority's analysis. The right at issue in the instant case is the right to cast a ballot. It is a fundamental right. *Dunn*, 405 US at 336. *Burdick* did not involve an individual's right to cast a ballot. It involved a candidate's right to appear on the ballot. The right of candidacy has never been recognized as a fundamental right. *Clements v Fashing*, 457 US 957, 963; 102 S Ct 2836; 73 L Ed 2d 508 (1982). Thus, *Burdick* is virtually of no assistance in determining whether the requirements at issue work a severe burden on the fundamental right to vote.

B. *HARPER v VIRGINIA BD OF ELECTIONS*[8]

In *Harper*, the Supreme Court found that Virginia's poll tax requirement for state elections violated the Equal Protection Clause. 383 US at 666. It made clear that it greatly disfavors requirements not related to one's ability to participate intelligently in the electoral process and that threaten to deprive one of the right to vote. *Id.* at 668. When such requirements are at issue, the Court declared, the degree to which the right to vote is impaired is irrelevant. *Id.* If the regulation is not narrowly tailored to achieve a compelling governmental interest, even a small impairment will violate the Equal Protection Clause. *Id.*

C. *KRAMER v UNION FREE SCHOOL DIST NO 15*

Similarly, in *Kramer*, a bachelor living with his parents challenged a New York law. It limited the individuals eligible to vote in school district elections to owners of property within the district and parents of children enrolled in the local public schools. *Kramer*, 395 US at 622. The Court considered whether the limitations violated the Fourteenth Amendment. *Id.* at 626. The Court concluded that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 627.

D. *DUNN v BLUMSTEIN*

And in *Dunn,* the United States Supreme Court struck down a durational residency requirement. 405

[8] 383 US 663; 86 S Ct 1079; 16 L Ed 2d 169 (1966).

US at 333. It found that any one citizen in the jurisdiction has a constitutionally protected right to participate in elections on an equal basis with any other citizen in the jurisdiction. *Id*. at 336. And before that right may be restricted, the purpose of the restriction and the overriding interests served by it must meet close constitutional scrutiny. *Id.* The Court found that strict scrutiny "is required for any statute that 'place[s] a condition on the exercise of the right to vote.' " *Id.* at 337, quoting *Bullock v Carter*, 405 US 134, 143; 92 S Ct 849; 31 L Ed 2d 92 (1972).

The majority ignores each of these pre-*Burdick* cases because it believes that *Burdick* signaled a shift in the law. But *Burdick* did no more than clearly articulate the law as it existed at the time it was written. It did nothing to overrule prior decisions.[9] And, the United States Supreme Court's post-*Burdick* decision in *Bush v Gore*[10] confirms that a restriction works a severe burden and is subject to strict scrutiny if it interferes with an individual's right to cast an equal ballot.

E. *BUSH v GORE*

In *Bush*, the Court considered whether Florida's manual recount of ballots violated the Fourteenth Amendment. The standard for what qualified as a legal vote differed from county to county. *Bush*, 531 US at 103. In deciding the case, the Court noted that one source of the fundamental nature of the right to vote "lies in the equal weight accorded to each vote and the

[9] Yet, the members of the majority find that *Burdick* repudiated an erroneous construction of the Equal Protection Clause. I am baffled by how they arrive at this conclusion. It seems to me highly unlikely that our most revered legal institution would announce a dramatic shift in the law without at least suggesting it and limiting existing precedent.

[10] 531 US 98; 121 S Ct 525; 148 L Ed 2d 388 (2000).

equal dignity owed to each voter." *Id.* at 104. Because "[t]he right to vote is protected in more than the initial allocation of the franchise[, e]qual protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* Ultimately, the Court held that the recount of votes was unconstitutional because the lack of a clear standard permitted an unequal evaluation of the ballots. *Id.* at 110.

Though factually distinguishable from the instant case, *Bush* is relevant because it is the only post-*Burdick* United States Supreme Court decision involving an individual's right to cast an equal ballot.[11] The *Bush* Court peremptorily dismissed the state interests that were asserted and struck down the recount. In so doing, it had to have used a strict scrutiny standard.[12] Hence, the *Bush* decision stands as reassurance that the pre-*Burdick* decisions that applied a strict scrutiny analysis to infringements of a voter's right to cast a ballot are still good law.[13]

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[11] *Bush* does not even mention *Burdick*. The fact that *Bush* does not discuss *Burdick* is further substantiation that *Burdick* is not the landmark decision that the majority would have us believe.

[12] In *Bush*, the Supreme Court never explicitly stated what level of scrutiny it used in reviewing the constitutionality of the recount. However, the fact that the Court found the recount unconstitutional after summarily dismissing the interests prompting the recount indicates that the Court was utilizing strict scrutiny review. See *Stewart v Blackwell*, 444 F3d 843, 862 (CA 6, 2006); Hasen, *Symposium: The law of presidential elections: Issues in the wake of Florida, 2000: Bush v Gore and the future of equal protection law in elections*, 29 Fla St U L R 377, 395-396 (2001).

[13] For additional post-*Burdick* federal decisions finding that strict scrutiny applies to regulations that directly burden the right to cast a ballot, see, e.g., *Greidinger v Davis*, 988 F2d 1344, 1354 (CA 4, 1993) (finding that strict scrutiny applies to a voter registration scheme that conditions a voter's right to vote on the public disclosure of the voter's social security number); *Republican Party of Arkansas v Faulkner Co*, 49

F. THE PHOTO IDENTIFICATION REQUIREMENTS

At this time, the Secretary of State estimates that 370,000 Michigan registered voters do not have photo identification.[14] The photographic identification requirements of 2005 PA 71 mandate that these individuals obtain photographic identification or sign an affidavit before they can vote. The teaching of the United States Supreme Court's decisions in *Harper*, *Kramer, Dunn, Bush,* and their progeny[15] is that these requirements work a severe burden on the right to vote.[16]

Because "equal dignity [is] owed to each voter,"[17] the most "exacting test is required for any statute that

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F3d 1289, 1298-1299 (CA 8, 1995) (Finding that the requirement that political parties conduct and pay for primary elections was subject to strict scrutiny. This is because it had the effect of forcing many voters, who wished to vote in the Republican primary, to vote either in the Democratic primary or not at all.).

[14] D. Bell, *Court Jumps Into Dispute Over Voter ID Checks,* Detroit Free Press (April 27, 2006) (quoting Secretary of State spokeswoman Kelly Chesney).

[15] E.g., *Kusper v Pontikes*, 414 US 51; 94 S Ct 303; 38 L Ed 2d 260 (1973) (Striking down a party affiliation statute that impaired the right to vote by preventing individuals who had voted in a primary from voting in another party's primary for nearly two years. Less drastic alternatives existed that satisfied the state's interest involved.); *Hill v Stone*, 421 US 289, 298; 95 S Ct 1637; 44 L Ed 2d 172 (1975) (Striking down a "dual box" voting technique because "in an election of general interest, restrictions on the franchise of any character must meet a stringent test of justification.").

[16] None of the cases cited by the majority for the proposition that a lower standard of review applies concerned the regulation of an individual's right to *cast* a ballot. The United States Supreme Court decisions cited by the majority are (1) *Burdick,* 504 US 428, (2) *Timmons v Twin Cities Area New Party*, 520 US 351; 117 S Ct 1364; 137 L Ed 2d 589 (1997), and (3) *Storer,* 415 US 724. Each of these cases dealt with a candidate's right to get on the ballot, not an individual's right to *cast* a ballot. The right of candidacy has never been recognized as a fundamental right. *Clements*, 457 US at 963. But, as the cases I cite demonstrate, when an individual's right to *cast* a ballot is impaired, the United States Supreme Court has uniformly held that strict scrutiny applies.

[17] *Bush*, 531 US at 104.

'place[s] a condition on the *exercise* of the right to vote.' " *Dunn*, 405 US at 337 (quoting *Bullock*, 405 US at 143) (emphasis added). Where access to the ballot box is impeded because of qualifications or requirements, such as (1) the poll tax in *Harper,* (2) the property ownership requirement in *Kramer*, (3) the durational residency requirement in *Dunn*, or (4) the photo identification and affidavit requirements in this case, the most exacting level of scrutiny must be applied.

G. THE AFFIDAVIT OPTION OF 2005 PA 71

The majority concludes that it is because 2005 PA 71 includes the affidavit option that a minimal level of review of the photo identification requirement is appropriate. However, the affidavit option itself interferes with the right of individuals lacking photo identification to cast a ballot. The assistant attorney general who argued in support of the constitutionality of the act concedes this point. Even if, as the majority asserts, signing an affidavit were a minor obstacle, it is an obstacle that is imposed on only a select group of otherwise qualified voters.

"[W]here a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required." *New York Attorney General v Soto-Lopez*, 476 US 898, 906 n 6; 106 S Ct 2317; 90 L Ed 2d 899 (1986). And a restriction that burdens the right of only a select group of citizens to access the ballot is sufficient to trigger strict scrutiny review under the federal constitution. See, e.g., *Harper*, 383 US at 670;[18] *Wesberry*, 376

[18] "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."

US at 17-18;[19] Nowak & Keeton, Constitutional Law (5th ed), § 14.31, p 866.[20] As the *Burdick* Court itself stated, a lower standard of review will apply only to " 'nondiscriminatory restrictions.' " *Burdick*, 504 US at 434 (citation omitted). Because only individuals without photo identification will be subject to the affidavit process, these requirements clearly discriminate between individuals with photo identification and individuals without such identification.[21] Therefore, contrary to the position of the majority, the affidavit option does nothing to reduce the level of scrutiny that applies to 2005 PA 71.

H. THE RELEVANT COMPELLING GOVERNMENTAL INTEREST

When strict scrutiny applies, "a heavy burden of justification is on the State, and . . . the statute will be closely scrutinized in light of its asserted purposes." *Dunn*, 405 US at 343. The state must demonstrate that 2005 PA 71 is " 'necessary to promote a compelling governmental interest.' " *Id.* at 342, quoting *Shapiro v Thompson*, 394 US 618, 634; 89 S Ct 1322; 22 L Ed 2d 600 (1969) (emphasis omitted); *Kramer*, 395 US at 627. And even if a compelling interest can be shown, the state must use the least restrictive means to advance that interest.

> [T]he State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Stat-

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[19] "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

[20] "Because the right to vote is a fundamental right, any classification defining the ability to exercise the right must meet, under a strict scrutiny review, the dictates of the equal protection guarantee before the Court can sustain the measure as constitutional."

[21] "Discriminate" is defined as "to make a distinction in favor of or against a person on the basis of the group or class to which the person belongs, rather than according to merit." *Random House Webster's College Dictionary* (2001).

> utes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." [*Dunn*, 405 US at 343 (citations omitted).]

The interest that has been put forth for the photo identification requirements is that they will prevent voter fraud. The prevention of voter fraud is clearly a legitimate governmental objective. But, there is no evidence at present that voter fraud is a significant problem in Michigan. In fact "Michigan enjoys an election history that is relatively fraud-free." *Bay Co Democratic Party v Land,* 347 F Supp 2d 404, 437 (ED Mich, 2004) (citing Attorney General Opinion No 6930). And voter fraud appears to be very low nationally, as well.[22]

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[22] See Minnite & Callahan, *Securing the Vote: An Analysis of Election Fraud* (Demos, A Network for Ideas and Action, 2003), at: <http://www.demos.org/pubs/EDR_-_Securing_ the_Vote.pdf> (accessed July 11, 2007). After a review of news and legal databases and after interviews with state election officials, the authors found that, between 1992 and 2002, election fraud was "very rare" and a "minor problem" that "rarely affects election outcomes." *Id.* at 4, 17.

See also E. Lipton & I. Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud,* NY Times (April 12, 2007) (accessed July 16, 2007). In the aftermath of the 2000 presidential election, the Department of Justice began an aggressive probe of voter fraud. That investigation revealed "virtually no evidence of any organized effort to skew federal elections." Some have argued that the accusations of voter fraud have been advanced to mask efforts to suppress the rights of some to vote. There is evidence that supports this argument. See G. Gordon, *2006 Missouri Election was Ground Zero for GOP*, McClatchy Newspapers (May 2, 2007) <http://www.realcities.com/mld/krwashington/news/nation/17168096.htm> (accessed July 11, 2007). And, it has been advanced by the opponents of 2005 PA 71. In his dissent, Justice Cavanagh makes a persuasive argument regarding the requirements' potential negative effects on certain groups of voters.

More fundamentally, there are many types of voter fraud. 2005 PA 71 addresses only one: in-person polling place fraud that involves the impersonation of a registered voter. Yet, those arguing in favor of the photo identification requirements have not come forward with any documented instances of in-person voter fraud.[23]

Accordingly, the photo identification requirements are a solution in search of a problem. This is a particularly serious matter given that they affect and hinder the exercise of the fundamental constitutional right to vote. In order for the restrictions to withstand challenge, a constitutionally sufficient compelling governmental interest would have to be shown. But such an interest is conspicuously absent in this case.

I. THE LEAST RESTRICTIVE MEANS

Even assuming a constitutionally sufficient justification could be shown, the government must employ the least restrictive means of furthering that interest. The photo identification and affidavit requirements are not the least restrictive means. The goals of 2005 PA 71 may be achieved by more limited means that do not discriminate against and threaten to disenfranchise a large number of qualified Michigan voters. First, Chapter XXIII of the Election Law, MCL 168.491 to 168.524, already establishes comprehensive safeguards aimed at preventing fraudulent voting. The fact that there are no documented cases of in-person voter fraud suggests

[23] And it is not a lack of diligence that has prevented the production of such evidence. Rather, it is because there has not been a single documented instance of in-person voter fraud in the state of Michigan. In fact, it appears that only one allegation of in-person fraud has ever been made to the Secretary of State, and that allegation was never substantiated.

that these less drastic, nondiscriminatory means have adequately advanced the state's interest.

Another safeguard is the matching of signatures. In states that utilize voter signature matching, each voter is required to sign the poll sheet. The signature is then matched against the signature acquired at registration. Michigan utilizes this method in precincts where digital signatures are available. MCL 168.523. A less restrictive alternative to the photo identification requirements would be to ensure that all precincts have digital signatures available.[24]

Another safeguard is to permit voters the use of nonphoto identification. Seventeen states utilize this method.[25] If Michigan were to allow flexible nonphoto identification, it would avoid the prejudice to eligible voters who lack state-issued photo identification.

Unlike the above safeguards, the photo identification requirements of 2005 PA 71 pose an extreme remedy to an unsubstantiated problem. When the remedy causes a greater harm than the problem, it cannot survive strict scrutiny. All the aforementioned options represent less drastic means to accomplish the state's interest in preventing voter fraud. Hence, the photo identification requirements are not the least restrictive means to advance the asserted state interest. For the reasons I have detailed, 2005 PA 71 violates the federal constitution.

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[24] The majority claims that signature matching is not a less restrictive option because it would still require a signature. What the majority overlooks is that signature matching would require a signature from *everyone*, not just those who lack photo identification. It is this difference that makes signature matching a less restrictive, less discriminatory alternative.

[25] Study by National Conference of State Legislatures, available at <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm> (accessed July 11, 2007).

III. THE MICHIGAN CONSTITUTION

A complete analysis of 2005 PA 71 must also include consideration of the Michigan Constitution. "State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court's interpretation of federal law."[26]

That the state constitution requires an independent interpretation is not a novel concept. For much of the nation's history, state constitutions have been invoked to protect individual rights and often have been found to provide greater protection than the federal constitution.[27] The idea that state courts are not only free to interpret their constitutions independently, but have a duty to do so, is derived from federalism itself.[28]

James Madison acknowledged this principle when he stated, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the position allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[29] The Federalist No. 51.

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[26] Brennan, *State constitutions and the protection of individual rights*, 90 Harv L R 489, 491 (1977).

[27] Note: *Neither Icarus nor ostrich: State constitutions as an independent source of individual rights*, 79 NYU L R 1833, 1835 (2004).

[28] *Id.* at 1842.

[29] Similarly, Justice Brandeis recognized the benefits of our federal system when he stated in *New State Ice Co v Liebmann*, 285 US 262, 311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandeis, J., dissenting), "It is one of the happy incidents of the federal system that a single courageous State may,

In *Sitz v Dep't of State Police,*[30] this Court thoughtfully explained the role that the federal constitution plays in interpreting our state constitution.

> Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution. It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the constitution.
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> . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded [by the two constitutions] may be greater, lesser, or the same. [*Sitz,* 443 Mich at 760-762.]

When interpreting our constitution, therefore, "[t]he right question is not whether [the] state's guarantee is the same as or broader than its federal counterpart as interpreted by the [United States] Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand."[31] And though the United States Supreme Court's interpretation of the federal constitution may be a polestar to help us navigate to the correct interpretation of our constitution, it is no more than that. Ultimately, it is our constitutional duty to independently interpret the Michigan Constitution.

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if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

[30] 443 Mich 744; 506 NW2d 209 (1993).

[31] Linde, *E pluribus—Constitutional theory and state courts*, 18 Ga L R 165, 179 (1984).

The Michigan Supreme Court has long recognized the duty by engaging in a "searching examination to discover what 'law the people [of Michigan] have made.' " *Sitz*, 443 Mich at 759 (citation omitted). As Chief Justice Cooley correctly stated well over 100 years ago, the state Supreme Court's "duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express." *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884).

Hence we must determine what level of protection the people of Michigan have provided against infringements on the right to vote. The surest way to answer this question is to examine the specific provisions of the Michigan Constitution dealing with that right.

A. ARTICLE 2, SECTION 1

Article 2, § 1 of the Michigan Constitution states that "[e]very citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution." By its terms, this clause provides that individuals who have met certain requirements are "qualified to vote."

In giving meaning to the phrase "qualified to vote," this Court "discerns the common understanding of constitutional text by applying [the] term's plain meaning . . . ." *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). The word "qualified" is defined as "having met the conditions required by law or custom for exercising a right, holding an office, etc." *Random House Webster's College Dictionary* (2001).

Article 2, § 1, therefore, expressly confers the right to vote on any United States citizen, age 21 or older, who has been a Michigan resident for six months, and who meets local residency requirements.[32] The question then becomes whether the photo identification and affidavit requirements unconstitutionally infringe on this right.

When the constitutionality of legislation is examined, a showing of "[d]ifferent degrees of state interest [is] required by the courts, depending upon the type of private interest which is being curtailed." *Kropf v Sterling Hts*, 391 Mich 139, 157-158; 215 NW2d 179 (1974). The strict scrutiny standard of review applies to "legislation [that] impinge[s] on a fundamental right explicitly or implicitly guaranteed by the constitution." *In re Kasuba Estate*, 401 Mich 560, 570; 258 NW2d 731 (1977); *Kropf*, 391 Mich at 157-158. Because our constitution expressly confers the right to vote on individuals who have satisfied the requirements of art 2, § 1, any

[32] The Twenty-sixth Amendment of the United States Constitution has lowered the voting age to 18. And, as the majority points out, other constitutional provisions may specifically take away an otherwise qualified individual's right to vote. See, for example, Const 1963, art 2, § 2, which permits the exclusion of citizens from voting because of mental incompetence or commitment to a jail or penal institution. However, unless another constitutional provision specifically provides otherwise, anyone who meets the requirements of art 2, § 1 is qualified to vote. The majority claims that the Purity of Elections Clause is one of the constitutional provisions that provides otherwise. So, the majority asserts, the framers of our constitution thought it important enough to set forth the qualifications to vote but then added the Purity of Elections Clause. The majority believes that the framers inserted that clause so that the Legislature could later add any other qualification it felt like adding. This argument cannot withstand scrutiny. To read the Purity of Elections Clause as broadly as the majority wishes would essentially render art 2, § 1 meaningless. I cannot accept that our framers would adopt a meaningless constitutional provision.

infringement on that right, beyond these requirements, is subject to strict scrutiny review.[33]

B. *WILKINS v ANN ARBOR CITY CLERK*[34]

It is consistent with the decisions of this Court that infringements on the right to vote not in art 2, § 1 are invalid under the Michigan Constitution, unless they withstand the most exacting review. For example, in *Wilkins*, this Court considered whether a statute that precluded certain students from registering to vote in the state violated the Equal Protection Clause of the state constitution.[35] *Wilkins*, 385 Mich at 675-676. We held that the constitution "guards against subtle restraints on the right to vote, as well as outright denial"[36] and actual denial of the right need not be shown in order for strict scrutiny review to be required. *Id.* at 685. The statute at issue in *Wilkins* placed a burden on the students' right to vote. There were less restrictive ways of accomplishing the state interests of preventing voter fraud and providing for an educated electorate. Hence the Court found that the statute violated the Equal Protection Clause of the state constitution.[37] *Id.* at 694.

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[33] Article 2, § 1 is not the only constitutional provision that gives rise to the requirement that strict scrutiny apply to regulations that impair the right to vote. The Michigan Constitution begins with the declaration that "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. Additionally, the Michigan Equal Protection Clause prohibits any person from being denied the enjoyment of his or her "political rights." Const 1963, art 1, § 2. These constitutional provisions indicate that the people of Michigan attach the utmost importance to the fundamental right to vote.

[34] 385 Mich 670; 189 NW2d 423 (1971).

[35] The Equal Protection Clause is at art 1, § 2 of the Michigan Constitution.

[36] *Id.* at 684.

[37] The majority disregards *Wilkins* because *Wilkins* relied on federal law. But *Wilkins*'s reliance on federal law is irrelevant. *Sitz*, 443 Mich at

C. *MICHIGAN STATE UAW COMMUNITY ACTION PROGRAM COUNCIL v SECRETARY OF STATE*[38]

Similarly, in *Michigan State UAW,* this Court considered whether a statute automatically disqualifying inactive voters violated art 2, § 1 of the Michigan Constitution. *Michigan State UAW,* 387 Mich at 513. After emphasizing the fundamental importance of the right to vote, we found that the law was unconstitutional, unless it was supported by a compelling state interest. *Id.* at 514. Indeed, the Court held that "[a]ny burden, however small, will not be permitted unless there is demonstrated a compelling state interest."[39] *Id.* at 516.

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762 n 12 (" 'state courts are not required to incorporate federally-created principles into their state constitutional analysis' ") (citation omitted). The *Wilkin*s Court held that any infringement on the right to vote triggers strict scrutiny review under the Michigan Equal Protection Clause. That the United States Supreme Court may have altered its interpretation of the federal constitution is not adequate reason to abandon a prior decision of this Court interpreting the Michigan Constitution. This Court should "not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *Id.* at 759.

The majority also claims that *Wilkins* did not consider art 2, § 4 of the Michigan Constitution. The majority's reading of *Wilkins* is incorrect. In *Wilkins*, the Court noted that the Court of Appeals had upheld the statute because it was a valid exercise of legislative authority under art 2, § 4. *Wilkins,* 385 Mich at 685. See also *Wilkins v Ann Arbor City Clerk*, 24 Mich App 422, 427; 180 NW2d 395 (1970). The Court rejected this argument because regulations enacted under this constitutional provision still must be supported by a compelling state interest. *Wilkins,* 385 Mich at 685-687.

[38] 387 Mich 506; 198 NW2d 385 (1972).

[39] The majority claims that, when properly read, *Michigan State UAW* does not stand for the proposition that the Michigan Constitution requires the application of strict scrutiny to all voters-rights cases. I am baffled by this statement. In *Michigan State UAW*, the Court was very explicit in stating that it was considering *only* whether the statute at issue violated the Michigan Constitution, specifically art 2, § 1. The Court held that "[a]ny burden [on the right to vote], however small, will not be

The government had argued that it was within the Legislature's powers under art 2, § 4 of the Michigan Constitution to disqualify inactive voters. Article 2, § 4 authorizes the enactment of "laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." *Michigan State UAW*, 387 Mich at 515. This Court rejected that argument, finding that "the state still must demonstrate a compelling state interest to justify a law passed pursuant to this section." *Id.* at 516. And, because a comprehensive set of safeguards were already in place to accomplish the purported governmental interest of preventing voter fraud, this Court struck down the statute as unconstitutional.[40] *Id.* at 517-520.

D. *SOCIALIST WORKERS PARTY v SECRETARY OF STATE*[41]

In *Socialist Workers Party*, at issue was a statute requiring new political parties to meet both a petition requirement and a minimum-primary-vote requirement to appear on the general election ballot. *Socialist Workers Party*, 412 Mich at 580. Again, the plaintiffs

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permitted unless there is demonstrated a compelling state interest." *Michigan State UAW,* 387 Mich at 516. The only possible way this decision can be read is that art 2, § 1 of the Michigan Constitution requires the application of strict scrutiny to regulations that burden the right to vote.

[40] The majority also claims that *Michigan State UAW* failed to consider the effect of art 2, § 4 of the Michigan Constitution. The majority's reading of this opinion is incorrect. In *Michigan State UAW*, 387 Mich at 516, this Court explicitly recognized that the government had argued that the statute was authorized by this constitutional provision. This Court rejected the argument, determining that "the state still must demonstrate a compelling state interest to justify a law passed pursuant to [art 2, § 4]."

[41] 412 Mich 571; 317 NW2d 1 (1982).

argued that the requirements violated the Equal Protection Clause of the state constitution. *Id.* at 582. This Court agreed, determining the requirements unconstitutional because they were not narrowly tailored to achieve a compelling state interest.[42] *Id.* at 594. The Court held, also, that the law violated art 2, § 4 of the Michigan Constitution, the " 'purity of elections' " clause. *Socialist Workers Party*, 412 at 599.

In deciding that the statute violated the Purity of Elections Clause, the Court recognized that the clause embodies "two separate concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.' " *Id.* at 596 (citation omitted). The Court found that a law that undermined the fairness and evenhandedness of an election would be invalid. *Id.* at 598-599. And, because the statute at issue gave parties already established an advantage over new parties, the Court held that the statute violated the clause. *Id.*

This Court's decisions in *Wilkins*, *Michigan State UAW*, and *Socialist Workers Party* stand for the proposition that any infringement on the right to vote, however minor, is subject to strict scrutiny under the

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[42] The majority finds that *Socialist Workers Party* can be discarded because it relied on federal precedent in interpreting the Michigan Constitution. In *Socialist Workers Party,* this Court found that strict scrutiny applied under the Michigan Constitution. It relied on the federal constitution in making that decision. Regardless, the case is relevant to show that, under the state constitution, strict scrutiny applies to the requirements at issue. As I stated earlier, this Court should "not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *Sitz*, 443 Mich at 759.

Michigan Constitution.[43] These decisions also illustrate the proper role of the Purity of Elections Clause. The Legislature is free to enact new laws under this clause, but any legislation that threatens to disenfranchise voters or that undermines the fairness of an election will be invalid.

The requirements at issue in the instant case infringe on the right to vote by creating an obstacle that burdens the right of qualified voters to cast a ballot. Hence, the teaching of *Wilkins*, *Michigan State UAW,* and *Socialist Workers Party* is that these requirements are unconstitutional, unless they are narrowly tailored to achieve a compelling governmental interest.

E. FACTORS TO BE WEIGHED

We are required by the language of our state constitution and the decisions of this Court interpreting that language to find that infringements on the right to vote are subject to strict scrutiny. But an additional reason supports that finding. On past occasions, this Court has cited factors that are helpful in determining when it is

[43] The majority claims that these decisions can be ignored because they were decided at a time when all voting regulations were subject to strict scrutiny. This simply is not true. At the same time this Court decided *Michigan State UAW* and *Wilkins,* and over 10 years before this Court decided *Socialist Workers Party*, the United States Supreme Court explicitly maintained that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock*, 405 US at 143. Accordingly, to claim that this Court decided these cases assuming that strict scrutiny applies to all voting regulations assumes that past members of the Court misunderstood the decisions of the United States Supreme Court. This is an insulting assumption. Out of deference to and respect for my predecessors, I assume that they were well aware that the federal constitution did not require application of strict scrutiny in all instances. Rather, they made a conscious decision that the Michigan Constitution, unlike the federal constitution, requires any infringement on the right to vote to withstand strict scrutiny review.

appropriate to find that the state constitution affords more protection than its federal counterpart. When these factors are weighed, it is apparent that our state constitution affords greater protection against infringements on the right to vote than does the federal constitution.[44]

The factors are (1) the textual language of the state constitution, (2) significant textual differences between parallel provisions of the two constitutions, (3) structural differences between the state and federal constitutions, (4) state constitutional and common-law history, (5) state law preexisting adoption of the relevant constitutional provision, and (6) matters of peculiar state or local interest. *Sitz*, 443 Mich at 763 n 14.

Article 2, § 1 of the Michigan Constitution expressly confers the right to vote on individuals who satisfy the requirements set forth in that section. This is a difference between the Michigan Constitution and the federal constitution. The federal constitutional provisions regarding the right to vote prohibit denial of the right on the basis of certain protected characteristics. But the federal constitution does not expressly give anyone the right to vote.[45] *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 34 n 74; 93 S Ct 1278; 36 L Ed 2d 16 (1973). The fact that the Michigan Constitution confers the right to vote on qualified electors while the

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[44] Numerous state courts have found that their state constitution affords greater protection against infringements on the right to vote than the federal constitution. E.g., *Weinschenk v State*, 203 SW3d 201, 212 (Mo, 2006); *Maryland Green Party v Maryland Bd of Elections*, 377 Md 127, 150; 832 A2d 214 (2003).

[45] The Fifteenth Amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Nineteenth Amendment provides:

federal constitution does not, supports the conclusion that the Michigan Constitution affords greater protection than its federal counterpart.

The language of the Michigan Constitution also differs from the federal constitution in that the Michigan Equal Protection Clause[46] protects "political rights," whereas the federal Equal Protection Clause[47] does not. Additionally, art 1, § 1 of the Michigan Constitution

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> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.
>
> The Twenty-sixth Amendment provides:
>
> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> Congress shall have power to enforce this article by appropriate legislation.

[46] Const 1963, art 1, § 2. This provision provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

[47] US Const, Am XIV, § 1. This provision provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

declares that "[a]ll political power is inherent in the people." The federal constitution contains no analogous provision.

There are also structural differences between our constitution and the federal constitution that indicate that the state constitution provides greater protection against infringements on the right to vote. Unlike the federal constitution, the Michigan Constitution dedicates an entire article to elections.[48] This signifies the importance that Michigan people attach to the right to vote. The federal constitution contains no parallel article regarding elections.

Another difference is that, unlike federal caselaw, the decisions of this Court have uniformly held that infringements on the right to vote are subject to strict scrutiny. Before today, in every case decided under the current state constitution, this Court applied strict scrutiny to statutes that impaired the right to vote. See *Wilkins*, *Michigan State UAW,* and *Socialist Workers Party*. On the other hand, the federal courts have long recognized that different levels of scrutiny will apply depending on how significant the burden is. See, e.g., *Storer,* 415 US at 730; *Anderson*, 460 US at 788.

And even long before the ratification of our current constitution, this Court recognized the fundamental and paramount nature of the right to vote, explaining that "[n]o elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence." *Attorney General, ex rel Conely v Detroit Common Council*, 78 Mich 545, 563; 44 NW 388 (1889). This Court's decision in the *Detroit* case suggested, also, that the appropriate recourse for those seeking to

[48] All of art II is dedicated to elections.

prevent fraud by imposing an identification requirement is a constitutional amendment, not legislation.

> If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our State, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the Constitution, then the remedy is with the people to alter such Constitution by the lawful methods pointed out and permitted by that instrument. [*Id.* at 564.]

Accordingly, for well over 100 years, this Court has held that restrictions that threaten to disenfranchise otherwise eligible voters are invalid, absent a constitutional amendment or a compelling governmental interest. This fact weighs heavily in favor of finding greater protection under the state constitution.

Finally, voting is fundamentally a matter of local concern. The federal constitution leaves the regulation of elections largely to the states. The Elections Clause of the federal constitution provides that the state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives . . . ." US Const, art I, § 4, cl 1. The individual states have complete control, also, over the election process for state offices. *Tashjian v Republican Party of Connecticut*, 479 US 208, 217; 107 S Ct 544; 93 L Ed 2d 514 (1986).

The fact that the states are granted such broad regulatory power indicates that this is an area where state constitutions likely include greater protection against potential abuses. This is confirmed by the fact that the Michigan Constitution expressly sets forth the qualifications for voting, whereas under the federal system, qualifications are left to legislative determination. Compare US Const, art I, § 2, which provides that

federal electors must be equivalent to those for state positions, with Const 1963, art 2, § 1, which provides that an individual who meets certain requirements is qualified to vote. Because the federal constitution leaves the regulation of elections largely to the states, it makes sense that the state constitutions would provide greater protection against potential election abuses.

For all of the above reasons, I would hold that any infringement on the right to vote is unconstitutional under the Michigan Constitution, unless it can withstand the most exacting scrutiny. The photo requirements of 2005 PA 71 infringe on the fundamental right to vote and, as demonstrated in the preceding section, are not narrowly tailored to achieve a compelling state interest. Hence, I would declare these requirements unconstitutional.[49]

The majority disagrees with my conclusion and finds that the Michigan Constitution affords no greater protection against regulations that burden the right to vote than does the federal constitution. But, in deciding that 2005 PA 71 does not violate the Michigan Constitution, the majority simply follows federal precedent in lockstep. I strongly disagree with this approach. It is the functional equivalent of giving the United States Supreme Court the ability to amend the Michigan Constitution. To quote Justice Dennis of the Louisiana Supreme Court, "my colleagues have sunk this court to the lowest pitch of abject followership. They no longer believe in our state constitution as an act of fundamental self-government by the people . . . . They no longer perceive this court to be the final arbiter of the meaning

[49] 2005 PA 71 cannot withstand strict scrutiny review because (1) there is no evidence that in-person voter fraud is a significant problem in Michigan, and (2) even if it were, there are other methods to combat fraud that are less burdensome than the requirements at issue.

of that constitution, bound by the intent of the drafters and ratifiers as reflected by the text, the drafting history, and this court's constitutional precedents. Instead, for them, our state constitution is a blank parchment fit only as a copybook in which to record the [decisions of the United States Supreme Court.]" *State v Tucker*, 626 So 2d 707, 719 (La, 1993).

IV. CONCLUSION

A review of the United States Supreme Court decision in *Burdick* shows that strict scrutiny continues to be the standard of review applicable here. *Harper, Kramer,* and *Dunn* are still good law.

But even if the Fourteenth Amendment of the federal constitution did not require it, the Michigan Constitution demands that 2005 PA 71 pass the strict scrutiny test in order to be pronounced constitutional. *Detroit Common Council, Wilkins, Michigan State UAW,* and *Socialist Workers Party* all speak to that fact.

The right to vote is fundamental, and the strict scrutiny test must be applied to any statute that infringes on it. It is beyond question that the requirements of 2005 PA 71 infringe on the right to vote by adding conditions to a voter's access to the polling place. These conditions fail the strict scrutiny test because no compelling state interest in them has been demonstrated. Significant in-person voter fraud has not been shown to exist in Michigan. But, even if it had, less burdensome methods exist to combat whatever voter fraud may threaten to erupt. 2005 PA 71 should be held unconstitutional.

Those most severely prejudiced by today's decision are the impoverished and the disadvantaged. Yet, Michigan has always enjoyed a strong reputation for the protection of our civil rights. This tragic decision has

the potential to wipe out many of this state's achievements in this area. I believe that history will judge us harshly for joining those states that have limited the precious constitutional right to vote. Accordingly, I dissent.

PEOPLE v NYX

Docket No. 127897. Argued November 14, 2006 (Calendar No. 4). Decided July 18, 2007.

Maurice L. Nyx was convicted following a bench trial in the Wayne Circuit Court, Vera Massey Jones, J., of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(*iii*), on the basis of the defendant's admission that he touched the victim's vagina. The defendant appealed, alleging that the trial court erred in convicting him of CSC II when he had only been charged with three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(*iii*). The Court of Appeals, NEFF, P.J., and COOPER and R. S. GRIBBS, JJ., vacated the convictions and remanded the matter to the trial court for the entry of an order of acquittal of the charges of CSC I. Unpublished opinion per curiam, issued January 13, 2005 (Docket No. 248094). The Court of Appeals held that because CSC II is a cognate lesser offense of CSC I, the crime must be charged before the trial court may consider it. The Supreme Court granted the prosecution's application for leave to appeal. 474 Mich 1099 (2006).

In an opinion by Chief Justice TAYLOR, joined by Justice MARKMAN, and an opinion by Justice CAVANAGH, joined by Justice KELLY, in which he concurred in the result only, the Supreme Court *held*:

The Court of Appeals properly vacated the defendant's CSC II conviction.

In an opinion by Chief Justice TAYLOR, joined by Justice MARKMAN, and an opinion by Justice YOUNG, joined by Justice WEAVER, the Supreme Court *held*:

A defendant charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree.

Chief Justice TAYLOR, joined by Justice MARKMAN, stated that a defendant charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an

element not found within the higher degree. The elements of CSC II are not all subsumed within CSC I. CSC II is not a necessarily included lesser offense of CSC I. Rather, it is a cognate lesser offense. MCL 768.32(1) precludes a judge or a jury from convicting a defendant of an uncharged cognate lesser offense even if the crime is divided into degrees. The word "inferior" in MCL 768.32(1) means an offense that is necessarily included in the greater charge. An offense is only inferior when all the elements of the lesser offense are included within the greater offense. The error in this case was not harmless.

Justice MARKMAN, concurring, agreed fully with the lead opinion, but wrote separately to articulate that the rule proposed by the dissent is particularly unfair in the context of the criminal sexual conduct (CSC) statutes because it would allow a defendant charged with criminal sexual penetration (CSC I) to be convicted of a related, but separate, criminal act of criminal sexual contact (CSC II).

Justice CAVANAGH, joined by Justice KELLY, concurring in the result only, agreed that the Court of Appeals decision to vacate the defendant's conviction for CSC II should be affirmed because the defendant did not have adequate notice that he faced that charge, but did not join the lead opinion in full because its characterization of the word "inferior" is contrary to the established definition and historical use of the term.

Affirmed; remanded to the trial court for an order of discharge.

Justice YOUNG, joined by Justice WEAVER, concurring in part and dissenting in part, concurred that MCL 768.32(1) permits a defendant to be found guilty of a necessarily included lesser offense, but not a cognate lesser offense, of the charged offense. However, he disagreed with the conclusion of the majority that a statutory violation occurred in this case on the basis of his belief that second-degree criminal sexual conduct is a necessarily included lesser offense of first-degree criminal sexual conduct. The conviction of second-degree criminal sexual conduct was amply supported by the victim's testimony and the defendant's confession. If error had occurred, the unpreserved nonconstitutional error would be harmless under the plain error rule. The judgment of the Court of Appeals should be reversed and the matter remanded to the Court of Appeals to address the defendant's remaining appellate issues.

Justice CORRIGAN, dissenting, would hold that under the plain language of MCL 768.32(1), a fact-finder may convict a defendant of a legislatively denominated inferior degree of the charged offense if a rational view of the evidence supports the conviction. There is no ambiguity in the text of MCL 768.32(1) that would

warrant application of the canon of constitutional avoidance, nor is there a serious likelihood that the statute will be held unconstitutional. The rule of construction set forth in *People v Cornell*, 466 Mich 335 (2002), for determining whether an offense is inferior does not apply where the Legislature itself has formally divided an offense into degrees; and it appears that second-degree criminal sexual conduct is necessarily included in first-degree criminal sexual conduct, notwithstanding this Court's previous statement to the contrary. Any error was harmless in light of the fact that the defense at trial was that the defendant engaged in no sexual touching with the complainant. The judgment of the Court of Appeals should be reversed and the matter should be remanded to the Court of Appeals to address the defendant's remaining issues.

CRIMINAL LAW — CHARGED OFFENSES — UNCHARGED OFFENSES.

A defendant charged with an offense consisting of various degrees may not be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree (MCL 768.32[1]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

John F. Royal for the defendant.

TAYLOR, C.J. The issue in this case is whether a defendant charged with a crime that the Legislature has divided into degrees, such as first-degree criminal sexual conduct (CSC I), may, pursuant to MCL 768.32(1), properly be convicted of a lesser degree of the charged offense, such as second-degree criminal sexual conduct (CSC II), where the crime of a lesser degree contains an element not within the charged offense of a greater degree. The Court of Appeals held that *People v Cornell*[1] forbids this result.

[1] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

We agree and hold that a defendant charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree. The judgment of the Court of Appeals is affirmed.

I. FACTS AND PROCEEDINGS BELOW

Defendant was employed as the dean of a school in Detroit. A student accused defendant of having penetrated her vagina. As a result, defendant was charged with one count of CSC I by an actor who is in a position of authority over the victim and uses this authority to get the victim to submit to penetration of the vagina with a penis and the victim is at least 13 but less than 16 years of age. MCL 750.520b(1)(b)(iii). Defendant was also charged with two counts of CSC I by an actor who is in a position of authority over the victim and uses this authority to get the victim to submit to penetration of the vagina with a finger and the victim is at least 13 but less than 16 years of age. MCL 750.520b(1)(b)(iii).

The trial court presided over a bench trial. The complainant testified about the sexual penetration. A police officer testified that when questioned, defendant had admitted engaging in sexual contact but had denied that any penetration had occurred. The court acquitted defendant of the CSC I charges, stating that it "could not quite believe" the complainant's assertion that the penetration had occurred and that "sometimes kids exaggerate."[2] The court then convicted defendant of two counts of CSC II (sexual contact for the purpose of

[2] But, at a remand hearing held months later, the court puzzlingly stated on the record that that the prosecutor had shown CSC I, that the court "believed every word she [the complaint] said," and that the court had hoped that by giving defendant a break he would not have to go to

sexual gratification with a complainant between 13 and 15 years of age). MCL 750.520c(1)(b)(*iii*).

Defendant appealed in the Court of Appeals, arguing that the trial court was without authority to consider the cognate lesser offense of CSC II. The prosecutor argued that MCL 768.32(1) authorized the trial court to convict defendant of CSC II, after having acquitted him of CSC I, because CSC is a crime divided into degrees. The Court of Appeals agreed with defendant, determining that the prohibition in *Cornell, supra,* against considering cognate lesser offenses had been violated.[3] The CSC II convictions were vacated, and the case was remanded for the entry of an order of discharge.

We granted the prosecutor's application for leave to appeal.[4]

II. STANDARD OF REVIEW

Whether MCL 768.32(1) permits a defendant to be convicted of an offense of a lesser degree that contains an element not found within the charged offense of a higher degree is a question of statutory interpretation that we review de novo.[5] When interpreting statutes, our goal is to give effect to the intent of the Legislature by applying the plain language of the statute.[6]

III. ANALYSIS

MCL 768.32(1) provides:

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prison. Defendant was, however, sentenced to concurrent prison terms of 3 to 15 years of imprisonment for his CSC II convictions.

[3] Unpublished opinion per curiam, issued January 13, 2005 (Docket No. 248094).

[4] 474 Mich 1099 (2006).

[5] *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

[6] *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

> Except as provided in subsection (2),[7] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Pursuant to this language, when a defendant is charged with an offense "consisting of different degrees," the fact-finder may acquit the defendant of the charged offense and find the defendant "guilty of a degree of that offense inferior to that charged in the indictment . . . ."

There is no dispute that criminal sexual conduct is a crime the Legislature has divided into degrees. There is first-degree criminal sexual conduct,[8] second-degree criminal sexual conduct,[9] third-degree criminal sexual conduct (CSC III),[10] and fourth-degree criminal sexual conduct (CSC IV).[11] The elements of CSC II are not all subsumed within CSC I. While the prosecutor need not show that the perpetrator of a sexual penetration had

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[7] Subsection 2 provides different rules regarding lesser included offenses when a defendant is charged with a major controlled substance offense.

[8] MCL 750.520b. CSC I is a felony punishable by imprisonment for life or any term of years. MCL 750.520b(2). A defendant convicted of CSC I may not be sentenced to probation. MCL 777.1

[9] MCL 750.520c. CSC II is a felony punishable by imprisonment for not more than 15 years. MCL 750.520c(2). A defendant convicted of CSC II is eligible for a probationary sentence. MCL 777.1

[10] MCL 750.520d. CSC III is a felony punishable by imprisonment for not more than 15 years. MCL 750.520d(2). A defendant convicted of CSC III may not be sentenced to probation. MCL 777.1.

[11] MCL 750.520e. CSC IV is a misdemeanor punishable by not more than two years of imprisonment. MCL 750.520e(2). A defendant convicted of CSC IV is eligible for a probationary sentence. MCL 777.1.

any particular criminal intent in order to obtain a conviction of CSC I, MCL 750.520a(p), CSC II requires proof of one of several intents that are not always present when CSC I is committed.[12] Thus, CSC II is not a necessarily included lesser offense of CSC I.[13] Rather, it is a cognate lesser offense.[14]

The only question in the case at bar is whether CSC II, even though it is not a necessarily included lesser offense of CSC I, is still "inferior" to CSC I.

As early as 1861, this Court pointed out in *People v McDonald*[15] that "It is a general rule of criminal law, that a jury may acquit of the principal charge, and find

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[12] "Sexual contact" is statutorily defined to mean the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for revenge, or to inflict humiliation, or out of anger. MCL 750.520a(o)

[13] Lesser offenses are divided into necessarily included lesser offenses and cognate lesser offenses. An offense is considered a necessarily included lesser offense if it is impossible to commit the greater offense without first having committed the lesser offense. *Cornell, supra* at 345.

[14] A cognate lesser offense is one that shares elements with the charged offense but contains at least one element not found in the higher offense. *Cornell, supra* at 345. We have found that CSC II is a cognate lesser offense of CSC I. In *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997), we held that

> because CSC II requires proof of an intent not required by CSC I, that defendant intended to seek sexual arousal or gratification, CSC II is a cognate lesser offense of CSC I. In short, it is possible to commit CSC I without first having committed CSC II.

We note that following the *Lemons* decision the CSC II statute was amended to add three other possible intents that would prove a CSC II, namely, an intentional touching "in a sexual manner for revenge, or to inflict humiliation or out of anger." See n 12 of this opinion.

[15] *People v McDonald*, 9 Mich 150, 152 (1861) (emphasis added).

the prisoner guilty of an offense of lesser grade, if *contained within it*."[16] Then, in 1869, in *Hanna v People*[17] this Court considered the similarly worded predecessor of MCL 768.32(1) and held that the statute should "be construed as extending to all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, *wherever the charge for the higher grade includes a charge for the less*." *Hanna, supra* at 321 (emphasis added).

In 2002, in *Cornell*, we overruled earlier cases that had allowed instructions on cognate lesser offenses and returned to the construction of the statute that had been given in *Hanna* and in Justice COLEMAN's dissent in *People v Jones*.[18] In summarizing Justice COLEMAN's dissent in *Jones*, we noted that Justice COLEMAN construed MCL 768.32 to only permit consideration of "necessarily included lesser offenses." *Cornell, supra* at 347. The *Cornell* Court, *id*. at 354, also cited with approval the following language from *People v Torres (On Remand)*:[19]

> We believe that the word "inferior" in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. *The controlling factor is whether the lesser offense can be*

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[16] This is consistent with the United States Supreme Court's statement in *Schmuck v United States*, 489 US 705, 717-718; 109 S Ct 1443; 103 L Ed 2d 734 (1989), that it is an ancient doctrine of the common law that a defendant cannot be held to answer a charge not contained in the indictment brought against the defendant.

[17] *Hanna v People*, 19 Mich 316, 320-321 (1869).

[18] *People v Jones*, 395 Mich 379; 236 NW2d 461 (1975).

[19] *People v Torres (On Remand),* 222 Mich App 411, 419-420; 564 NW2d 149 (1997).

> *proved by the same facts that are used to establish the charged offense*. [Emphasis added.]

Thus, *Cornell* construed MCL 768.32(1) as limiting convictions of lesser offenses to those that are "necessarily included" lesser offenses. *Cornell, supra* at 356 n 9, 359.

We have made similar statements in subsequent cases. In *People v Mendoza*,[20] we stated:

> We are confident that we applied the appropriate canon of statutory construction in construing MCL 768.32 by giving "inferior offense" its common-law meaning when it was codified by the Legislature.

The *Mendoza* Court also stated:

> [W]e held [in *Cornell*] that *an inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense,* meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction. [*Id*. at 533 (emphasis added).]

The *Mendoza* Court went on to conclude:

> [T]he elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. *Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also "inferior" offenses* within the scope of MCL 768.32. [*Id.* at 541 (emphasis added).]

Similarly, in *People v Nickens*,[21] we unanimously reiterated the *Cornell*/*Mendoza* construction of MCL 768.32(1), stating:

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[20] *People v Mendoza*, 468 Mich 527, 532 n 2; 664 NW2d 685(2003).

[21] *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). In *Nickens, supra* at 624, we held that assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1), was a necessarily in-

> In *Cornell, supra* at 357, this Court held that, under MCL 768.32, a lesser offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense. "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *Mendoza, supra* at 532 n 3.

Consistently with *McDonald, Hanna, Torres, Cornell, Mendoza,* and *Nickens,* we hold that MCL 768.32(1) precludes a judge or a jury from convicting a defendant of a cognate lesser offense even if the crime is divided into degrees. We do this because the word "inferior" in MCL 768.32(1) is best understood as meaning an offense that is necessarily included in the greater charge.

To reiterate, MCL 768.32(1) requires the lesser offense to be inferior to the charged offense, and an offense is only inferior when all the elements of the lesser offense are included within the greater offense. Thus, even if the crime is divided by the Legislature into degrees, the offense of a lesser degree cannot be considered under MCL 768.32(1) unless it is inferior, i.e., is within a subset of the elements of the charged greater offense. Given that all the elements of CSC II are not included within CSC I, the trial court was without authority to convict defendant of CSC II after it acquitted him of CSC I. Thus, the Court of Appeals properly vacated defendant's convictions and remanded the case for the entry of an order of discharge.

The prosecution would have us interpret MCL 768.32(1) as forbidding instructions on cognate lesser

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cluded lesser offense of CSC I, conduct involving personal injury and the use of force or coercion to accomplish sexual penetration. MCL 750.520b(1)(f).

offenses *except* when the Legislature has divided a crime into degrees.[22] We reject this argument for a variety of reasons. First, it is contrary to over 130 years of caselaw construing the word "inferior" to mean only lesser crimes that are subsumed within the greater crime, and would require us to overrule numerous cases where we have so held. Also, it would return Michigan to an era when instructions on cognate lesser offenses were given. *Cornell* ended that era.

It is true that the prosecutor's construction would only allow cognate lesser offense instructions in cases where the Legislature has divided crimes into degrees. But there are many crimes that have been so divided by the Legislature. The list includes, at least, murder,[23] CSC,[24] home invasion,[25] child abuse,[26] vulnerable adult abuse,[27] retail fraud,[28] fleeing and eluding,[29] and money laundering.[30] Thus, if we were to adopt the position of the prosecution, we would have a situation in which instructions on cognate lesser offenses are not allowed except in cases where a defendant is charged with any degree of murder, CSC, home invasion, child abuse, vulnerable adult abuse, retail fraud, fleeing and eluding, and money laundering other than the lowest degree of such of-

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[22] We note that in *Mendoza*, *supra* at 533 n 5, we rejected the suggestion that our construction of MCL 768.32(1) in *Cornell*, that inferior offenses were limited to necessarily included lesser offenses, was dictum.

[23] MCL 750.316; MCL 750.317.

[24] MCL 750.520b through MCL 750.520e.

[25] MCL 750.110a.

[26] MCL 750.136b.

[27] MCL 750.145n.

[28] MCL 750.356c; MCL 750.356d.

[29] MCL 750.479a.

[30] MCL 750.411*l* through MCL 750.411o.

fense.[31] We are persuaded that the bright-line rule of *Cornell,* which simply precludes conviction of cognate lesser offenses no matter the charge, is consistent with MCL 768.32(1) and is thus preferable.

Further, given that cognate lesser offenses contain at least one element not contained within the greater charge, there would be a due process concern if the prosecution's approach were adopted because defendants are entitled to know the charges against them.

In *Schmuck v United States*,[32] the United States Supreme Court stated:

> It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. [Citations omitted.]

In general, when a defendant is bound over on a "degreed" offense, the defendant is informed of the nature of the charges against him or her and of the elements that the prosecutor must prove beyond a reasonable doubt in order to obtain a conviction. If the prosecutor is allowed to seek a jury instruction on a cognate lesser offense, the prosecutor would essentially be asking the jury to convict the defendant on the basis of an element or elements against which the defendant

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[31] We recognize that a cognate lesser offense may not exist for each of these formally degreed offenses. But, where they do exist, Justice CORRIGAN's view would wrongfully allow conviction of an offense that is not "inferior" to the crime charged.

[32] *Schmuck v United States*, 489 US 705, 717-718; 109 S Ct 1443; 103 L Ed 2d 734 (1989).

did not have notice that he or she would be required to defend. As applied to this case, when defendant was bound over on the charges of CSC I, he was notified that the prosecutor had to prove beyond a reasonable doubt that he had engaged in sexual penetration with the victim. But the information did not serve to notify defendant that he was also subject to conviction of the cognate lesser offense of sexually touching the victim for the purpose of sexual arousal or gratification.

Thus, the adoption of the prosecutor's interpretation of the statute would render the statute subject to constitutional challenge. When there are two possible interpretations of a statute, by one of which it would be constitutional and by the other it would be constitutionally suspect, it is our duty to adopt the one that will save the statute.[33] Moreover, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[34] We avoid such constitutional problems in this case by relying on a definition of a lesser "inferior" offense that has been recognized in our caselaw for over 130 years.

Given that a conviction of CSC II involves proof of an element that is not contained within an indictment of CSC I, there is a serious question whether the prosecutor's interpretation would render MCL 768.32(1) unconstitutional; but the interpretation that we reiterate today, which is consistent with over 130 years of caselaw, precludes any due process concern. Finally, the cognate regime ended by *Cornell* returned the charging power to the executive branch. This is as it should be

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[33] *Blodgett v Holden*, 275 US 142, 148; 48 S Ct 105; 72 L Ed 206 (1927).

[34] *United States v Jin Fuey Moy*, 241 US 394, 401; 36 S Ct 658; 60 L Ed 1061 (1916), citing *United States ex rel Attorney General v Delaware & Hudson Co*, 213 US 366, 408; 29 S Ct 527; 53 L Ed 836 (1909).

and is consistent with this Court's longstanding separation of powers concerns in criminal charging matters.[35] See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672; 194 NW2d 693 (1972).[36]

IV. THE ERROR WAS NOT HARMLESS

We reject any suggestion that the error that occurred here was harmless. When defendant went to trial, *People v Lemons* had held that CSC II was a cognate lesser offense of CSC I and *People v Cornell* had held that MCL 768.32(1) forbids consideration of cognate lesser offenses. Given this caselaw, the error was plain and we conclude that it seriously affected the "fairness, integrity or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defense counsel waived a jury, cross-examined witnesses, called a witness of his own, and made his closing argument in defense of a charge that defendant had sexually penetrated the complainant, i.e., CSC I. Given that controlling caselaw had established that it was improper to consider cognate lesser offenses and that CSC II was a cognate lesser offense of CSC I, it is not too surprising that defense counsel did not object to a police officer's testimony that defendant had admitted a touching. Neither the prosecutor nor defense counsel

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[35] In her dissent in *People v Jones*, Justice COLEMAN pointed out that the prosecutor determines the initial charge and allowing the defendant to have an instruction regarding a cognate lesser offense could infringe "the prosecutor's right to decide what crime is to be charged." *Jones, supra* at 400 (COLEMAN, J., dissenting).

[36] See also *People v Perry,* 460 Mich 55, 63 n 19; 594 NW2d 477 (1999):

> [T]he defendant has a right to notice of the charge, while the prosecutor has the right to select the charge and avoid verdicts on extraneous lesser offenses preferred by the defendant.

asked the court to consider convicting defendant of CSC II. That is, the case was submitted to the court as an all-or-nothing case.

In rendering its verdict, the trial court acquitted defendant of CSC I. Thus, defense counsel was successful in obtaining an acquittal of the charged offense.[37] But the trial court sua sponte went on to convict defendant of two counts of the separate, uncharged offense of CSC II, citing police testimony that defendant had admitted sexual contact with the victim. Had defense counsel known that the trial court was going to consider the uncharged cognate lesser offense of CSC II as a possible verdict, defense counsel might have requested a new preliminary examination, and he may have adopted a different strategy at trial,[38] including, at least, objecting to the police officer's testimony regarding his alleged admission of a sexual touching.[39] Indeed, if defendant knew he might be convicted of CSC II, defense counsel may not have withdrawn his motion to

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[37] The trial court's subsequent comments at a later hearing that it actually did believe the complainant's testimony regarding penetration are, of course, without legal consequence and only serve to reflect poorly on the judge's initial verdict.

[38] As was stated in *People v Adams,* 202 Mich App 385, 391; 509 NW2d 530 (1993), where offenses have different elements

> the defendant may well prepare his defense, including the cross-examination of prosecution witnesses, in an entirely different manner for the lesser offense than he would for the greater offense. However, once the trial is completed . . . it is . . . impossible . . . for the defendant to adjust his trial strategy to encompass the newly added offense.

[39] Justice YOUNG argues in his partial dissent that defense counsel actually challenged the confession. *Post* at 152. While defense counsel challenged whether a confession of sexual touching was made in his closing argument, he did not object when the police officer testified that defendant had made such an admission.

suppress evidence of the statement or for a *Walker*[40] hearing just before the trial began.

It is also the case that defendant may not have waived a jury trial if he had known that a conviction of CSC II was going to be a considered as a permissible verdict.[41] It is impossible for the prosecutor to prove that, in an alternative trial where defendant was provided with notice defendant still would have been convicted of CSC II.[42] Accordingly, the trial court's improper consideration of a cognate lesser offense after its failure to inform defendant that he might be subject to conviction for CSC II cannot be deemed harmless.

V. RESPONSE TO JUSTICE CORRIGAN'S DISSENT

Justice CORRIGAN believes the word "inferior" in MCL 768.32(1) only refers to necessarily included lesser offenses if the charged offense is not a formally degreed offense. We, in contrast, conclude that the word "inferior" in MCL 768.32(1) has the same meaning, i.e., all the elements of the lesser offense are included in the greater offense, no matter the charge. As previously set

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[40] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Justice YOUNG argues in his partial dissent that there is a complete dearth of coercion or involuntariness. *Post* at 153. This is not too surprising given that no hearing was held. Indeed, if the motion to suppress the defendant's statement was denied and he was told he was also facing conviction for CSC II, he may well have sought a plea bargain.

[41] Justice CORRIGAN asserts in her dissent that defense counsel likely waived the right to a jury in hopes that the trial court would convict defendant of a lesser charge. *Post* at 173 n 8. While we are sure this does happen in some cases, we find it significant that defense counsel did not argue, even in the alternative, for the court to convict defendant of a lesser offense if it was not going to acquit the defendant of CSC I.

[42] Justice CORRIGAN argues in her dissent that a rational view of the evidence supported the CSC II convictions. *Post* at 174. While this is true, it is irrelevant because defendant had no notice that such a verdict would be permissible given that he was charged with CSC I.

forth, case after case, starting with *McDonald* all the way through *Nickens,* has indicated that a lesser crime was not "inferior" unless it was contained within the higher charged offense. Justice CORRIGAN accuses the majority of giving the word "inferior" a "hidden, counterintuitive meaning." *Post* at 159. But we have simply given it the meaning found in case after case after case. Indeed, Justice CORRIGAN has not cited, and cannot cite, a single case where this Court held that pursuant to MCL 768.32(1) a cognate lesser offense was "inferior" to a higher charged offense.[43] Justice CORRIGAN further

[43] Justice CORRIGAN does point out that, before 1980, second-degree murder contained an element not contained within first-degree felony murder, and argues from this that notice would have been a problem under our analysis. *Post* at 160. First, in our past jurisprudence, it typically was the defendant who requested a jury instruction regarding a cognate lesser included offense. And even on those occasions when a prosecutor requested an instruction regarding a cognate lesser included offense, the defendant frequently did not object because being convicted of the cognate offense (e.g., second-degree murder) was preferable to being convicted of the charged offense (e.g., first-degree felony murder). Second, before 1980, this Court's caselaw allowed jury instructions regarding cognate lesser included offenses. Thus, defendants were on notice that such an instruction might be given and there was no notice problem. In contrast, the case at bar was tried after *Cornell* forbade the giving of cognate lesser offense jury instructions. Defendant had every right to expect his trial to be conducted consistently with *Cornell*. Indeed, if defendant had feared a conviction of CSC I and requested the court to consider convicting him of CSC II, the prosecutor would have had every right to object and ask the court to comply with *Cornell* by only considering the charged offense of CSC I. If defense counsel had requested the court to consider convicting defendant of CSC II as a lesser offense, defendant would not be entitled to relief pursuant to the "invited error" doctrine. As we explained in *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003), a party cannot seek appellate review of an instruction that the party itself requested. Appellate review is precluded because when a party invites the error, the party waives the right to seek appellate review, and any error is extinguished. *Id.*

We do note that the prosecution could have avoided the problem this appeal presents if it had simply charged defendant in the alternative with CSC I and CSC II.

claims that *Hanna* and *Cornell* "simply presumed that formally degreed offenses were within the scope of the statute." *Post* at 158 (emphasis omitted). We cannot agree. Given that some lesser degreed offenses are cognate lesser offenses containing an element not included within the higher charge, the language of the Court in *Hanna* and *Cornell* actually suggests that the Court did not consider such cognate lesser offenses to be "inferior."[44]

Justice CORRIGAN correctly asserts that CSC II, III, and IV "carry less severe maximum punishments," *post* at 155, than CSC I. She argues from this that CSC II, III, and IV are thus automatically "inferior" to CSC I. However, Justice CORRIGAN neglects to consider the fact that, under her analysis, CSC III is an inferior offense to CSC II. Yet, both CSC II and CSC III carry the same penalty—a 15-year maximum sentence. It is also the case that a defendant convicted of CSC II is eligible for probation, whereas a defendant convicted of CSC III is precluded from receiving a probationary sentence. Thus, one cannot legitimately claim that CSC III is an inferior offense to CSC II on the basis of the sentencing consequences of a conviction. Moreover, even though CSC II, III, and IV carry less severe maximum sentences than CSC I, this does not prove that they are inferior offenses to CSC I, given that in *Cornell* we specifically indicated that the word "inferior" in the statute does not refer to inferiority in the penalty associated with the offense but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. *Cornell*, *supra* at 354.[45]

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[44] As stated in *Hanna,* the statute applies "wherever the charge for the higher grade includes a charge for the less." *Hanna, supra* at 321. As stated in *Cornell*, *supra* at 347, MCL 768.32 only permits consideration of "necessarily included lesser offenses."

[45] Justice CORRIGAN asserts, *post* at 177, that the sensible rule that *Cornell* restored to Michigan is "being upset." To the contrary, one of the

In her dissent, Justice CORRIGAN, *post* at 167 n 4, attempts to distinguish the United States Supreme Court opinion in *Schmuck,* stating that the case did not address formally degreed inferior offenses and did not hold that the constitution mandates the test set forth in FR Crim P 31(c). We find the cited language from *Schmuck* fully applicable.[46] The Court said it was "ancient doctrine of both the common law *and of our Constitution* that a defendant cannot be held to answer a charge not contained in the indictment brought

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rules of *Cornell* was that no cognate lesser offense instructions could be given. It is Justice CORRIGAN who would blur this bright-line rule and allow cognate lesser offense instructions whenever a defendant is charged with one of the many degreed offenses. Justice CORRIGAN further complains, *post* at 177, that prosecutors will now be forced to charge defendants in the alternative whenever they wish a fact-finder to be able to convict a defendant of a cognate lesser offense of a degreed offense. We do not see this as a negative development because it provides notice to a defendant of the crimes of which he or she may be convicted.

[46] Justice CORRIGAN cites *Hopkins v Reeves*, 524 US 88; 118 S Ct 1895; 141 L Ed 2d 76 (1998), for the proposition that some states use the cognate evidence test for lesser included offense instructions. *Post* at 167 n 4. This, of course, is true and used to be true in Michigan. But this does not take away from the fact that a defendant is constitutionally entitled to notice of the crime with which he or she is charged. Indeed, *Hopkins* actually supports our opinion because it specifically states that it is a "distortion" to allow a defendant to be convicted of a cognate offense because it would allow the jury to find a defendant guilty of elements the state had not attempted to prove. *Id*. at 99. Such a "distortion" occurred in this case. Justice CORRIGAN also cites *Paterno v Lyons*, 334 US 314; 68 S Ct 1044; 92 L Ed 1409 (1948). In that case the defendant was charged with receiving stolen property. Five months later he pleaded guilty of attempted larceny. Years later the defendant argued that because attempted larceny was not a necessarily included lesser offense of receiving stolen property, he did not have constitutional notice. Not surprisingly, the United States Supreme Court found that the defendant had sufficient notice of the crime to which he pleaded guilty. The situation in the case at bar is far different. Indeed, if defendant, after having been charged with CSC I, had later pleaded guilty of CSC II then argued that he did not have sufficient notice of the CSC II charge, his claim would be summarily rejected.

against him." *Schmuck, supra* at 717.[47] Thus, it is clear the Court did rely on the constitution, and, in actuality, it did address formally degreed inferior offenses to the extent they might contain an element not in the charged offense by stating that a defendant could not be held to answer for such a lesser charge without violating the common law and the constitution. Moreover, we indicated in *Cornell*, *supra* at 356, n 9 that "[w]hile MCL 768.32 does not use the same phrasing as FR Crim P 31(c), which refers to 'an offense necessarily included in the offense charged,' as we have already explained, the wording of MCL 768.32 also limits consideration of lesser offenses to necessarily included lesser offenses."

Justice CORRIGAN also accuses the majority of invoking the constitutional avoidance doctrine without first identifying an ambiguity in the statute. *Post* at 165. Our caselaw has interpreted "inferior" to mean included within the higher charged offense for over 130 years, whereas Justice CORRIGAN would interpret "inferior" to mean an offense with a lesser number only, *even if the lesser numbered offense contains an element not within the charged offense*. Surely, there is no error in the majority's pointing out that the dissent's interpretation of the statute would render it unconstitutional and that this is an additional reason supporting the majority's decision to maintain the interpretation of the statute that has prevailed for 130 years.

Justice CORRIGAN asserts that there is no "constitutional dilemma," *post* at 154. But even the prosecution, while arguing that this is not such a case, acknowledges in its brief that "given the modern rise of complex offenses with multiple alternative elements, it is possible for due process to be raised in a given case . . . ."

[47] Justice CORRIGAN effectively reads the words "except when a defendant is charged with a degreed offense" into the Supreme Court's words.

Moreover, we noted with approval in *Cornell*, *supra* at 346, that one of Justice COLEMAN's concerns with giving jury instructions for cognate lesser offenses was that it threatens a defendant's due process rights. Thus, it is wholly inaccurate for the dissent to deny that a constitutional problem exists.

Justice CORRIGAN cites two foreign cases, *Salinas v United States*[48] and *State v Foster*,[49] for the proposition that a defendant may be convicted of a lesser degreed offense without violating a defendant's constitutional right to notice. Neither case supports the dissent.

In *Salinas,* the defendant was charged with arson in the first degree and convicted of arson in the second degree. In rendering its opinion, the *Salinas* court first reiterated that an information or indictment must contain an averment of every essential element of the crime with which a defendant is charged in order that he or she may prepare his or her defense. As applicable here, it is without contest that the information did not allege that defendant had contact with the victim's groin "for the purpose of sexual gratification" as the trial court concluded. Next, the *Salinas* court indicated that first- and second-degree arson denounce "but one crime" and that "an indictment charging the more aggravated degree necessarily contains all of the elements of the lower degree." *Salinas, supra* at 918. Indeed, the *Salinas* court stated that it could not perceive how one could commit first-degree arson without having committed second-degree arson. The case at bar is dissimilar because all agree that it is possible to commit CSC I without having committed CSC II.

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[48] *Salinas v United States,* 277 F2d 914 (CA 9, 1960).

[49] *State v Foster*, 91 Wash 2d 466; 589 P2d 789 (1979).

In *State v Foster* the defendant was charged with first-degree assault but the jury convicted him of second-degree assault. The *Foster* court, stating that it was following the *Salinas* court, indicated that it viewed assault as "one offense" and that the two crimes are not "separate and distinct" from one another." *Foster, supra* at 472. This is a different situation from the case at bar because CSC I and CSC II are not but one crime and, while some of their elements overlap, the crimes are properly viewed as separate and distinct.

Finally, Justice CORRIGAN, *post* at 161-165, posits that, notwithstanding the contrary holding in *People v Lemons,* CSC II may not be a cognate lesser offense of CSC I, i.e., it may be a necessarily included lesser offense. Justice CORRIGAN notes that *Lemons* was decided before *Cornell* and before *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005).[50] Justice CORRIGAN, *post* at 162, asserts that these "major adjustments" in our lesser included offense jurisprudence warrant at least a reexamination of the pre-*Cornell* analysis in *Lemons*. The dissent also notes that before *Lemons* was decided, the Court of Appeals had held in three cases that CSC II was a necessarily included lesser offense of CSC I.[51]

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[50] In *Tombs,* this Court recognized the longstanding principle that a criminal statute is presumed to include a criminal intent or *mens rea*, absent an express or implied indication that the Legislature wanted to dispense with it. *Id.* at 456-457 (opinion by KELLY, J.), 466 (opinion by TAYLOR, C.J.). This rule is presumed because otherwise innocent conduct would be criminalized.

[51] Justice CORRIGAN, however, neglects to note that in at least three other cases the Court of Appeals had held that CSC II was a cognate lesser offense of CSC I. See, e.g., *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 577; 476 NW 2d 753 (1991), *People v Norman,* 184 Mich App 255, 259-260; 457 NW2d 136 (1990), and *People v Garrow*, 99 Mich App 834; 298 NW2d 627 (1980). Needless to say, the cases cited by Justice CORRIGAN were overruled by *Lemons*.

First, we note that the prosecutor has not made this argument. Second, the subset of elements test for determining whether an offense is a necessarily included lesser offense or a cognate lesser offense has not changed and was not affected in any way by *Cornell*.[52]

Justice CORRIGAN argues that *Tombs* modified the intent that must be proven for a conviction of CSC I. It is noted that *Lemons* states that the sexual penetration necessary for a conviction of CSC I "can be for any purpose." Justice CORRIGAN asserts that, now that *Tombs* requires the showing of a criminal intent, the broader criminal intent requirement of CSC I required by *Tombs* "plainly includes the narrower intent required for CSC II." *Post* at 163.

Assuming, without deciding, that the Legislature did not include any express or implied indication that it wanted to dispense with a criminal intent requirement for all the ways that CSC I may be committed,[53] we are unpersuaded that CSC II is actually a necessarily included lesser offense of CSC I rather than a cognate lesser offense.[54]

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[52] As noted in footnotes 13-14 of this opinion, an offense is considered a necessarily included lesser offense if it is impossible to commit the greater offense without first having committed the lesser offense, whereas a cognate lesser offense is one that shares elements with the charged offense but contains at least one element not found in the higher offense. *Cornell, supra* at 345.

[53] As explained more fully in Justice MARKMAN's concurrence, sometimes CSC I is in fact a strict liability offense. *People v Cash*, 419 Mich 230, 240; 351 NW2d 822 (1984) (reasonable mistake of age is not a defense to a charge of having sex with a minor). This fact alone shows that CSC II is not a necessarily included lesser offense of CSC I because CSC II always requires proof of a general criminal intent. Thus, it is possible to commit CSC I without having committed CSC II. Neither Justice CORRIGAN nor Justice YOUNG deals with this fact.

[54] We note that Justice CORRIGAN, Justice YOUNG, and Justice WEAVER would overrule *People v Lemons* (an opinion authored by Justice BOYLE

Lemons indicated that the sexual penetration necessary for a conviction of CSC I "can be for any purpose." We take this to mean that the prosecution need not prove a particular purpose. In any event, the question is whether the elements of CSC II are "completely subsumed" in the greater offense of CSC I, *Mendoza, supra* at 532 n 3, that is, whether it is impossible to commit CSC I without having committed CSC II. *People v Nickens*, 470 Mich 622, 633 n 8; 685 NW2d 657 (2004).

As previously indicated, CSC II can be proven by showing one of several intents: intentional touching of intimate parts that can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for revenge, or to inflict humiliation, or out of anger. MCL 750.520a(o).

MCL 750.520b provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration" and "sexual penetration" is statutorily defined to mean sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, MCL 750.520a(p).

We are satisfied that a defendant perpetrating a sexual penetration punishable by the CSC I statute could have a criminal/non-innocent intent that could not reasonably be construed as coming within one of the intents listed in the CSC II statute.[55] That is, the

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and decided unanimously) without any argument or briefing from the prosecution that it was wrongly decided.

[55] The following types of situations would appear to constitute CSC I without reasonably being construed as an act involving one of the CSC II intents. A defendant who, because of a sadistic personality or a perverse curiosity, penetrates a stranger's rectum with an object. The intent to do

limited number of specific intents that establish a CSC II are not the only criminal/non-innocent intents that exist that could support a conviction of CSC I. Although one of the criminal intents necessary for a conviction of CSC II will frequently be present when a sexual penetration occurs, one of those intents will not always be present. Other criminal/non-innocent intents can be present. Thus, it is possible to commit CSC I without first having committed CSC II, and the elements of CSC II are not "completely subsumed" in the greater offense of CSC I. Accordingly, CSC II is properly considered a cognate lesser offense of CSC I.

VI. CONCLUSION

For the reasons we stated, we hold that MCL 768.32(1) does not allow a defendant to be convicted of cognate lesser offenses even when the Legislature has divided the crime into degrees. The Court of Appeals judgment is affirmed, and the case is remanded to the trial court for an order of discharge.

MARKMAN, J., concurred with TAYLOR, C.J.

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this, however characterized, could hardly be reasonably construed as an act done for the purpose of sexual arousal or gratification, or for revenge, or to inflict humiliation, or out of anger. Or, should a man, to avoid child support, attempt to induce a miscarriage of the child borne by his girlfriend by penetration of her womb through her vagina with a sharp object, his intent would be financial and his behavior could not reasonably be construed as an act done for the purpose of sexual arousal or gratification, or for revenge, or to inflict humiliation, or out of anger. Finally, if a prisoner assaults another inmate by sticking his or her finger up the other inmate's rectum because the victim was rumored to have smuggled narcotics into the prison in his or her rectum, such a defendant's behavior could hardly be reasonably construed as an act done for the purpose of sexual arousal or gratification, or for revenge, or to inflict humiliation, or out of anger. These examples, while admittedly unpleasant, and perhaps even bizarre, make the point that it is possible to commit a CSC I without having necessarily committed a CSC II.

MARKMAN, J. (*concurring*). I concur fully with the lead opinion, but write separately to articulate why the rule proposed in Justice CORRIGAN's dissent is particularly unfair in the context of the criminal sexual conduct (CSC) statutes, which are at issue in this case.

Generally, a "degreed" offense criminalizes a single act and defines the maximum punishment for that act on the basis of the circumstances underlying its commission. For example, the home invasion statute criminalizes the act of breaking and entering a dwelling or entering a dwelling without permission. However, a defendant's maximum term of incarceration is determined by the circumstances surrounding the commission of that act. Thus, a defendant who intends to commit or actually commits a felony while engaged in that criminal act is guilty of first-degree home invasion and subject to a statutory maximum sentence of 20 years in prison. MCL 750.110a(2) and (5). A defendant who intends to commit or actually commits a misdemeanor while engaged in that same criminal act is guilty of third-degree home invasion and is subject to a maximum penalty of five years in prison. MCL 750.110a(4) and (7). However, in either case, a defendant charged with home invasion is on *notice* that he or she has been charged with a single criminal act—breaking and entering or entering without permission—and that his or her term of incarceration will be determined by the circumstances surrounding the commission of that act.

In contrast, the CSC statutes are unique among the "degreed" offenses because they apply to related, but distinct, criminal sexual acts—criminal sexual penetration and criminal sexual contact. In order to obtain a conviction for first-degree CSC (CSC-I) or third-degree CSC (CSC-III), the prosecutor must prove that the

defendant engaged in "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body," MCL 750.520a(p), under one of a variety of circumstances. MCL 750.520b(1) and 750.520d(1). Thus, the relationship between CSC-I and CSC-III is exactly the same as the relationship between other "degreed" offenses, such as home invasion. A defendant charged with CSC-I or CSC-III has notice that he or she is being charged with a single criminal offense—sexual penetration—and that the potential term of incarceration will be determined on the basis of the circumstances surrounding the commission of that offense. However, in order to obtain a conviction for second-degree CSC (CSC-II) or fourth-degree CSC (CSC-IV), the prosecutor must prove that the defendant engaged in the conduct that involved "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) [r]evenge[,] (*ii*) [t]o inflict humiliation [, or] (*iii*) [o]ut of anger," MCL 750.520a(o), under one of a variety of circumstances. MCL 750.520c(1) and 750.520e(1). In other words, CSC-II and CSC-IV not only contemplate a different criminal act than CSC-I or CSC-III—sexual contact instead of sexual penetration—but also include an intent element that the prosecutor is not required to prove in order to obtain a conviction for CSC-I or CSC-III. That is, the prosecutor need only prove sexual penetration to obtain a conviction for CSC-I or CSC-III, while the prosecutor must prove both sexual contact and a bad intent to obtain a conviction for CSC-II or CSC-IV.

Thus, a defendant who is bound over or indicted for CSC-I on the basis of an allegation of sexual penetration has no notice that he or she is also subject to incarceration for engaging in sexual contact with the victim.[1] In the instant case, defendant likely failed to object to or otherwise refute the introduction of a statement he made to the police admitting sexual contact, because it was not relevant to his defense that no sexual *penetration* had occurred. Moreover, defendant would not have had a strong motivation to object to or otherwise refute any evidence offered by the prosecutor regarding his "intent" in engaging in sexual contact with the victim, because such intent is not relevant in a prosecution for CSC-I and it is not incompatible with the claimed defense that no penetration occurred. Indeed, allowing the admission may have been compatible with a potential defense that the victim exaggerated her encounter with defendant and that, while he may have done something inappropriate, he did not commit CSC-I.[2]

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[1] While the statutes clearly identify CSC-II as a lesser degree of CSC-I, and CSC-IV as a lesser degree of CSC-III, it is critical to recognize that the statutes apply to two essentially distinct and separate criminal acts, each of which requires distinct and separate proofs. This is roughly the equivalent of the Legislature combining the assault and arson statutes, or similarly unrelated statutes, into a new "threatening conduct" statute and then dividing that statute into degrees. Under that scenario, a defendant charged with "first-degree threatening conduct (arson)" could not reasonably be expected to prepare for trial and be fairly placed on notice that he or she could also be convicted of an uncharged assault simply because that assault is labeled as "second-degree threatening conduct (assault)." Similarly, when defendant was charged with CSC-I, he was placed on notice that he was subject to incarceration for committing a criminal sexual penetration. However, charging him with CSC-I did not fairly notify him that he was *also* subject to incarceration for an essentially distinct and separate criminal act, CSC-II.

[2] As the dissent correctly notes, defendant's theory of the case was that *no* sexual contact of any kind occurred between himself and the victim. However, the critical fact remains that defense counsel had no incentive to challenge the admission of the confession because it was not relevant

Allowing that evidence to be used subsequently to convict the defendant of a separate and distinct offense for which he was not even charged is inherently unfair and, in my judgment, violates a defendant's fundamental right to due process. I see little difference in a constitutional sense between defendant in this case, who was convicted of the uncharged offense of CSC-II, and a defendant who was charged with, but ultimately acquitted of, assault with intent to murder, but who was nevertheless convicted of an uncharged felonious assault on the basis that the elements of that offense were proven at trial.

The dissent argues that our decision in *People v Tombs,* 472 Mich 446; 697 NW2d 494 (2005), "has obviously modified our understanding of the intent required to prove CSC I." *Post* at 163. In *Tombs, supra* at 451, this Court stated that "we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated." According to the dissent, *Tombs* calls into question our assertion in *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997), that "[s]exual penetration [under CSC-I] can be for any purpose." Rather, the dissent argues, a "penetration committed *without a criminal purpose* would likely fail to satisfy the mandates of *Tombs*." *Post* at 163 (emphasis in original). I disagree. *Tombs* did not do away with "strict liability" offenses, but instead correctly acknowledged that such offenses are generally disfavored. One "strict liability" offense that has been recognized by this Court for 85 years is the act of committing sexual penetration with a victim under the age of 16. *People v Gengels,* 218 Mich 632; 188 NW 398

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to the charge of CSC-I and because it could have potentially formed the basis of a different theory of defense—namely that the victim had exaggerated the incident.

(1922). In *Gengels,* the defendant was charged under the former statutory rape statute, MCL 750.520, which prohibited "carnal knowledge of a female under 16." The defendant argued that the victim told him she was 18 and, therefore, he was entitled to a defense based on a good-faith or reasonable mistake of age. We rejected such a defense:

> But in the crime charged here proof of the intent goes with proof of the act of sexual intercourse with a girl under the age of consent. It is not necessary for the prosecution to prove want of consent. Proof of consent is no defense, for a female child under the statutory age is legally incapable of consenting. Neither is it any defense that the accused believed from the statement of his victim or others that she had reached the age of consent. [*Id.* at 641.]

Sexual penetration of a victim under the age of 16 remains a strict liability offense under the current criminal sexual conduct statutes. *People v Cash*, 419 Mich 230, 240; 351 NW2d 822 (1984).[3] In *Cash*, the defendant was charged with CSC-III but asserted that he was entitled to a "reasonable mistake of age" defense. This Court noted that *Gengels* is consistent with the rule of the vast majority of states, and of the federal

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[3] Neither Justice CORRIGAN nor Justice YOUNG disputes that CSC-I and CSC-III are, in certain circumstances, strict liability offenses. Given that understanding, the dissenters' argument that CSC-II is a necessarily included lesser offense of CSC-I cannot be maintained. An offense is considered a "necessarily included lesser offense" when " 'it is impossible to commit the greater without first having committed the lesser.' " *People v Cornell*, 466 Mich 335, 345; 646 NW2d 127 (2002) (citation omitted). A defendant may be convicted of CSC-I without the jury making any finding *at all* regarding a criminal intent. However, in order to obtain a conviction for CSC-II, the jury must *always* find beyond a reasonable doubt that the defendant intended to commit an act that can "reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner." Because it is possible to commit CSC-I without having first committed CSC-II, the latter is a cognate lesser offense and, pursuant to *Cornell,* may not be considered.

courts, rejecting the "reasonable mistake of age" defense. *Id.* Moreover, *Gengels* is consistent with the common-law definition of "statutory rape" as a strict liability offense. Because there was no indication that the Legislature intended to abrogate the common law, this Court held that sexual penetration of a victim who is at least 13 but less than 16 constitutes a strict liability offense and, therefore, "reasonable mistake of age" is not a defense. *Id.* at 250.

In the instant case, defendant was charged with the sexual penetration of a victim who is at least 13 but less than 16. Had defendant met a victim of the same age on the street and engaged in the same conduct as was charged, he would have been strictly liable for CSC-III. MCL 750.520d(1)(a). However, because defendant is "in a position of authority over the victim and used this authority to coerce the victim to submit," MCL 750.520b(1)(b)(*iii*), the presence of that additional aggravating *fact* subjects him to punishment for CSC-I. The existence of an aggravating fact does not impose a new *mens rea* on an act for which defendant would otherwise be strictly liable under the CSC-III statute. Because defendant remains strictly liable for engaging in the sexual penetration of the underage victim in this case, I do not believe that *Tombs* requires any showing of criminal intent.[4]

CAVANAGH, J. (*concurring in the result only*). I concur with the result reached by the lead opinion affirming the Court of Appeals decision to vacate defendant's

[4] Even if I were to agree that the Legislature did not wish to dispense with a criminal intent requirement for the crime of CSC-I, I would still concur with the lead opinion that CSC-II is not a necessarily included lesser offense of CSC-I. As noted by the lead opinion, CSC-I can be committed in a variety of ways without implicating one of the CSC-II states of mind. *Ante* at 135 n 55.

conviction for second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant did not have adequate notice that he faced the charge of CSC II, so convicting him of that offense would violate his right to due process. However, I do not join the lead opinion in full because, as Justice CORRIGAN has noted, I believe the lead opinion's characterization of the word "inferior" is contrary to the established definition and historical use of the term. See *People v Mendoza*, 468 Mich 527, 550-551; 664 NW2d 685 (2003) (opinion by CAVANAGH, J.).

KELLY, J., concurred with CAVANAGH, J.

YOUNG, J. (*concurring in part and dissenting in part).* I concur in that portion of the lead opinion that concludes that, where an accused is charged with an offense "consisting of different degrees," MCL 768.32(1) permits the accused to be found guilty of an inferior offense as that term has been defined in *People v Cornell*.[1] I believe that the statute permits a defendant to be found guilty of a necessarily included lesser offense, but not a cognate lesser offense, of the charged offense.

However, I disagree with the lead opinion's conclusion that the statute has been violated. Because it is impossible to commit first-degree criminal sexual conduct (CSC I), MCL 750.520b, without first having committed second-degree criminal sexual conduct (CSC II), MCL 750.520c, CSC II is a necessarily included lesser offense of CSC I. Therefore, the trial court was free to find, on the basis of the victim's testimony as well as defendant's confession, defendant guilty of second-degree criminal sexual conduct. Moreover, even

[1] 466 Mich 335; 646 NW2d 127 (2002).

if an error had occurred in this case, the unpreserved error would be harmless under plain error review. Because the lead opinion concludes otherwise, I dissent. I would reverse the judgment of the Court of Appeals and remand the case for consideration of defendant's remaining appellate issues.

I. FACTUAL BACKGROUND AND TRIAL COURT DECISION

Because the lead opinion's description of the facts is so divergent from my own, I provide the following facts, taken from the trial record.

The testimony in this case indicates that on two separate days defendant, the dean of students at a charter high school, led the victim into a dark, deserted stairway at the high school and sexually assaulted her.[2] The victim testified that on the first occasion, defendant penetrated her vagina with his finger and his penis. The victim testified that during the second incident, occurring two days later, defendant both fondled and digitally penetrated her vagina, but was interrupted when another student, the victim's friend, attempted to open the door to the stairway.[3] This testimony was corroborated by the student, who testified that she opened the door to the stairway and it "shut right back."[4]

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[2] Testimony provided by a school official indicated that this stairway was off limits to students and was generally chained and padlocked shut. Only four school personnel had keys to the padlock, including defendant. An internal investigation revealed that the light fixture in the stairway was not functional, consistent with the victim's testimony that the stairway was completely dark.

[3] The victim testified that defendant immediately pushed the door closed as it started opening.

[4] The witness testified that she was "worried" and started looking for the victim. The witness went to the stairway area because the victim had told her the location of the previous incident. The witness also testified

The second stairway incident was also consistent with a statement given by defendant during a police interview in which he described the victim as the aggressor in the sexual encounter. In his statement, defendant told the officer that the victim "had been following him for the last two weeks," that her following him "bothered him," and that he went to the dark, off limits stairway area with the victim. Defendant stated that upon arriving in the deserted stairway, the victim pulled her pants down, "grabbed his penis, and attempted to put it inside her vagina." Defendant further stated that "his hand went between [the victim's] legs, touching her vagina." However, defendant indicated that the incident ended when "someone came to the door" and defendant "pushed the door back with his arm."

In rendering its verdict, the trial court observed that the victim's testimony regarding being with the defendant in the dark stairway was substantiated by the witness's testimony, and was "also corroborated by what the defendant admits happened."[5] Noting that there were some inconsistencies in the victim's testimony, the trial court ruled that it was basing its verdict on what it could "rely upon"—defendant's admission that he touched the victim's vagina. The trial court found defendant guilty of two counts of CSC II,[6] finding

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that she observed defendant flirting with the victim on several occasions before the incidents, including "digging" in the victim's back pockets and jacket pockets that were "located over her breasts."

[5] The trial court subsequently expressed disbelief that any "teacher would allow themselves [sic]" to be in an unlit stairway area "with a child." However, the trial court noted that "not only the complainant says it happened, her friend says it happened, and even the defendant admits that it happened."

[6] By the trial court's own admission, it convicted defendant of CSC II and impliedly acquitted defendant of CSC I although the court subsequently acknowledged that "[t]he People established CSC I." The court

that defendant "intentionally touched the groin area or genital area of the complainant, and that this was done for sexual purposes."[7]

II. CSC II IS A NECESSARILY INCLUDED LESSER OFFENSE OF CSC I

The lead opinion cites *People v Lemons*[8] for the proposition that CSC II is a cognate lesser offense of CSC I because CSC II contains an additional "element" that is not found in CSC I. However, as explained below, the plain language of MCL 750.520b and 750.520c reveals that both crimes contain only two elements. Rather, what the lead opinion refers to as an additional "element" is actually part of the *definition* of one of the two elements. Additionally, the lead opinion independently concludes that CSC II is a cognate lesser offense of CSC I because it is possible to commit CSC I without first having committed CSC II. The lead opinion hypothesizes that a defendant who commits CSC I could possess a criminal purpose "that could not reasonably be construed as coming within the intents listed in the

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"hop[ed] that by compromising a verdict," it would give "the defendant a break" and that he "wouldn't have to go to prison." The trial court "was surprised," however, to find that defendant had two prior felony convictions that negatively affected his minimum sentence range under the sentencing guidelines.

[7] The trial court also ruled that the victim was 13 to 15 years old at the time and that defendant used his position of authority over the victim.

[8] 454 Mich 234; 562 NW2d 447 (1997). In *Lemons*, the defendant was charged with CSC I for receiving cunnilingus from her son and stepdaughter, both of whom were under 13 years of age. The defendant sought and was denied a jury instruction on CSC II, the trial judge concluding that oral contact was sufficient to establish cunnilingus. The *Lemons* Court reversed the Court of Appeals determination that the trial court erred by refusing to instruct the jury on CSC II on two bases. First, the Court concluded that CSC II was a cognate lesser offense because CSC II required proof that the "defendant intended to seek sexual arousal or gratification." *Id*. at 253. Second, the Court concluded that cunnilingus "by definition" did "not require penetration." *Id*. at 255.

CSC II statute."[9] Ultimately, however, the conclusion that CSC II is a cognate lesser offense of CSC I is premised on a misreading of the relevant statutes.

Both CSC I and CSC II are general intent crimes,[10] each containing two elements.[11] For either crime, a defendant "is guilty of criminal sexual conduct" where the defendant engages in sexual conduct and any of the several delineated "circumstances" exist.[12] The principal difference between these two offenses is the type of evidence necessary to satisfy the sexual conduct element—CSC I requires that the defendant commit "sexual penetration," while CSC II requires "sexual contact."

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[9] *Ante* at 135.

[10] *People v Langworthy*, 416 Mich 630, 645 n 26; 331 NW2d 171 (1982). The *mens rea* requirement of general intent crimes is satisfied by proving that the defendant purposefully or voluntarily performed the wrongful act at issue. *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983); *Langworthy*, *supra* at 639, 644; *People v Nowack*, 462 Mich 392, 405; 614 NW2d 78 (2000).

[11] As a statutory criminal offense, the establishment of elements is a decision for the Legislature. See *People v Selwa*, 214 Mich App 451, 458; 543 NW2d 321 (1995).

[12] These delineated "circumstances" are duplicative, and require the existence of one of several aggravating factors in addition to the sexual conduct, including: the victim being less than 13 years old, MCL 750.520b(1)(a), 750.520c(1)(a); the victim's young age combined with the familial relationship between the defendant and victim, MCL 750.520b(1)(b)(*i*) or (*ii*), 750.520c(1)(b)(*i*) or (*ii*) or combined with the defendant's use of an authoritative position over the victim, MCL 750.520b(1)(b)(*iii*) or (*iv*), 750.520c(1)(b)(*iii*) or (*iv*); the sexual conduct's occurring during the commission of a felony, MCL 750.520b(1)(c), 750.520c(1)(c); the defendant's use of a weapon, MCL 750.520b(1)(e), 750.520c(1)(e); the defendant's causing personal injury to the victim and using force or coercion to accomplish the sexual act, MCL 750.520b(1)(f), 750.520c(1)(f); or the victim's mental incapacity or physical helplessness combined with personal injury, a familial relationship, or the defendant's use of an authoritative position over the victim. MCL 750.520b(1)(g), 750.520b(1)(h)(*i*), 750.520b(1)(h)(*ii*), 750.520c(1)(g), 750.520(c)(h)(*i*), 750.520c(1)(h)(*ii*).

Both of the sexual conduct elements are statutorily defined. "Sexual penetration" is defined at MCL 750.520a(p) as

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

"Sexual contact," on the other hand, is defined at MCL 750.520a(o) as

> includ[ing] the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge
>
> (*ii*) To inflict humiliation
>
> (*iii*) Out of anger.

Therefore, under the plain language of the statute, the "sexual contact" element of CSC II is satisfied where there is an intentional touching of either the victim's or actor's intimate parts, and that intentional touching "can *reasonably be construed* as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner" for revenge, to inflict humiliation, or out of anger. *Id.* Contrary to the claims of the lead opinion, the definition of "sexual contact" does not add a *third* element to CSC II; rather, it provides meaning to one of the two elements delineated in MCL 750.520c. This statutory language is clear and includes a "reasonable person" or *objective* assessment of the purpose behind the sexual contact, thereby

limiting criminal liability to only those intentional touchings that may "reasonably be construed" as being sexually motivated.

Thus, defendant's claimed *subjective* motivation for committing the sexual touching plays no role under the plain language of the definition of "sexual contact." Certainly, a defendant is free to argue to the jury that the prosecutor has failed to prove the "sexual contact" element of the offense because an objective assessment of the facts and circumstances indicates that the sexual contact was not done for a sexual purpose. However, there is no basis in the statute from which to conclude that defendant's subjective motivation *precludes* a jury from concluding that the element has been proven, and that the sexual touching could be reasonably construed as "being for the purpose of sexual arousal," "done for a sexual purpose," or done "in a sexual manner for . . . [r]evenge[,] to inflict humiliation[,]" or "[o]ut of anger."

As the lead opinion correctly notes, the proper test for determining whether CSC II is a necessarily included lesser offense of CSC I is whether the elements of the lesser offense are completely subsumed in the greater offense, and it is impossible to commit CSC I without having committed CSC II. In order to demonstrate that it is theoretically possible to commit CSC I without having committed CSC II, the lead opinion provides a list of colorful examples of sexual penetration, wherein the defendant claims to have a motivation for the penetration that does not fall within MCL 750.520a(o). In posing these examples, the lead opinion fails to reckon with a critical legal fact: the plain definition of "sexual contact" requires an *objective* assessment of the purpose behind the sexual conduct. Thus, the defendant's *subjective* motivation for the conduct is utterly irrelevant. In each and every one of

the examples listed, the "sexual contact" element would be satisfied because a reasonable juror could construe the purpose for the sexual conduct as satisfying MCL 750.520a(o).

Because I believe that the elements of CSC II are completely subsumed in CSC I because it is impossible to commit the greater offense without having committed the lesser offense, CSC II is an "inferior offense" under MCL 768.32(1). Therefore, no statutory violation occurred when the trial court sua sponte found defendant guilty of the necessarily included lesser offense.

III. HARMLESS ERROR

Assuming arguendo that an error occurred in this case, I believe that the error was harmless. As an unpreserved nonconstitutional error, the applicable standard of review is for plain error.[13] Under the plain error rule, defendant must show that an error occurred, that the error was plain, and that the plain error affected a substantial right of the defendant.[14] In order to show that a substantial right was affected, defendant must show that the error affected the outcome of the trial proceedings.[15] Defendant's failure to establish a plain error affecting a substantial right precludes a reviewing court from acting on such an error.[16] However, even where a defendant establishes that the plain error affected a substantial right, reversal is only warranted " 'when the plain, forfeited error resulted in the

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[13] *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). The same standard of review applies to forfeited constitutional errors. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

[14] *Grant*, *supra* at 552-553; *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[15] *Id*.

[16] *Id*.

conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .' "[17]

The lead opinion contends that defendant, being charged only with CSC I, tendered an "all or nothing" defense regarding whether "defendant had sexually penetrated the complainant."[18] Thus, defendant's conviction of CSC II resulted in prejudice. Unfortunately, this assertion is not supported by the trial court record. The defense theory was not predicated on the claim that no penetration had occurred; rather, the defense theory advanced at trial was that no sexual misconduct of *any kind* occurred.

THE DEFENSE *ACTUALLY* TENDERED AT TRIAL

The lead opinion states that the error that occurred in this case was not harmless because defendant "may have adopted a different strategy at trial," including "objecting to the police officer's testimony regarding his alleged admission of a sexual touching."[19] The lead opinion further states that, but for the error, defense counsel "may not have withdrawn his motion to suppress the statement or for a *Walker*[20] hearing just before the trial began."[21] Similarly, the concurring opinion opines that the error was outcome determinative because of "the critical fact" that "defense counsel had no incentive to challenge the admission of the confession . . . ."[22]

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[17] *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), quoting *Carines*, *supra* at 763 (internal citations and quotation marks omitted); *Olano*, *supra* at 736; *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[18] *Ante* at 125, 126.

[19] *Ante* at 126.

[20] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[21] *Ante* at 126-127.

[22] *Ante* at 115-116 n 2.

All these claims of prejudice, however, are belied by a review of the trial court record, which reveals the *actual defense* presented at trial. The theory of defense presented at trial was that *no sexual conduct of any type* occurred between defendant and the victim, that the victim lied about the alleged incidents, and that the victim had motive to lie because one of her classmates attempted to extort money from defendant.[23] The chosen defense of denying *all* sexual conduct necessarily encompasses denying sexual penetration as well as denying sexual contact. Defense counsel cross-examined prosecution witnesses, focusing on inconsistencies in their testimony in an effort to attack their credibility. The sole defense witness, a math teacher at the school, testified that his attendance records indicated that both witnesses were in his math class at the time of the events, further attacking their credibility. Because the defense presented was a *complete denial* of the alleged events, it is unclear how the defense trial strategy might have changed had defense counsel known that the trial court was going to find defendant guilty of CSC II on the basis of sexual conduct that defendant *admitted committing*.

Moreover, the trial court record conclusively establishes that defense counsel *in fact* challenged the confession by arguing at trial that the inculpatory statement *was never made*. During closing argument, defense counsel forthrightly argued to the trial court that "[t]here were no admissions and no statement made by Mr. Nyx." Therefore, rather than claim that the statement was involuntary or the product of coercion, defense counsel made the strategic decision to

[23] Testimony adduced at trial revealed that after the victim told a classmate about the first incident, the classmate attempted to extort $3,000 from defendant.

claim that it was not given. While the lead opinion claims that the defendant would have sought suppression of the statement in a *Walker* hearing but for the error, this course of action would unavoidably require acknowledging that an inculpatory statement was given. Such an action would have undermined the actual defense tendered at trial. Thus, I do not share the view of my colleagues that the failure to request a *Walker* hearing is indicative of anything other than the fact that defendant claimed he made no confession of sexual misconduct.

Furthermore, as a *Walker* hearing is designed to test the voluntariness of a confession, the lead opinion fails to recognize that pursuing a *Walker* hearing was the weaker avenue of challenge under the facts of this case. Maurice Nyx, a college educated professional, voluntarily arrived at the police station midday to be interviewed, accompanied by his attorney. He was not in custody during the interview, signed a waiver of rights form before giving the statement, and never asked for his attorney *at any point* during the interview before admitting to the interviewing officer that he volitionally touched the vagina of his 15-year-old student while in a dark, restricted access stairway at the school. In addition to a complete dearth of coercion or involuntariness, the record reveals no factual basis for the majority's conclusion that, but for the error, defense counsel *would have* sought suppression of the confession. Rather, the record reveals no credible basis upon which defendant could have pursued a successful *Walker* hearing. Moreover, given that defense counsel *actually* challenged the confession, it cannot be said that counsel "had no incentive" to do so. Certainly, given defendant's defense theory of complete denial, the existence of defendant's confession makes his theory of defense less

probable, providing defense counsel with more than ample incentive to challenge the existence of the confession.

IV. CONCLUSION

I agree that MCL 768.32(1) permits a defendant to be found guilty of a necessarily included lesser offense, but not a cognate lesser offense, of the charged offense. However, I disagree with the lead opinion's conclusion that a statutory violation has occurred because I believe that CSC II is a necessarily included lesser offense of CSC I. Therefore, the trial court properly found defendant guilty of CSC II, which was amply supported by the victim's testimony as well as defendant's confession. Moreover, assuming that an error had occurred in this case, the unpreserved nonconstitutional error would be harmless under the plain error rule.

I would reverse the judgment of the Court of Appeals and remand the case to that Court to address defendant's remaining appellate issues.

WEAVER, J., concurred with YOUNG, J.

CORRIGAN, J. (*dissenting*). I respectfully dissent. MCL 768.32(1) allows a trier of fact to find a defendant guilty of an "inferior" degree of an offense that "consist[s] of different degrees . . . ." That is precisely what occurred in this case. We do not face any constitutional dilemma requiring the lead opinion's novel approach to the statute. Moreover, because second-degree criminal sexual conduct, MCL 750.520c, (CSC II) is a necessarily included lesser offense of first-degree criminal sexual conduct, MCL 750.520b, (CSC I), the new rule does not govern this case. But if it did, any error would be harmless.

Accordingly, I would reverse the judgment of the Court of Appeals and remand the case to that Court to address defendant's remaining appellate issues.

I. INTERPRETATION OF MCL 768.32(1)

MCL 768.32(1) is clear and unambiguous. It provides:

> [U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

This plain language indicates that when a defendant is charged with an offense "consisting of different degrees," the fact-finder may acquit the defendant of the charged offense and find him "guilty of a degree of that offense inferior to that charged in the indictment . . . ." Here, criminal sexual conduct is an offense "consisting of different degrees"—the Legislature has formally divided the offense into degrees and designated them as such. The highest degree of the offense is CSC I, carrying a maximum sentence of life imprisonment. The other degrees of CSC carry less severe maximum punishments. Therefore, under the plain language of MCL 768.32(1), the fact-finder may consider and find a defendant guilty of CSC II, III (MCL 750.520d), or IV (MCL 750.520e) when the defendant is charged with CSC I if a rational view of the evidence supports the conviction.

Although the statutory language is clear, the lead opinion holds that a defendant may not be convicted of an offense of lesser degree unless the test set forth in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), is

satisfied. The lead opinion concludes that *Cornell* bars consideration of lesser offenses whose elements are not subsumed in the charged offense, even where the Legislature has formally denominated an offense as one of inferior degree.

As early as 1869, this Court made clear that the predecessor of MCL 768.32(1) was not *restricted* to formally degreed offenses, but this Court did *not* hold that formally degreed offenses were *excluded* from the scope of the statute. On the contrary, this Court's historical analyses implicitly presumed that formally degreed offenses fell within the statute. In *Hanna v People*, 19 Mich 316, 320 (1869), Justice CHRISTIANCY, writing for the Court, stated:

> I do not think this provision was intended to be *restricted* in its application to offenses divided by the statutes contained in this title (which contain all the provisions in reference to crimes), into classes expressly designated by the name of "degrees." Thus confined, it would apply, so far as I have been able to discover, only to the single case of an indictment for murder in the first degree, and would not even include manslaughter as a lower degree of the offense, but only murder in the second degree; since [at the time *Hanna* was decided] murder [was] the only offense divided by the statute into classes expressly designated as "degrees." [Emphasis added.]

Because both the common law and a separate statutory provision already provided for the consideration of second-degree murder, the predecessor of MCL 768.32(1) would have been entirely superfluous if it were limited to that offense. Thus, Justice CHRISTIANCY concluded that the predecessor of MCL 768.32(1) must "be construed as *extending* to all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, wherever the charge for

the higher grade includes a charge for the less." *Hanna, supra* at 322 (emphasis added).[1]

Similarly, this Court in *Cornell* did not exclude offenses that have been formally divided into degrees from the scope of MCL 768.32(1). Rather, we agreed with the *Hanna* Court that

> the provision was not intended to be *limited only* to those [offenses] expressly divided into "degrees," but was intended to *extend* to all cases in which different grades of offenses or degrees of enormity had been recognized. Moreover the statute removed the common-law misdemeanor restriction. Thus, application of the statute is neither *limited* to those crimes expressly divided into degrees nor to lesser included felonies. [*Cornell*, *supra* at 353-354 (emphasis added).]

In considering offenses that were *not* formally degreed, we held in *Cornell* that the word "inferior" in MCL 768.32(1) refers " 'to the absence of an element that distinguishes the charged offense from the lesser offense.' " *Cornell, supra* at 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). Thus, we held that a trier of fact may not

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[1] The central flaw in the lead opinion's historical analysis is that it does not acknowledge or address this language in *Hanna*. The *Hanna* Court stated in no uncertain terms that the statutory provision was not *restricted* to formally degreed offenses, *not* that it *excluded* such offenses. *Id.* at 320.

The lead opinion's suggestion that MCL 768.32(1) codifies a historical common-law rule barring consideration of lesser degreed offenses is mistaken. First, no authority could be found to establish the existence of any such rule for formally degreed offenses. And even if such a common-law rule did exist, MCL 768.32(1) did not codify the rule. On the contrary, the statute *abrogated* any such rule by squarely providing that where an offense is divided into degrees, the fact-finder may convict the defendant of an inferior degree of the charged offense. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("The Legislature has the authority to abrogate the common law.").

consider "cognate lesser offenses, which are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense." *Cornell, supra* at 355. Further, we held "that a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357.

It is perfectly clear, then, that both *Hanna* and *Cornell* simply *presumed* that formally degreed offenses were within the scope of the statute. Our decision in *Cornell* merely explicated a tool of construction for determining whether an offense is "inferior" where the Legislature has *not* formally denominated it as such. Where the Legislature *has* expressly divided an offense into degrees, as it has with criminal sexual conduct, no construction is necessary. *By legislative definition*, criminal sexual conduct is an offense "consisting of different degrees," and application of the *Cornell* test is thus unnecessary. CSC II is a degree of the offense that the Legislature has expressly designated as "inferior" to CSC I.

The new rule—that a *legislatively denominated* lesser degree is not an "inferior" degree—reflects a lack of deference to the Legislature's authority to denominate an offense as "inferior." Unquestionably, the power to define crimes is wholly a *legislative* function. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). The Legislature thus acted within its proper sphere of constitutional authority when it (1) enacted MCL 768.32(1) permitting the fact-finder to consider an inferior degree of the charged offense and (2) chose to categorize CSC II as a lesser or inferior degree of CSC I.

We have no authority to override this legislative classification (in the absence of a constitutional flaw).

Having conceded that the Legislature has divided the offense of criminal sexual conduct into degrees, the lead opinion remarkably concludes that CSC II is not an inferior degree of CSC I, even though the degrees of this offense *are legislatively numbered in descending order*, with second-, third-, and fourth-degree criminal sexual conduct as lesser degrees of first-degree criminal sexual conduct.

The lead opinion characterizes our caselaw as precluding "a judge or a jury from convicting a defendant of a cognate lesser offense even if the crime is divided into degrees." *Ante* at 121. The caselaw does not remotely purport to preclude a conviction where *the Legislature itself has formally divided the offense into degrees*.[2]

The lead opinion's claim that it is following 130 years of caselaw, and that my interpretation would require overruling those cases, is therefore wholly unfounded. The lead opinion cites no authority to suggest that the word "inferior" has some hidden, counterintuitive meaning that would render MCL 768.32(1) inapplicable to the very type of offenses described in the statute, i.e., offenses that the Legislature itself has formally divided into degrees.

The new rule also ignores our *history* of allowing a conviction of a formally inferior degree that is not a subset of the elements of the charged offense. Before *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980),

[2] The lead opinion cites *People v McDonald*, 9 Mich 150, 153 (1861); *Hanna*, *supra*; *Torres, supra* at 419-420; *Cornell*, *supra*; *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2003); and *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004), none of which addressed the application of MCL 768.32(1) to formally degreed offenses.

malice was not a necessary element of first-degree felony murder. But second-degree murder *does* require proof of malice, *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Thus, before *Aaron*, second-degree murder contained an element not required for first-degree felony murder. Yet this Court held consistently, even before *Aaron*, that an instruction for second-degree murder was appropriate where the defendant was charged with first-degree felony murder. See *People v Carter*, 395 Mich 434, 438; 236 NW2d 500 (1975); *People v Treichel*, 229 Mich 303, 307-308; 200 NW 950 (1924). Thus, this Court historically has allowed conviction of a formally inferior degree that is *not* subsumed in the charged offense.

This Court's decision in *People v McDonald,* 9 Mich 149 (1861), further supports my analysis of our historical treatment of lesser included offenses. In *McDonald*, this Court held that assault and battery was included in a charge of felonious assault, and thus upheld an assault and battery conviction even though the defendant was charged only with felonious assault. It is possible to commit an assault without committing a battery. See *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). Thus, as it is possible to commit a felonious assault without first having committed an assault and battery, *McDonald* confirms that our case-law has not required a subset of the elements test, contrary to the lead opinion's view.

Further, Justice CAVANAGH's concurring opinion in *Mendoza, supra,* supports my historical analysis. In *Mendoza*, Justice CAVANAGH opined that limiting the application of MCL 768.32(1) to necessarily included lesser offenses contravened the accepted meaning of the term "inferior." *Id*. at 551 (opinion by CAVANAGH, J.). He argued that the statutory term "inferior" authorized a

range of convictions broader than necessarily included lesser offenses. He contended that "[a]lthough, the majority attempts to claim its holding has a historical foundation, it, in fact, usurps this Court's longstanding interpretation, which accords with the statute's plain meaning." *Id*. at 554. Thus, Justice CAVANAGH would permit the fact-finder to consider a "cognate" offense to the extent that it is "inferior" to the crime charged and supported by the evidence. *Id*. at 554-555.

I continue to support the holdings in *Cornell* and *Mendoza* because they set forth a means of discerning whether a nondegreed offense is "inferior" to the charged offense. But we simply have no authority to impose a judicial gloss on *formally degreed* offenses because MCL 768.32(1) expressly permits the fact-finder to consider them. Thus, in the context of formally degreed offenses such as CSC I and II, I agree with Justice CAVANAGH's view that there is no historical basis to limit the meaning of the term "inferior" to necessarily included lesser offenses.

II. IS CSC II NECESSARILY INCLUDED IN CSC I?

Accepting the new rule of criminal law and procedure that a formally degreed offense must satisfy the *Cornell* test, the lead opinion does not explain *why* that rule was satisfied in this case. The lead opinion assumes that CSC II is merely a cognate lesser offense of CSC I, but a serious question exists regarding whether CSC II really is necessarily included in CSC I. We have yet to address this issue in the wake of recent authorities.

In the pre-*Cornell* era, this Court had concluded that CSC II is a cognate lesser offense of CSC I. In *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997), this Court stated:

> CSC I requires the prosecutor to prove "sexual penetration." MCL 750.520b(1); MSA 28.788(2)(1). CSC II requires the prosecutor to prove "sexual contact." MCL 750.520c(1); MSA 28.788(3)(1). Sexual penetration can be for any purpose. MCL 750.520a(l); MSA 28.788(l)(1). The statute defines sexual contact, however, as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). Thus, because CSC II requires proof of an intent not required by CSC I—that defendant intended to seek sexual arousal or gratification—CSC II is a cognate lesser offense of CSC I. In short, it is possible to commit CSC I without first having committed CSC II.

The *Lemons* Court acknowledged that CSC II is, in general, factually included in CSC I, " 'for sexual penetration is usually for a sexual purpose.' " *Id*. at 254 n 29 (quoting *People v Garrow*, 99 Mich App 834, 839-840; 298 NW2d 627 [1980]). But the *Lemons* Court remained convinced that "the additional intent requirement for CSC II mandates that it be considered a cognate lesser offense of CSC I." *Id*.

Nonetheless, *Lemons* was decided before *Cornell*, when instructions on necessarily included lesser offenses were *mandatory* in the absence of a genuine evidentiary dispute and instructions on nondegreed, cognate offenses were permitted. See *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975). Now, however, in light of *Cornell*, the trier of fact may consider a necessarily included lesser offense only where a rational view of the evidence supports it, and cognate lesser offenses that are not formally degreed may not be considered at all. These major adjustments in our lesser included offense jurisprudence warrant at least a reexamination of the pre-*Cornell* analysis in *Lemons*.

In addition, *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005), has obviously modified our understanding of the intent required to prove CSC I. That broader criminal intent requirement plainly includes the narrower intent required for CSC II. In *Tombs*, this Court explained that "we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, *even if it was left unstated*." *Id*. at 451 (opinion by KELLY, J.) (emphasis added). Thus, absent a clear indication that the Legislature intended to dispense with the requirement of a criminal purpose, we will presume from the Legislature's silence that proof of a criminal intent is required. *Id*. at 456-457.

In light of *Tombs*, we should reassess the *Lemons* Court's assertion that "[s]exual penetration [under CSC I] can be for *any purpose*." *Lemons*, *supra* at 253 (emphasis added). A penetration committed *without a criminal purpose* would likely fail to satisfy the mandates of *Tombs*.

The implications of *Tombs* should be considered. If proof of a criminal intent is required in a CSC I case, it is then fair to ask whether the intent element of CSC II is included in the criminal intent required for CSC I. The justices signing the lead opinion ought to carefully consider their assertion that CSC II is not an inferior degree of CSC I.[3]

In fact, the CSC I statute, MCL 750.520b, only prohibits penetrations that are "sexual," and the defi-

[3] Further, in a series of decisions issued before *Lemons*, the Court of Appeals held that CSC II was a necessarily included lesser offense of CSC I. See *People v Green*, 86 Mich App 142, 150; 272 NW2d 216 (1978) ("Since all of the elements of CSC II are the same as those of CSC I except for penetration, and there cannot be penetration without contact, second-degree CSC is a necessarily included lesser offense of CSC I."); *People v Secreto*, 81 Mich App 1; 264 NW2d 99 (1978); *People v Thompson*, 76 Mich App 705; 257 NW2d 268 (1977).

nitional statute, MCL 750.520a(p), lists types of sexual penetrations, including sexual intercourse, cunnilingus, fellatio, and anal intercourse. The definitional statute for CSC II does not "add" a different sexual-purpose component. It merely reiterates that the nature of the contact under the criminal sexual conduct statute must be sexual, just as the penetrations in CSC I cases must be sexual in nature.

I therefore question the lead opinion's contention that the statutory definition of "sexual contact" contains a subjective motivation or specific intent requirement. MCL 750.520a(o) defines "sexual contact" to include

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) Revenge. (*ii*) To inflict humiliation. (*iii*) Out of anger.

This language does not prescribe a subjective motivation that must be proven to establish CSC II. Rather, it limits the types of "intentional touchings" that may be considered "sexual contact." Specifically, an "intentional touching" constitutes "sexual contact" only if it "can reasonably be construed" as being for the purpose of sexual arousal or gratification, etc. That is, the statute uses *objective* language indicating that the intentional touching must be susceptible to being *reasonably construed* as reflecting the sexual purposes described in the statute.

The lead opinion offers a series of hypothetical situations that satisfy the elements of sexual penetration, but allegedly do not constitute "sexual contact." But

those situations fail to honor the statutory definition. Every listed hypothetical situation involves a touching that, whatever the actor's *subjective* motivation, could be *reasonably construed* as being for a sexual purpose identified in MCL 750.520a(o). Thus, these hypothetical situations do not support the lead opinion's holding. On the contrary, they reflect that the lead opinion has replaced the phrase "can reasonably be construed as" in MCL 750.520a(o) with a subjective motivation element.

III. CONSTITUTIONAL AVOIDANCE

The lead opinion applies the canon of constitutional avoidance. It reasons that applying MCL 768.32(1) to formally inferior degrees that are not subsumed in the charged offense "would render the statute subject to constitutional challenge." *Ante* at 124. The lead opinion perceives "a due process concern . . . because defendants are entitled to know the charges against them." *Ante* at 123. The lead opinion thus adopts an interpretation "that will save the statute." *Ante* at 124.

In invoking the constitutional avoidance doctrine, the lead opinion has omitted a crucial step *by failing to identify any ambiguity in MCL 768.32(1) that would warrant loading the dice in favor of its preferred interpretation*. "The canon of constitutional avoidance comes into play only when, *after the application of ordinary textual analysis*, the statute is found to be *susceptible of more than one construction*; and the canon functions as a means of choosing between them." *Clark v Martinez*, 543 US 371, 385; 125 S Ct 716; 160 L Ed 2d 734 (2005) (emphasis added; original emphasis omitted).

The lead opinion omits an ordinary textual analysis to explain why MCL 768.32(1) is susceptible of more than one construction. The language allowing a defendant charged with "an offense, consisting of different degrees,"

to be found "guilty of a degree of that offense inferior to that charged in the indictment . . . " is not unclear.

As discussed, the statutory language is not difficult to comprehend, and provides notice to the defendant that he should defend against all degrees. Indeed, the lead opinion has acknowledged that criminal sexual conduct is "an offense consisting of different degrees," so it presumably does not find this language ambiguous. And where the Legislature has delineated the degrees of an offense and numbered them in descending order, it has plainly expressed that each subsequent degree is an inferior degree of those that precede it. Thus, the lead opinion's failure to identify an ambiguity renders its dice-loading argument unconvincing.

But even if an ambiguity existed, the lead opinion does not justify its application of the doctrine of constitutional avoidance.

> The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is *a serious likelihood that the statute will be held unconstitutional*. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a "fair" one. [*Almendarez-Torres v United States*, 523 US 224, 238; 118 S Ct 1219; 140 L Ed 2d 350 (1998) (emphasis added).]

In my view, there is no "serious likelihood that the statute will be held unconstitutional." *Id*. The lead opinion does not identify any authority holding that due process concerns preclude consideration of an offense that a legislature has *formally denominated* as an inferior degree of the charged offense.[4]

In truth, compelling authorities do not raise a serious question regarding the constitutionality of MCL 768.32(1). Indeed, the lead opinion cannot possibly demonstrate a serious likelihood that MCL 768.32(1) will be held unconstitutional, in light of the United

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[4] *Schmuck v United States*, 489 US 705, 717-718; 109 S Ct 1443; 103 L Ed 2d 734 (1989), does not so hold. In that case, the United States Supreme Court held that Federal Rule of Criminal Procedure 31(c) "speaks in terms of an offense that is 'necessarily included in the offense charged.' " *Schmuck, supra* at 716. Unlike the federal rule, which does not address formally degreed offenses, MCL 768.32(1) permits conviction of an "inferior degree" of the charged offense. The *Schmuck* Court did *not* address *formally degreed* inferior offenses, nor did it hold that the federal constitution mandates the test set forth in FR Crim P 31(c).

The lead opinion highlights language from *Schmuck* stating that it was "ancient doctrine of both the common law and our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." *Id*. at 717. But the *Schmuck* Court *was not addressing formally degreed offenses*.

The United States Supreme Court has never suggested that due process forbids a conviction of a formally degreed lesser offense. Rather, the Supreme Court has recognized that states employ "a variety of approaches" in determining whether a lesser included offense instruction is warranted. See *Hopkins v Reeves*, 524 US 88, 96-98 & n 6; 118 S Ct 1895; 141 L Ed 2d 76 (1998). In upholding a Nebraska conviction, the Supreme Court in *Hopkins* noted that Nebraska had "alternated between use of the statutory elements test and the cognate evidence test." *Id*. at 98. The analysis in *Hopkins* leaves little doubt that the availability of a lesser included offense instruction in a state criminal trial is generally a matter of state law.

Accordingly, there is no constitutional dilemma justifying an override of the plain language of MCL 768.32(1).

States Supreme Court's decision in *Paterno v Lyons*, 334 US 314; 68 S Ct 1044; 92 L Ed 1409 (1948).

In *Paterno*, the Supreme Court upheld a guilty plea to a charge of attempted grand larceny where the defendant was charged with receiving stolen property. Under New York law, attempted grand larceny was not necessarily included in the charged offense of receiving stolen property. *Id*. at 321 n 10. Yet the United States Supreme Court upheld the conviction, noting that "[t]here is close kinship between" the two offenses. *Id*. at 320. The Supreme Court further explained:

> It would be exaltation of technical precision to an unwarranted degree to say that the indictment here did not inform petitioner that he was charged with substantial elements of the crime of larceny thereby enabling him, as a means of cutting his sentence in half, to agree to plead guilty to an attempted larceny. [*Id*. at 321.]

Additional authorities undercut the lead opinion's constitutional avoidance argument. In *Salinas v United States*, 277 F2d 914 (CA 9, 1960), the defendant was charged with first-degree arson in the United States District Court for Alaska. The trial court instructed the jury that the charge of first-degree arson included a charge of second-degree arson. First-degree arson required proof that the defendant had willfully burned " 'any dwelling house . . . or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto . . . .' " *Id*. at 916, quoting § 65-5-1, ACLA Supplement. Second-degree arson proscribed burning "any building or structure of whatsoever class or character" not included in the first-degree arson provision. *Id*. The defendant had burned down a restaurant containing living quarters on the second floor. The jury found the defendant guilty of second-degree arson.

The Ninth Circuit Court of Appeals held that the defendant's conviction of the inferior degree of arson did not violate due process. It explained:

> Often a particular crime is graded or classified into degrees "* * * in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation." *Davis v Utah Territory*, 1893, 151 U.S. 262, 266, 14 S. Ct. 328, 329, 38 L. Ed. 153. Where a substantive crime is so divided, the elements necessary to the commission of the crime itself are the same in each instance, but the degree of culpability differs depending upon the category in which the circumstances place the offense. [*Salinas, supra* at 917.]

Thus, "where the indictment sets out a crime *divided into degrees* the defendant is put on notice of the particular offense charged against him together with any aggravating circumstances appearing by additional averments." *Id*. (emphasis added).

The *Salinas* court further explained:

> The well settled rule, recognized in Alaska by two statutes, is that when an indictment charges a crime in which a lesser offense is necessarily included, *or charges a higher degree of a particular offense that is divided into degrees*, the accused, although acquitted of the greater offense or of the higher degree of the same offense may, *consistent with the requirements of due process*, be convicted of a lesser included offense or a lower degree of the offense charged. [*Id*. (emphasis added).]

Notably, one of the Alaska statutes contained language nearly identical to our provision, MCL 768.32(1).[5]

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[5] The Alaska statute provided: " 'That upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof.' " *Id*. at 918 n 3, quoting § 66-13-73, ACLA.

The defendant in *Salinas* argued that second-degree arson was a separate and distinct offense because it was not necessarily included in the charge of first-degree arson. The defendant contended that first-degree arson could be committed without first having committed second-degree arson, thereby failing a test articulated in *Giles v United States*, 144 F2d 860, 861 (CA 9, 1944), and *House v State*, 186 Ind 593; 117 NE 647 (1917). The *Salinas* court rejected that argument:

> This test is of doubtful application in determining whether the elements of a lesser degree of a substantive crime, *divided into several degrees*, are included in a charge of a higher degree of that crime; it is more appropriate where different crimes are being considered. The elements of a single crime divided into degrees are the same in each instance, and only one crime can be committed. The aggravation of the basic offense may vary in each degree; the substantive crime, with its elements, remains the same. The *Giles* case did not seek to apply the above test to determine the sufficiency of an indictment that charged one crime divided into degrees, but rather whether one crime was necessarily included in another, different crime. This was also the situation in the *House* case where the rule originated; *there the court was careful to note specifically that it was not dealing with an offense divided into degrees*.
>
> We are inclined to view the two statutes relating to first and second degree arson as commonly denouncing but one crime—that of arson. As it relates to buildings and structures, this crime is divided into two grades, the one being more aggravated than the other by reason of the particular nature of the building burned, i.e., a dwelling house. Consequently an indictment charging the more aggravated degree necessarily contains all of the elements of the lower degree. [*Salinas, supra* at 918.]

Similarly, in *State v Foster*, 91 Wash 2d 466; 589 P2d 789 (1979), the defendant was charged with first-degree assault with intent to kill, and the court instructed on

second-degree negligent assault. The jury found the defendant guilty of second-degree negligent assault. The defendant claimed that he was deprived of his constitutional right to notice of the accusation against him, and that he could be convicted of second-degree assault only if it were included in first-degree assault. The Washington Supreme Court rejected this argument:

> The general rule regarding this right is that the crimes of which a person can be convicted, and those on which a jury is properly instructed, are limited to those which are charged in the information. . . . There are two exceptions to this rule: (1) where a defendant is convicted of a lesser included offense of the one charged in the information . . . ; and (2) *where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged*, pursuant to RCW 10.61.003. [*Id*. at 471 (emphasis added).]

The Washington statute was worded nearly identically to MCL 768.32(1).[6] The *Foster* court held that "this statute gave appellant sufficient notice that he was subject to a conviction of second-degree negligent assault." *Foster, supra* at 471.

The *Foster* Court also found *Salinas* persuasive:

> Similarly [to the analysis in *Salinas*], we conclude that both the first-degree and second-degree assault statutes proscribe but one offense—that of assault. Since the offense upon which the trial court instructed the jury is a lesser degree crime of the one with which he was charged and the two crimes, namely assault, are not separate and distinct from one another, we conclude that appellant was

[6] The Washington statute provided: "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, *and guilty of any degree inferior thereto*, or of an attempt to commit the offense." RCW 10.61.003 (emphasis added).

> given sufficient notice to satisfy the requirements of [the state constitution] and the Sixth Amendment. [*Id*. at 472.]

Like in *Salinas* and *Foster*, our Legislature has formally divided the offense of criminal sexual conduct into degrees and numbered them in descending order. Thus, criminal sexual conduct is but one offense divided into several degrees, and CSC II is, *by legislative definition*, an inferior offense of CSC I. Defendant received adequate notice of the nature of this charge.

Finally, the lead opinion has offered no reason to believe that MCL 768.32(1) is unconstitutional *as applied to defendant*.[7] MCL 768.32(1) provided notice to defendant because the plain language of the statute permits the trier of fact to consider a lesser degree of CSC. Moreover, defendant certainly had notice that a

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[7] See *People v Lynch*, 410 Mich 343, 352; 301 NW2d 796 (1981), citing *United States v Raines*, 362 US 17, 20; 80 S Ct 519; 4 L Ed 2d 524 (1960).

Rather than offering legal analysis to establish that MCL 768.32(1) is unconstitutional *as applied to defendant*, the lead opinion selectively quotes from the prosecutor's supplemental brief. The lead opinion characterizes the prosecutor's supplemental brief as *conceding* that " 'given the modern rise of complex offenses with multiple alternative elements, it is possible for due process to be raised in a given case . . . .' " *Ante* at 131. The lead opinion perhaps pointedly omits the prosecutor's subsequent statement that "*this case is plainly not such a case, and this court should await a viable 'as applied' challenge to the statute before addressing that question*." Prosecutor's supplemental brief, pp 10-11 (emphasis added). Moreover, the chief appellate prosecutor further explains that he "*has, in over 31 years, never seen or heard of such a case actually existing, and does not believe the court will ever encounter one*." Prosecutor's supplemental brief, p 11 (emphasis added).

Thus, when read in context, the prosecutor's statement is hardly a "concession." The lead opinion offers no evidence to rebut the prosecutor's view that no case implicating due process concerns under MCL 768.32(1) is likely to arise. Thus, the lead opinion not only fails to explain how the statute is unconstitutional as applied to defendant, but it also fails to demonstrate a *serious likelihood* that it will *ever* be held unconstitutional, as the lead opinion *must* do before applying the canon of constitutional avoidance. *Almendarez-Torres*, *supra* at 238.

rational view of the evidence supported a CSC II conviction. It was, after all, *defendant's own admission* that he had touched the victim's vagina that led the court to find him guilty of CSC II. It is simply untenable to suggest that defendant had no notice of his own confession, or that use of that confession somehow violated due process.[8]

In my view, the Legislature is entirely free to correct the lead opinion's rewrite of MCL 768.32(1). The lead opinion has *not* held that the statute is unconstitutional. Instead, the lead opinion has merely applied a canon of *statutory* interpretation known as the doctrine of constitutional avoidance.[9]

IV. HARMLESS ERROR

Even accepting the lead opinion's contention that an error occurred, it would be harmless.[10] As the alleged error here is unpreserved and nonconstitutional, it is

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[8] The lead opinion states that defendant may have adopted a different trial strategy, by objecting to police testimony regarding his confession, if he had known the court would consider CSC II. *Ante* at 126. The lead opinion does not reveal how it divined that defendant would have interposed such an objection, nor does the lead opinion identify a source in the record to challenge the admission of defendant's confession. Indeed, defense counsel likely opted for a bench trial with the firm hope that the judge would convict defendant of a lesser offense, even though the defense theory was that no sexual incident occurred.

[9] See *Clark v Martinez*, 543 US 371, 381-382; 125 S Ct 1716; 160 L Ed 2d 734 (2005) (explaining that "[t]he canon is not a method of adjudicating constitutional questions by other means," that "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions," and that "when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others," but rather "to vindicate his own *statutory* rights") (emphasis in original).

[10] Errors regarding lesser included offenses are subject to harmless error review. *Cornell*, *supra* at 361.

reviewed for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 764; 597 NW2d 130 (1999).

In considering whether defendant's substantial rights were affected, I would note that under *Cornell*, the trier of fact may consider an inferior offense only if it is supported by a rational view of the evidence. This aspect of our holding in *Cornell* must apply to all inferior offenses, both formally degreed offenses and those that are inferior under the *Cornell* rule of construction. As we explained in *Cornell*: "To permit otherwise would be inconsistent with the truth-seeking function of a trial, as expressed in MCL 768.29." *Cornell*, *supra* at 357-358.[11] That rationale applies equally here.

In this case, a rational view of the evidence supported the court's decision to convict defendant of CSC II. The victim testified that defendant fondled her vagina. This testimony is consistent with defendant's own *admission,* given during a police interview.[12] Thus, the court's finding that defendant was guilty of two counts of CSC II was permissible under MCL 768.32(1).

The lead opinion incorrectly asserts that the defense

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[11] MCL 768.29 provides, in relevant part:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, *with a view to the expeditious and effective ascertainment of the truth regarding the matters involved*. [Emphasis added.]

[12] Specifically, defendant admitted that while he and the 15-year-old complainant were alone in the stairwell, he "touched her vagina." He stated that the complainant "grabbed his penis, and attempted to put it inside her vagina." Defendant stated that he then "put both his arms around [the complainant] at the time, and his hand went between [her] legs, touching her vagina." Defendant admitted that, when someone came to a nearby door, he pushed the door back with his arm.

at trial was focused on a charge that defendant had sexually *penetrated* the victim. *Ante* at 125. Justice MARKMAN's concurrence reflects a similar misunderstanding of the record. He states that defendant "likely failed to object to or otherwise refute the introduction of a statement he made to the police admitting sexual contact, because it was not relevant to his defense that no sexual *penetration* had occurred." *Ante* at 139 (emphasis in original). Justice MARKMAN further characterizes defendant's defense as claiming that "while he may have done something inappropriate, he did not commit CSC-I." *Ante* at 139.

In truth, defendant claimed that no sexual touching of any kind occurred, and that he never made the statement to the police. Indeed, defense counsel stated in closing argument that "the question that obviously this Court is left to take a look at is whether beyond a reasonable doubt it's been proven that Mr. Nyx had in fact improper *contact* with this defendant [sic]." (Emphasis added.) Defense counsel then challenged the testimony of prosecution witnesses, noting that there were "contradicting stories" from the complainant and another witness: "It's [sic] contradicting stories as to when it happened, allegedly; what allegedly happened, on what day this allegedly happened." Defense counsel further discussed inconsistencies between the police reports and hospital records regarding the complainant's version of the crime. In short, the defense theory was that no sexual incident occurred, *not* that defendant engaged in sexual contact short of penetration.

Nor did the defense attempt to rely on defendant's confession. The defense strategy at trial was to suggest that *defendant did not make a statement*. During the cross-examination of police witnesses, defense counsel

attempted to challenge their credibility. For example, counsel elicited testimony that the officer who took the statement did not record the interview and did not note certain events that occurred during the making of the statement. In closing argument, counsel discussed a notation in a police document suggesting *that no statement was made*.[13] Thus, defense counsel plainly did not rely on the confession to suggest that defendant did something "inappropriate" short of penetration.

For these reasons, the defense at trial would not have changed had defendant known that the judge would convict him of CSC II instead of CSC I. Thus, even accepting the lead opinion's view that an error occurred, I would conclude that it did not affect defendant's substantial rights, and that reversal is therefore not required under *Carines*.

V. RAMIFICATIONS OF THE MAJORITY'S DECISION

The broader consequence of the lead opinion's adoption of its new rule of criminal procedure and new definition of substantive criminal law is that CSC II is no longer an inferior degree of CSC I. Indeed, it seems that any "cognate" degreed offense cannot qualify as an inferior offense.

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[13] For example, defense counsel argued:

> The information provided by the officer states that there's the statement. It's not a written statement. It's not reduced to writing. It's not included in the Request for Warrant, although the information provided by both officers is that allegedly it's known on the 21st, and that in fact, looking at Investigator [Audrey] Thomas' request, that it was not a statement made. There were no admissions and no statements made by Mr. Nyx.

Defense counsel was thus challenging *whether the statement was made*. He manifestly was *not* arguing that the statement was correct and that defendant thus engaged in only sexual contact and not penetration.

The Court's decision affects all formally degreed offenses until such time as our appellate courts clarify the status of each degreed offense. Prosecutors will now have the burden of charging each degree of an offense that they wish to have considered, and to present often-confusing alternative arguments and proofs to the trier of fact for each degree of the offense charged. We will face a cottage industry of litigation to decipher whether each formally degreed offense is truly necessarily included or merely cognate.

As the lead opinion acknowledges, our Legislature has chosen to classify many crimes as formally degreed offenses.[14] To avoid claims of ineffective assistance of counsel, defense lawyers must now argue that *any* lesser degreed offense is not truly "inferior." Indeed, counsel's failure to object with regard to a lesser degree at a trial or plea hearing, or affirmative acquiescence in the inclusion of the lesser degree, will allow a defendant to argue on appeal that trial counsel was ineffective. We will spend years sorting out the consequences of this new rule.

The sensible rule that *Cornell* restored to Michigan is being upset by this decision. There are clear practical effects that will follow as a result of the lead opinion. Testifying before a jury is a nerve-wracking experience, and witnesses often offer more tentative statements at trial than those they made during the police investigation. Hence, a prosecutor can never know which statements of a CSC victim may be accepted as true by the trier of fact or the weight that will be given to them. In order to assure that an offender does not escape responsibility for his crime, a prosecutor will now be required

[14] See *ante* at 122, noting that the list of formally degreed offenses includes, at least, murder, CSC, home invasion, child abuse, vulnerable adult abuse, retail fraud, fleeing and eluding, and money laundering.

to charge CSC II as an alternative count whenever bringing a charge of CSC I, or risk the possibility of acquittal where the victim's testimony at trial may not be as strong as anticipated. The same charging requirement would hold true for any other crime for which this Court has not definitively held that the lesser degreed offense is also a "necessarily included" offense. Thus, this decision heralds a revival of *Ora Jones*. Now, the decision of which cognate lesser offense will be included will move from the end of the trial when proofs have been adduced to the prosecutor's charging decision before any evidence has been presented.

Finally, defendants will also suffer negative consequences with the new rule. Take, for example, a case where the prosecutor has charged a defendant with CSC I involving a 12-year-old girl (and decides not to charge CSC II as an alternative count). If the defendant disputes penetration but not sexual contact, he will face an all-or-nothing verdict instead of offering the jury the reasonable alternative of convicting him of that which he admitted: CSC II.

VI. CONCLUSION

I would hold that under the plain language of MCL 768.32(1), a fact-finder may convict a defendant of a legislatively denominated inferior degree of the charged offense if a rational view of the evidence supports the conviction. The *Cornell* rule of construction for determining whether an offense is "inferior" does not apply where the Legislature itself has formally divided an offense into degrees. In any event, it appears that CSC II is necessarily included in CSC I, notwithstanding this Court's contrary statement in *Lemons*. Moreover, any error was harmless in light of the fact the defense at trial was that defendant engaged in *no* sexual touching

with the complainant. There is no ambiguity in the text of MCL 768.32(1) to warrant application of the canon of constitutional avoidance, nor is there a serious likelihood that the statute will be held unconstitutional. I would thus reverse the judgment of the Court of Appeals and remand the case to that Court to address defendant's remaining appellate issues.

LASH v CITY OF TRAVERSE CITY

Docket No. 131632. Argued March 6, 2007 (Calendar No. 3). Decided July 18, 2007.

Joseph Lash brought an action in the Grand Traverse Circuit Court against the city of Traverse City, seeking money damages for the city's failure to hire him as a police officer because his residence was more that 20 "road miles" (miles measured by the shortest route of public travel) from the city limits. The city's residency requirement required the plaintiff's residence to be within 15 "radial miles" (miles measured by a straight line between two points) or 20 road miles. The court, Thomas G. Power, J., granted the city's motion for summary disposition, ruling that the 20-mile minimum distance applicable to such residency requirements, as provided in MCL 15.602(2), was properly measured in road miles. The court also held that the plaintiff could bring a private cause of action to enforce the provisions of MCL 15.602(2). The Court of Appeals affirmed in part, reversed in part, and remanded the matter to the trial court for further proceedings. 271 Mich App 207 (2006). In separate opinions by ZAHRA, P.J., and MURPHY, J., the Court held that the distance provided in MCL 15.602(2) should be measured in "radial miles," and in separate opinions by NEFF, J., and MURPHY, J., the Court held that the plaintiff could bring a private cause of action to enforce the statute. The Supreme Court granted the defendant's application for leave to appeal. 477 Mich 920 (2006).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The 20-mile distance provided in MCL 15.602(2) is to be measured in "radial miles," in a straight line between an employee's place of residence and the nearest boundary of the public employer. The defendant's residency requirement contravenes MCL 15.602(2) because it demands that the employee reside within 15 radial miles from the nearest city boundary. However, no private cause of action for money damages may be maintained for a violation of the statute.

1. The statute is not ambiguous. The plain meaning of the word "mile" is a measurement of a distance totaling 5,280 feet.

The definition of the word "mile" does not indicate that the distance is to be measured along available routes of public travel.

2. Without legislative authorization, a cause of action for money damages cannot be created against a governmental entity in contravention of the broad scope of governmental immunity. There is no express authorization permitting a private cause of action against a public employer for violation of MCL 15.602(2) and there is no evidence that the Legislature intended such a remedy.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

Justice CAVANAGH, joined by Justice WEAVER, concurring in part in the result and dissenting in part, concurred with the holding that the 20-mile distance is to be measured in a straight line between the employee's place of residence and the nearest boundary of the public employer. He dissented from the holding that the statute does not allow the plaintiff to maintain a private cause of action for money damages for a violation of the statute because such remedy may be the only possible and effective remedy by the time an employee or potential employee discovers a statutory violation. Justice CAVANAGH would affirm the Court of Appeals.

Justice KELLY, concurring in part and dissenting in part, agreed with the majority's holding that, pursuant to the decision in *Mack v Detroit*, 467 Mich 186 (2002), with which she continues to disagree, governmental immunity bars plaintiff's action. She also agreed with the majority's dictum that the 20-mile distance permitted in the statute is to be measured in radial miles as opposed to road miles. But for the holding in *Mack,* she would hold that the defendant abandoned its governmental immunity defense by never raising the issue, and that a private cause of action is available to the plaintiff for allegedly being denied an employment opportunity because of the defendant's violation of the statute.

1. WEIGHTS AND MEASURES — PUBLIC EMPLOYERS — STATUTORY DISTANCES IN RESIDENCY REQUIREMENTS.

Where a public employer requires an employee to reside 20 miles or another specified distance greater than 20 miles from the nearest boundary of the public employer, the distance is properly measured in a straight line between the employee's place of residence and the nearest boundary of the public employer (MCL 15.602[2]).

2. ACTIONS — MUNICIPAL CORPORATIONS — GOVERNMENTAL IMMUNITY.

A cause of action for money damages cannot be created against a governmental entity in contravention of the broad scope of governmental immunity without legislative authorization (MCL 691.1401 *et seq.*).

3. ACTIONS — PRIVATE CAUSES OF ACTION — MUNICIPAL CORPORATIONS — RESIDENCY REQUIREMENTS.

A plaintiff may not maintain a private cause of action for money damages against a public employer that has violated the provisions of MCL 15.602(2) with regard to residency requirements imposed on public employees.

Law Office of Glen N. Lenhoff (by *Glen N. Lenhoff, Michael E. Freifeld,* and *Robert D. Kent*-Bryant), for the plaintiff.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Gretchen L. Olsen*), for the defendant.

Amicus Curiae:

Garan Lucow Miller, P.C. (by *Rosalind Rochkind*), for the Michigan Municipal League.

YOUNG, J. At issue in this case is the proper construction of MCL 15.602, a statute that limits the restrictions public employers may make regarding employee residency. While the statute does not allow an employer to require an employee to live in any specific geographic area, it does permit a public employer to require that an employee reside within a distance of 20 miles or more from the public employer's nearest boundary.

Plaintiff alleges that he was denied employment with defendant because the city imposed a residency requirement and measured the requirement in "road miles"

rather than "radial miles."[1] When measured in road-miles, the distance between plaintiff's residence and defendant's nearest boundary was greater than that allowed by the city's residency requirement. Plaintiff contends that this residency requirement violates MCL 15.602(2), and seeks monetary damages for defendant's refusal to hire him.

We hold that the 20-mile distance permitted in MCL 15.602(2) is to be measured in a straight line between the employee's place of residence and the nearest boundary of the public employer. Because defendant's residency requirement demands that an employee reside within 15 radial miles of the nearest city limit, defendant's residency requirement contravenes MCL 15.602(2).

However, while defendant has violated the statute, nothing in the statute permits plaintiff to maintain a private cause of action for money damages. Moreover, no private right of action to recover money damages may be inferred because defendant is a governmental entity that is entitled to immunity unless the Legislature has explicitly authorized suits by citizens against the governmental entity.

We therefore hold that there is no private right of action for a violation of MCL 15.602(2). The decision of the Court of Appeals is affirmed in part, reversed in part, and we remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff, a police sergeant with the city of Flint, responded to an advertisement seeking applicants for

[1] As used throughout this opinion, the term "road miles" refers to measuring a distance by the shortest route of public travel. In contrast, the term "radial miles" refers to measuring a distance in a straight line between two points.

patrol officers with defendant's police department. The advertisement expressly outlined defendant's residency requirement: "A residency requirement of 15 miles radius, or 20 road miles, from the nearest City limit will be enforced for selected candidates."[2]

Plaintiff was interviewed in December 2002. Subsequently, he received a letter indicating that his interview was successful and that further action would be taken as vacancies arose. The following month, plaintiff purchased a 30-acre parcel of property in Thompsonville, Michigan. The property is located outside the 20-mile limit if measured in road miles, but is within the 20-mile limit if measured in radial miles.

In August 2003, after the candidate list expired, defendant again solicited applicants for patrol officers, outlining the same residency requirement. Plaintiff reapplied and was reinterviewed for the position. In March 2004, plaintiff was offered conditional employment, contingent on his passing a physical examination, a physical endurance test, and a psychological examination.[3]

As part of a routine preemployment background investigation, defendant discovered that plaintiff's property was 23 road miles from the nearest city limit. Plaintiff was advised that the hiring process would not continue unless he complied with defendant's residency requirement. Plaintiff refused to meet the residency requirement and suggested that the city renegotiate the

[2] This residency requirement, included in the collective bargaining agreement between defendant and the Police Officers Labor Council, is consistent with Traverse City Executive Order No. 311.

[3] These examinations were scheduled for early April 2004, approximately three weeks after the conditional offer of employment was made. However, defendant cancelled the testing after rescinding the employment offer.

collective bargaining agreement to relax the requirement. Plaintiff's suggestion was rejected. Because plaintiff refused to comply with defendant's residency requirement, defendant rescinded the conditional offer of employment and cancelled the scheduled testing.

In September 2004, plaintiff filed the instant lawsuit against defendant, seeking only monetary damages for defendant's "unlawful failure to hire" him. Plaintiff claimed that defendant's residency requirement violated MCL 15.602 because it required plaintiff to reside closer than 20 miles from defendant's nearest boundary as measured on a radial basis.

Defendant moved for summary disposition, claiming that its residency requirement was valid because the proper measurement under the statute was road miles, and that plaintiff's property did not fall within the requirement. Defendant further argued that plaintiff had failed to state a claim because the statute did not create a private cause of action. Lastly, defendant argued that plaintiff suffered no compensable damages because he continued to work as a Flint police officer, earning greater wages than he would have earned with defendant. In addition to suffering no wage loss, defendant noted that plaintiff's Thompsonville property had appreciated in value.

In response, plaintiff observed that MCL 15.602 did not specify road miles as the proper basis of measurement, and contended that a private cause of action was permissible because it provided the only effective redress for the statutory violation. While plaintiff did not claim wage loss damages, he insisted that he had incurred other monetary damages, including mileage expenses incurred during the two employment inter-

views, "continuing private school expenses" for his children in Flint, costs associated with the purchase and repair of the Thompsonville property, and damages related to his spouse's claimed lost job opportunity in Flint.

The trial court granted summary disposition to defendant, holding that the statutory distance was properly measured in road miles, because the "purpose of the statute" was to ensure that an employee could travel to work within a reasonable time. The trial court also held that a private cause of action could be maintained because there was "no other way to enforce" the statute.

In a published opinion, the Court of Appeals affirmed in part, reversed in part and remanded to the trial court for further proceedings.[4] Regarding the proper means of measurement, two members of the panel held that the distance provided in MCL 15.602(2) was to be measured in radial miles rather than road miles. A different configuration of panel members held that the statute permitted a private cause of action for money damages. This Court granted defendant's application for leave to appeal.[5]

II. STANDARDS OF REVIEW AND STATUTORY CONSTRUCTION

Addressing the issues presented in this case requires that we interpret MCL 15.602. Issues of statutory interpretation are questions of law that this Court reviews de novo.[6] Similarly, we review the trial court's decision to grant or deny summary disposition de novo.[7]

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[4] *Lash v Traverse City*, 271 Mich App 207; 720 NW2d 760 (2006).

[5] 477 Mich 920 (2006).

[6] *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

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

When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature.[8] To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language.[9] When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.[10]

III. ANALYSIS

A. THE STATUTE

MCL 15.602 states in relevant part as follows:

> (1) Except as provided in subsection (2), a public employer shall not require, by collective bargaining agreement or otherwise, that a person reside within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer.
>
> (2) Subsection (1) does not prohibit a public employer from requiring, by collective bargaining agreement or otherwise, that a person reside within a specified distance from the nearest boundary of the public employer. However, the specified distance shall be 20 miles or another specified distance greater than 20 miles.
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> * * *
>
> (4) Subsection (1) does not apply if the person is a volunteer or paid on-call firefighter, an elected official, or an unpaid appointed official.

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[8] *Tryc v Michigan Veterans' Facility*, 451 Mich 129; 545 NW2d 642 (1996).

[9] *Sotelo v Grant Twp*, 470 Mich 95; 680 NW2d 381 (2004).

[10] *Koontz v Ameritech Services, Inc*, 466 Mich 304; 645 NW2d 34 (2002).

The plain language of § 1 describes the general prohibition against residency requirements—a public employer "shall not require" that a person reside within a specific geographic area or within a specific distance or travel time from the employee's workplace as a condition of employment.

While § 1 indicates what a public employer *may not* require, § 2 provides an exception and describes what residency limitations a public employer *may* require as a condition of employment. Under § 2, an employer may require that an employee reside within a *specified distance* from the nearest boundary of the public employer, without regard to the employee's place of employment, as long as that specified distance is 20 miles or greater.

Lastly, § 4 describes the categories of employees to whom the general prohibition against residency requirements described in § 1 is never applicable. A public employer may require on-call firefighters, elected officials, and unpaid appointed officials to reside in a specific geographic area or within a specified distance or travel time from the workplace as a condition of employment.

B. THE METHOD OF MEASUREMENT UNDER MCL 15.602(2)

Defendant maintains that the Legislature's failure to define the method of measuring the 20-mile minimum distance in § 2 renders the statute ambiguous, because the term "20 miles" is susceptible to being measured in either radial miles or road miles. Moreover, defendant claims that this ambiguity is easily resolved by looking to the "purpose" of the statute, which defendant claims is to ensure that employees' travel time "is not too long."

However, we reject defendant's claim that the statute is ambiguous. As an initial matter, the plain meaning of

the word "mile" is a measurement of a distance totaling 5,280 feet.[11] Nothing in the ordinary definition of the word indicates that this distance is to be measured along available routes of public travel.[12] Certainly, had the Legislature desired that the permissible residency restriction be measured in "road miles" or along roadways it surely could have said so.[13] We presume that the Legislature intended the common meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature.[14] Because inserting the word "road" before "miles" in the statute subverts the plain language of the statute, defendant's preferred interpretation fails.[15]

The context of the statute provides further support for the conclusion that the distance stated in MCL 15.602(2) is to be measured linearly. The statute specifically provides that the 20-mile distance is to be

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[11] *Random House Webster's College Dictionary* (1996), p 859.

[12] As we have noted in previous opinions, a statutory term is not rendered ambiguous merely because resort to a dictionary reveals more than one definition. *Koontz v supra*; *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). However, in this case the term "miles" has only one definition, which remains constant at 5,280 feet whether the distance is driven, walked, or flown.

[13] See, for example, *Kroger Co v Liquor Control Comm*, 366 Mich 481; 115 NW2d 377 (1962). There, the Court construed a now repealed statute, MCL 436.17a, that prohibited the issuance of a retail liquor license within 500 feet of a church or school. The statute specifically indicated that the 500-foot distance "shall be measured along the center line of the street" from the nearest part of the church or school building to the nearest part of the location seeking the liquor license. *Kroger, supra* at 484.

[14] *Helder v Sruba*, 462 Mich 92; 611 NW2d 309 (2000); *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002).

[15] See *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 729; 614 NW2d 607 (2000); *Detroit Trust Co v Granger*, 278 Mich 152, 162; 270 NW 239 (1936); *Burke v Chief of Police of Newton*, 374 Mass 450; 373 NE2d 949 (1978).

measured from an employee's property to the nearest *boundary* of the public employer. In contrast to use of the phrase "nearest road," for example, use of the phrase "nearest boundary" does not contemplate a travel route, because the nearest boundary of the public employer might be in a field, in the middle of a lake, or in a backyard. Thus, the fact that the statute specifies one terminus without consideration of navigability further militates in favor of measuring the permissible residency requirement in radial miles.

We also observe that defendant's claimed statutory "purpose" is completely contrary to the structure of the statute. Defendant claims that road miles are the proper method of measurement because the "purpose" of MCL 15.602(2) is to ensure that an employee's "travel time to get to work is not too long." Defendant notes that efficient travel time "is especially critical" for police, fire, or emergency personnel. However, the general prohibition on residency requirements contained in § 1 prohibits an employer from requiring that an employee reside within either a "specified distance" or "travel time" from the employee's workplace. In contrast, the permissible parameter contained in the § 2 exception allows an employer to impose a residency requirement that is a "specified distance" from the nearest municipal boundary. The issue of travel time is conspicuously absent in § 2, indicating that travel time is not a permitted consideration when imposing a residency requirement. Moreover, while the Legislature could certainly have excepted police or other emergency personnel from the general residency requirement prohibition, MCL 15.602(4) indicates that *only* on-call firefighters, elected officials, and unpaid appointed officials are excluded from the prohibition stated in MCL 15.602(1).

We therefore hold that, where a public employer requires an employee to reside 20 miles from the employer's nearest boundary as permitted by MCL 15.602(2), this distance is properly measured in a straight line between the employee's place of residence and the nearest boundary of the public employer. Because defendant's residency requirement obligated plaintiff to reside within 15 radial miles or 20 road miles from defendant's limit, its residency requirement is violative of the statute.[16]

C. PRIVATE CAUSE OF ACTION UNDER MCL 15.602

Having concluded that defendant's residency requirement contravenes the statute, the remaining issue is whether plaintiff may maintain a private cause of action for money damages against defendant. While the statute does not explicitly provide for a private cause of action, plaintiff claims that a cause of action should be inferred, because without it plaintiff would have no adequate mechanism to enforce the act.

The Court of Appeals majority[17] stated that the "rule for inferring rights of action" is found in a footnote in *Pompey v Gen Motors Corp.*[18] In *Pompey,* it was noted

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[16] In her partially dissenting opinion, Justice KELLY opines that our analysis of the measurement of distance under MCL 15.602(2) is "only dictum," although she agrees with it. We find the logic of her contention hard to follow. Plaintiff seeks damages for defendant's refusal to hire him. Therefore, before determining whether plaintiff may maintain a private cause of action to remedy a violation of the statute, it is imperative to first determine whether a violation exists, thus requiring an analysis of MCL 15.602(2). Moreover, while we ultimately conclude that plaintiff may not maintain a private cause of action for money damages, plaintiff is free to seek the remedies available to him for defendant's violation of MCL 15.602(2).

[17] *Lash, supra* at 213 (opinion by NEFF, J.).

[18] 385 Mich 537, 553 n 14; 189 NW2d 243 (1971).

that where no common-law remedy existed, the remedy provided by statute was the sole remedy. In a footnote following that general proposition, the *Pompey* Court noted "two important qualifications" to this rule of exclusivity, stating that "the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, or unless a contrary intent clearly appears."[19]

In *Gardner v Wood*,[20] the issue presented was whether a civil cause of action for damages could be maintained against a premises owner for violation of the bottle club act, MCL 436.26c. *Gardner* held that, when a statute is silent concerning whether a private remedy is available for a statutory violation, a court may infer a private cause of action "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 . . . ."[21] Utilizing a test derived from the Second Restatement of Torts, *Gardner* held that a cause of action could be created to redress a statutory violation where the purpose of the statute at issue was

"found to be exclusively or in part

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[19] *Id.* (citation omitted). 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. See *Grand Traverse Co v Michigan*, 450 Mich 457; 538 NW2d 1 (1995) (available statutory remedy precluded a private cause of action without resort to assessing its adequacy); *White v Chrysler Corp*, 421 Mich 192, 206; 364 NW2d 619 (1984) (The Court refused to permit a tort remedy for violations of the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*., despite acknowledging that the statutory remedy was inadequate because it resulted "in the undercompensation of many seriously injured workers.").

[20] 429 Mich 290; 414 NW2d 706 (1987).

[21] *Gardner, supra* at 301 n 5, quoting 4 Restatement Torts, 2d, § 874A, p 301.

"(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."[22]

While the four-factor test focused exclusively on the purpose of the statute, *Gardner* further observed that the purpose of the statute alone was an insufficient basis for inferring a private right of action. Rather, *Gardner* held that the "determination [to infer a private cause of action] should not only be *consistent with legislative intent*, but should further the purpose of the legislative enactment."[23] *Gardner* held that a cause of action could not be maintained because it was inconsistent with the intent of the Legislature, indicating that the imposition of a private cause of action was "a matter for legislative resolution."[24] Similarly, subsequent decisions of this Court have refused to impose a remedy for a statutory violation in the absence of evidence of legislative intent.[25]

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[22] *Id*. at 302, quoting *Longstreth v Gensel*, 423 Mich 675, 692-693; 377 NW2d 804 (1985), quoting 2 Restatement Torts, 2d, § 286, p 25.

[23] *Id*. at 304 (emphasis added).

[24] *Id*. at 307. *Gardner* also cited with approval *Cort v Ash,* 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975), in which the United States Supreme Court delineated several factors to be considered in determining whether a private remedy is available for a statutory violation. However, as we noted in *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd,* 472 Mich 479, 498; 697 NW2d 871 (2005), post-*Cort* cases have retreated from consideration of all the enumerated factors, and now focus exclusively on evidence of legislative intent " 'to create, either expressly or by implication, a private cause of action.' " (Citation omitted.)

[25] See *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to

In this case, we need not consider either the factors articulated in *Gardner* or the footnote in *Pompey* because neither case may be properly extended to allow a private cause of action for money damages to be implied *against a governmental entity* such as defendant.[26] Without "express legislative authorization," a cause of action cannot be created "in contravention of the broad scope of governmental immunity . . . ."[27]

Here, there is no express authorization permitting a private cause of action against a public employer for violation of MCL 15.602(2), nor is there any evidence that the Legislature intended such a remedy. Because the words of a statute provide the most reliable evidence of the Legislature's intent, we look there to discern it,[28] and may not speculate regarding that intent beyond those words expressed in the statute.[29]

A "public employer" is defined under MCL 15.601(a) as a political subdivision of the state.[30] Political subdi-

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create."); *Office Planning Group, supra*; *Grand Traverse Co, supra* at 465 ("[W]e cannot find a principled basis for continuation of this cause of action. Reviewing the statute in its entirety, we hold that a plain reading of the statute simply does not support this cause of action or the relief requested.").

[26] Justice KELLY's partial dissent claims that any discussion regarding whether a private cause of action may be implied for a violation of MCL 15.602 is dictum because governmental immunity bars plaintiff's action. However, as MCL 15.602 by its own terms *only applies* to public employers, it is difficult to envision how these two issues are severable. Rather, governmental immunity is the reason that neither *Gardner* nor *Pompey* may be extended to permit the judicial creation of a claim for money damages against a governmental entity.

[27] *Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002). Justice KELLY acknowledges the import and precedential effect of *Mack,* but simply disagrees with that decision.

[28] *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999).

[29] *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999).

[30] Specifically, MCL 15.601(a) defines "public employer" as a "county, township, village, city, authority, school district, or other political subdi-

visions such as defendant enjoy immunity from tort liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.[31] Under the GTLA, the defendant is immune from tort liability "unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government."[32] The GTLA permits a cause of action to be brought against a governmental agency in only six discrete areas, none of which is relevant here.[33] In addition, the Legislature has elsewhere created causes of action against political subdivisions of the state.[34] In fact, chapter 15 of the Michigan Compiled Laws is replete with instances where the Legislature has *explicitly permitted* actions for monetary damages against municipalities and their employees.[35] However, none of these exceptions can be interpreted to permit a suit for violation of the permit-

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vision of this state and includes any entity jointly created by 2 or more public employers."

[31] See MCL 691.1401(d), defining "governmental agency" as "the state or a political subdivision."

[32] *Mack*, *supra* at 195.

[33] The six statutory exceptions to governmental immunity are the highway exception, MCL 691.1402; the motor vehicle exception, MCL 691.1405; the public building exception, MCL 691.1406; the governmental hospital exception, MCL 691.1407(4); the proprietary function exception, MCL 691.1413; and the sewage system event exception, MCL 691.1417.

[34] See the Civil Rights Act, MCL 37.2103(g) and MCL 37.2202(1)(a); as well as the Persons with Disabilities Civil Rights Act, MCL 37.1103(g), MCL 37.1201(b), and MCL 37.1202.

[35] See the Freedom of Information Act, MCL 15.232(d)(iii) and MCL 15.240(7) (permitting actual or compensatory damages as well as punitive damages for refusing or delaying disclosure of a public record under the act); the Open Meetings Act, MCL 15.273 (permitting the recovery of up to $500 in damages against a public official for intentional violation of the act); the standards of conduct, MCL 15.342c (permitting a civil action for actual damages for violation of MCL 15.342b); and the Whistleblowers' Protection Act, MCL 15.361(b) and MCL 15.363 (permitting a civil action for actual damages for violation of MCL 15.362).

ted residency requirement described in MCL 15.602(2). Rather, the fact that the Legislature has explicitly permitted damage suits in other provisions of chapter 15 provides persuasive evidence that the Legislature did not intend to create a private cause of action for violation of this particular provision.

Moreover, plaintiff's claim that a private cause of action for monetary damages is the only mechanism by which the statute can be enforced is incorrect. Plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1).[36] A preliminary injunction may be granted under MCR 3.310(A) where plaintiff can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered.[37] Moreover, an "actual controversy" exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights.[38] In this case, plaintiff's claim is that defendant's residency requirement, made a condition of plaintiff's employment, was in violation of MCL 15.602(2). Such a

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[36] MCR 2.605(A)(1) provides the following remedy: "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."

[37] *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 225 n 11; 634 NW2d 692 (2001). In addition to requiring that a moving party demonstrate irreparable harm in the absence of injunctive relief, other factors should be considered by the trial court: "(1) harm to the public interest if such an injunction is issued; (2) whether harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, and (3) the strength of the moving party's showing that it is likely to prevail on the merits." *Id.*

[38] *Updegraff v Attorney General,* 298 Mich 48; 298 NW 400 (1941); *Finlayson v West Bloomfield Twp*, 320 Mich 350; 31 NW2d 80 (1948).

claim would constitute an "actual controversy" for the purposes of an action for a declaratory judgment.

Plaintiff claims that these remedies are "an illusion," because enforcing the statute by seeking declaratory or injunctive relief would "likely be costly." However, plaintiff cites no authority, and we are aware of none, that would permit the creation of a cause of action for monetary damages in contravention of governmental immunity simply because other available remedies are less economically advantageous to plaintiff. It is not within the authority of the judiciary "to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy."[39] Rather, the relief that plaintiff seeks must be provided by the Legislature.

IV. CONCLUSION

We hold that the 20-mile distance permitted in MCL 15.602(2) is to be measured in radial miles between the nearest boundary of the public employer and the employee's place of residence. In this case, the residency requirement demanded by defendant contravenes MCL 15.602(2).

However, we also hold that plaintiff may not maintain a private cause of action for money damages for violation of the statute because nothing in the statute creates such a cause of action. We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

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[39] *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002).

CAVANAGH, J. (*concurring in part in the result and dissenting in part*). I concur with the majority that the 20-mile distance permitted in MCL 15.602(2) is to be measured in a straight line between the employee's place of residence and the nearest boundary of the public employer. I dissent, however, because I believe that the statute allows plaintiff to maintain a private cause of action for money damages for a violation of the statute.

The lack of any remedy in the statute presents a problem. See *Pompey v Gen Motors Corp*, 385 Mich 537, 552 n 14; 189 NW2d 243 (1971). A violation of the statute has significant consequences for an employee or potential employee. For example, a potential employee may not be hired or a current employee may have his employment terminated or may not receive a promotion. But an employee or potential employee may not learn of this statutory violation until the only possible effective remedy is one for monetary damages. Thus, I would affirm the Court of Appeals on this issue and hold that a private cause of action does exist for a violation of the statute.

WEAVER, J., concurred with CAVANAGH, J.

KELLY, J. (*concurring in part and dissenting in part*). Consistent with this Court's unfortunate decision in *Mack v Detroit*,[1] the doctrine of governmental immunity bars plaintiff's cause of action here. Hence, no useful purpose is served by interpreting MCL 15.602 or deciding whether a private cause of action exists under the statute. The majority's discussion of these two issues is only dictum.

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[1] 467 Mich 186; 649 NW2d 47 (2002). I continue to agree with the dissent in *Mack*, with which I concurred. See also *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 417-420; 716 NW2d 236 (2006) (KELLY, J., dissenting) (recognizing that the holding in *Mack* constitutes binding precedent but reiterating disagreement with the majority's resolution of that case).

However, because the majority chooses to discuss these two issues, I will respond. First, I agree that the 20-mile distance permitted in MCL 15.602 is to be measured in radial miles as opposed to road miles. Also, but for *Mack,* I believe that a private cause of action under the statute would be available to plaintiff because of defendant's violation of MCL 15.602.

APPLICATION OF *MACK* AND THE DOCTRINE OF GOVERNMENTAL IMMUNITY

In *Mack*, this Court held that governmental immunity is a characteristic of government. *Mack v Detroit*, 467 Mich 186, 190; 649 NW2d 47 (2002). It is no longer an affirmative defense. The party seeking to impose liability on a governmental agency has the burden of pleading in avoidance of governmental immunity. *Id.* at 198. This Court also held in *Mack* that, without "express legislative authorization," a cause of action cannot be created "in contravention of the broad scope of governmental immunity." *Id.* at 196. The "presumption [under the governmental tort liability act (GTLA)[2] is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception." *Id*. at 201 (emphasis in original).

Following the rationale of *Mack*, the majority's holding that governmental immunity applies in this case is correct. As the majority notes, political subdivisions such as defendant enjoy immunity from tort liability under the GTLA.[3] And none of the six discrete

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[2] MCL 691.1401 *et seq*.

[3] MCL 691.1407(1) states: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1401(d) defines "governmental agency" as "the state or a political subdivision." Therefore, defendant city of Traverse City is a

areas[4] in which the GTLA permits a cause of action to be brought applies in this case. Moreover, there is no express authorization permitting a private cause of action against a public employer for violation of MCL 15.602(2). Therefore, under the rationale in *Mack*, governmental immunity applies to bar plaintiff's action.

Whenever governmental immunity applies, in accordance with *Mack,* a plaintiff must plead in avoidance of governmental immunity. *Mack*, *supra* at 198. In this case, plaintiff did not mention the doctrine in his pleadings or at any point in these proceedings.

Accordingly, it is of no legal consequence whether the residency requirement violated MCL 15.602 or whether the statute implies a private cause of action. However, the majority avoids acknowledging the dominant effect that governmental immunity has on this case and instead purports to hold, in addition, that (1) defendant's residency requirement contravenes MCL 15.602(2) and (2) plaintiff may not maintain a private cause of action for money damages for a violation of the statute. In my view, since the presumption of governmental immunity was never rebutted, it remains and utterly governs the case. The majority's conclusions on other issues is nothing but dicta.[5]

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governmental agency for purposes of governmental immunity. As this Court recognized in *Mack*, the management, operation, and control of a police department is a governmental function. *Mack*, *supra* at 204.

[4] See MCL 691.1402 (highway exception), MCL 691.1405 (motor vehicle exception), MCL 691.1406 (public building exception), MCL 691.1407(4) (governmental hospital exception), MCL 691.1413 (proprietary function exception), and MCL 691.1417 (sewage system exception).

[5] The majority never explains why "it is imperative to first determine whether a violation [of MCL 15.602(2)] exists . . . ." *Ante* at 191 n 16. Regardless of whether a violation exists, governmental immunity bars

GOVERNMENTAL IMMUNITY AS AN APPELLATE PARACHUTE

Long ago, governmental immunity was viewed as a characteristic of government. *Mack, supra* at 222 (CAVANAGH, J., dissenting). However, this view changed once the Legislature codified the common-law doctrine of governmental immunity. *Id*. at 220. Because the Legislature created no presumption favoring blanket governmental immunity, the existence of immunity had to be raised by the party seeking to benefit from it. *Id*. Using that reasoning, Justice CAVANAGH concluded in his dissent in *Mack* that governmental immunity is an affirmative defense. *Id*. I continue to support Justice CAVANAGH's dissent. I continue to believe that the better view is that governmental immunity is an affirmative defense and that the government still bears the burden of raising and proving it.

In this case, defendant listed governmental immunity as an affirmative defense in its first responsive pleading. However, it never mentioned it again until this Court asked about it. Apparently, because defendant did not mention the issue in its motion for summary disposition, the trial court did not address whether it applied. Because defendant did not mention the issue in the Court of Appeals, that Court did not address whether it applied.[6]

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plaintiff's cause of action. Only if and when plaintiff sought injunctive or declaratory judgment relief would a court need to decide whether defendant violated MCL 15.602(2).

[6] Neither the questions presented by plaintiff nor the counter-questions presented by defendant in the Court of Appeals concerned the issue of governmental immunity. The Court of Appeals has repeatedly stated that a party abandons an issue by failing to specifically raise it in the statement of questions presented. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007), citing MCR 7.212(C)(5).

Similarly, defendant did not raise the issue before this Court in its application for leave to appeal.[7] In granting leave to appeal, this Court did not order the parties to address the issue. See 477 Mich 920 (2006). Indeed, the first time the parties[8] clearly addressed the issue of governmental immunity was at oral argument before this Court when Chief Justice TAYLOR raised it sua sponte.[9]

Defendant ignored governmental immunity in this case until the eleventh hour. It should not be able to ignore the doctrine in the trial court and the Court of Appeals, then rely on it at the last minute before this Court. This Court should amend its holding in *Mack* to discourage a defendant from using governmental immunity as an appellate parachute.

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[7] Defendant did not explicitly address the issue of governmental immunity before this Court. Rather, in its brief before the Court of Appeals and this Court, defendant simply stated, "If the Legislature wanted to lift immunity, MCL 691.1407 *et seq*., and create a private cause of action, surely it would have said so." Other than a cursory citation of the GTLA, defendant did not attempt to argue that the act applied. Taken in context, defendant's citation of the GTLA was not in reference to any assertion that governmental immunity applies. Rather, it was in reference to the fact that there is no private cause of action. Therefore, neither of the parties raised the issue of governmental immunity before oral argument.

[8] Although the issue of governmental immunity was raised in an amicus curiae brief, the parties did not raise the issue.

[9] I would note that the procedural history regarding the issue of governmental immunity in this case is similar to that in *Mack*. There, the defendant city raised governmental immunity as a defense in the trial court, but failed to argue the issue in the Court of Appeals or in this Court. *Mack, supra* at 197 n 13. It was not until oral argument in *Mack* that the issue of governmental immunity was discussed. *Id.* at 226 n 2 (WEAVER, J., dissenting). So, just as the parties in this case neither briefed nor discussed whether governmental immunity applies, similarly, in *Mack*, none of the parties discussed or briefed the issue. In *Mack*, Justice WEAVER and Justice CAVANAGH strongly objected to other justices' sua sponte raising and relying on governmental immunity. Their concerns echo in the instant case as well.

THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION

I disagree with the majority's dictum that no private cause of action is available to plaintiff. In *Pompey v Gen Motors Corp*,[10] this Court summarized the rules of statutory interpretation that should be followed when determining whether an implied private cause of action exists to remedy a statutory violation. We observed that

> [t]he general rule, in which Michigan is aligned with a strong majority of jurisdictions, is 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. [*Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971).]

Significantly, the *Pompey* Court also noted two important exceptions to this rule:

> 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 553 n 14 (citations omitted).][11]

In this case, it is undisputed that no common-law right to relief exists and MCL 15.602 does not explicitly provide a cause of action for the enforcement of its provisions. However, using the test set forth in *Pompey*, I would find that the statute implies the availability of a private cause of action.

MCL 15.602 creates a new right in a particular class of persons. An employee has the right not to be required by his or her employer to reside within a specific

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[10] 385 Mich 537; 189 NW2d 243 (1971).

[11] In *Mack*, this Court concluded that *Pompey* was applicable to claims involving private actors as opposed to public actors. *Mack, supra* at 193 n 5. I continue to voice my disagreement with the decision. My analysis indicates how I would remedy the violation in this case.

geographic area, distance, or travel time from his or her place of employment. MCL 15.602(1). The legislative history of the statute supports the fact that the statute creates the right for an employee to be free from overly restrictive residency requirements imposed by his or her employer. The Senate Fiscal Agency bill analysis, in explaining the rationale behind the act, stated:

> Some people believe that these [residency] requirements unfairly infringe on what they believe is the right of the employee, as a citizen, to determine where he or she will live. It was proposed, therefore, that a State statute should prohibit the imposition of strict residency requirements on public employees, but allow local units of government to continue to require residency within a certain proximity. [Senate Fiscal Agency Analysis, SB 198, January 10, 2000.]

The bill analysis suggests that the statute was intended to balance the employer's desire for reasonable residency requirements against the employee's right to be free from unduly strict residency requirements.

When the Legislature creates a right in a statute, it must have intended that a remedy exist for a violation of the statute. However, MCL 15.602 does not contain an express remedy for its violation. The majority claims that plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605(A)(1). Although such equitable remedies are available, they may often be impractical in cases such as the one before us. For example, although a court may grant injunctive relief, all too frequently a plaintiff would not learn of the statutory violation until the job opening had been filled or eliminated. No action by the employer would remain to be enjoined. Injunctive relief would be useful, if at all, mostly for future applicants and would not assist the plaintiff.

Similar problems exist should a plaintiff bring a declaratory judgment action. It would be of no help to plaintiff in the instant case for a court to make a declaration that defendant's residency requirement is illegal. By the time the decision was issued, the job vacancy that plaintiff sought to fill would have been filled. Accordingly, the Legislature must have intended to allow a private cause of action that includes monetary damages for an aggrieved person in response to a violation of MCL 15.602.

CONCLUSION

I agree with the majority's holding that, pursuant to *Mack*, governmental immunity bars plaintiff's action. However, because governmental immunity applies, the majority's discussion of whether the residency requirement violates MCL 15.602(2) and whether a private cause of action exists is nothing more than dictum.

Were it not for the holding in *Mack,* which I continue to find badly flawed, I would hold that MCL 15.602 implies a private cause of action. Also, I would hold that the 20-mile distance permitted in MCL 15.602 should be measured in radial as opposed to road miles. Finally, but for *Mack,* I would hold that defendant abandoned the defense of governmental immunity.

BLOOMFIELD ESTATES IMPROVEMENT ASSOCIATION, INC
v CITY OF BIRMINGHAM

Docket No. 130990. Argued April 10, 2007 (Calendar No. 1). Decided July 18, 2007.

Bloomfield Estates Improvement Association, Inc., brought an action against the city of Birmingham in the Oakland Circuit Court to enforce a deed restriction limiting the use of a lot to residential purposes after the city turned the lot in question into a "dog park," a fenced area in which the public could allow their dogs to roam unleashed. The court, Deborah G. Tyner, J., granted summary disposition to the defendant after concluding that, although the plaintiff had not waived its right to enforce the deed restriction through acquiescence, the deed restriction was not violated because the use of the lot as a dog park constituted a residential use. In an unpublished opinion per curiam, issued March 14, 2006 (Docket No. 255340), the Court of Appeals, DONOFRIO, P.J., and DAVIS, J. (BORRELLO, J., dissenting), reversed, holding that use of the lot as a municipal park violated the deed restriction and that, despite the fact that the lot had been used for nonresidential purposes for at least 75 years, the plaintiff was not estopped from challenging more serious or extensive violations to which it had not acquiesced, including the lot's use as a dog park. The Supreme Court granted the defendant's application for leave to appeal. 477 Mich 958 (2006).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

1. The use of the lot both as a park and as a dog park violates the deed restriction that limits the lot's use to "strictly residential purposes only." The term "residential" refers to homes where people reside. Moreover, because the deed restriction permits only a "single dwelling house" to be built, the restricted land may be used solely for a "single dwelling house" and immediately related purposes. Therefore, the phrase "strictly residential purposes only" precludes the use of the lot as a dog park.

2. The plaintiff may enforce the deed restriction despite the plaintiff's failure to contest the use of the lot as a park because the use of the lot as a dog park constitutes a "more serious" violation of the deed restriction. The violation is "more serious" because it

involves the erection of a permanent structure on the lot, creates continuous and systematic use of the lot whereas previous use was irregular, affirmatively encourages people to bring their dogs to the lot whereas dogs were previously prohibited from it, and generates more traffic in the surrounding neighborhoods.

Justice CAVANAGH concurred in the result only.

Affirmed and remanded to the trial court for the entry of an order of summary disposition in favor of the plaintiff and for the determination of the appropriate remedy.

Justice KELLY, joined by Justice WEAVER, dissenting, disagreed with the determinations by the majority that the use of the lot in question as a dog park violates the deed restriction and that the plaintiff can enforce the restriction even though it failed to object to the use of the lot as a park for over 75 years. By defining "residential purposes" to include only single dwelling houses and immediately related purposes, the majority reduces other language in the deed restriction to a redundancy and violates well-established rules of construction that restrictions on the otherwise free use of land must be explicit in terms and cannot be enlarged or expanded by construction and that restrictive covenants are to be strictly construed against the party seeking to enforce them and all doubts resolved in favor of the free use of property. The Supreme Court should follow the definition of "residential purposes" adopted by most other states and hold that covenants restricting property to "residential purposes" merely limit the use of the property to living purposes as distinguished from businesses or commercial purposes. A use that is of the same nature as a previous, unobjected-to use does not amount to a flagrant violation. A dog park is of the same nature as a park. The plaintiff waived the right to object to the use of the lot as a dog park by acquiescing in the use of the lot as a park for over 75 years. The judgment of the Court of Appeals should be reversed and the judgment of the trial court should be reinstated.

1. COVENANTS — WORDS AND PHRASES — RESIDENTIAL — SINGLE DWELLING HOUSE.

A deed restriction limiting use of land to "residential" purposes and permitting only a "single dwelling house" to be built indicates that the intended use is as a "single dwelling house" and immediately related purposes.

2. COVENANTS — ACQUIESCENCE — WAIVER.

A plaintiff may contest a "more serious" violation of a deed restriction, even if that plaintiff has not contested less serious violations of the deed restriction in the past.

3. COVENANTS — ACQUIESCENCE — WAIVER — SERIOUSNESS OF SUBSEQUENT VIOLATION.

A "more serious" violation of a deed restriction occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation; that is, use that constitutes a "more serious" violation imposes a greater burden on the holder of a deed restriction than the burden imposed by a previous violation.

Kemp, Klein, Umphrey, Endelman & May, P.C. (by *Raymond L. Morrow* and *Ronald S. Nixon*), for the plaintiff.

Beier Howlett, P.C. (by *Timothy J. Currier* and *Jeffrey S. Kragt*), for the defendant.

MARKMAN, J. We granted leave to appeal to consider: (1) whether the use of a park as a "dog park" violates a deed restriction limiting use of the land to "residential purposes only"; and (2) whether a plaintiff has waived the ability to challenge a violation of a deed restriction when the plaintiff has failed to challenge less serious violations of the deed restriction in the past. We affirm the judgment of the Court of Appeals that use of land for a "dog park" violates a deed restriction limiting use of the land to "residential purposes only." Moreover, we also affirm the judgment of the Court of Appeals that a plaintiff may contest a "more serious" violation of a deed restriction, even if such plaintiff has not contested less serious violations of the deed restriction in the past. Accordingly, we remand this case to the trial court for the entry of an order of summary disposition in favor of plaintiff, and for a determination of the appropriate remedy.

I. STATEMENT OF FACTS

In 1915, the Bloomfield Estates Company recorded deed restrictions on lots in the Bloomfield Estates

subdivision. Among the lots on which the deed restrictions were imposed was Lot 52, which is the lot at issue in this case. Around 1928, Bloomfield Township purchased Lot 52 and other restricted subdivision lots pursuant to a plan to create a park. In 1929, a complaint was filed by the Bloomfield Township Board of Trustees to remove these deed restrictions, but the complaint was later voluntarily dismissed. In 1938, defendant city of Birmingham was deeded the restricted lots being used as a park, including Lot 52. The quitclaim deeds were "subject to the building and use restrictions of record." This land was incorporated into Springdale Park, a 55-acre park administered by defendant city. Only a portion of Springdale Park is burdened by the deed restriction at issue in this case. In 1941, plaintiff association was formed to enforce the deed restrictions on behalf of landowners in the Bloomfield Estates subdivision. The Bloomfield Estates Company quitclaimed its remaining rights to plaintiff in 1955.

Springdale Park has been used over the years for a variety of park-related activities, including those that might be characterized as involving unusual amounts of noise. For example, the park has been used for dances, Girl Scout camping, and baseball games. However, the Girl Scout camping and the dances did not occur on land burdened by the deed restrictions. Although baseball games took place on lots burdened by the deed restrictions in 1947, plaintiff requested that defendant cease allowing baseball games on these lots. Defendant responded by stating that "restrictions will be placed on the use of the park," and "it is not our intent to use Lots 57 and 58 for baseball games." Another 1947 letter challenged a building on Lot 42 that violated the deed restrictions, and defendant responded by stating that it would remove the building. In 1951, plaintiff again challenged the use of restricted lots for baseball games

and the presence of a maintenance building on a restricted lot. Defendant responded by noting that baseball had not been played on the property for 12 months, and that defendant would "remove this [maintenance] building from this lot." Although plaintiff has challenged violations of the deed restrictions occurring on restricted lots of the park, plaintiff has never challenged the use of the lots as a park.

In 2003, plaintiff became aware that defendant planned to use Lot 52 of Springdale Park as a "dog park," a fenced area within which dogs could roam unleashed. Plaintiff alerted defendant that plaintiff would enforce its rights under the deed restriction if the dog park was built. In 2004, defendant built the dog park. At the time the dog park was erected, dogs were not allowed in Springdale Park, and signs indicated that dogs were prohibited. Plaintiff filed suit against defendant, seeking enforcement of the deed restriction and injunctive relief against use of Lot 52 as a dog park. Plaintiff also asked the trial court to order defendant to tear down the fence.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had waived its right to enforce the deed restriction, and that the use of Lot 52 as a dog park did not violate the deed restriction. The trial court granted summary disposition to defendant. The trial court ruled that plaintiff had not waived its right to enforce the deed restriction through acquiescence; however, the trial court also concluded that the deed restriction was not violated, because the use of Lot 52 as a dog park constituted a "residential" use.

Plaintiff appealed to the Court of Appeals, and the Court of Appeals reversed in a split decision. Unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 255340). The Court

of Appeals determined that "reference to dictionary definitions shows that the restriction did not contemplate using the property as a park." *Id*., slip op at 3. Consequently, "[u]se of Lot 52 as part of a municipal park violates the deed restriction irrespective of whether part of it is fenced off as a dog park." *Id*. Because the lots had been used as a park for 75 years, "equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use." *Id*., slip op at 4. However, plaintiff could "challenge more serious or more extensive violations." *Id*., citing *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625, 629-630; 227 NW 772 (1929). Because the dog park constituted a "more serious violation of the deed restrictions," plaintiff could challenge that use. *Id*. Consequently, the Court of Appeals found that the trial court erred in granting summary disposition for defendant. The Court of Appeals reversed the trial court and remanded for the entry of an order of summary disposition in favor of plaintiff. It also remanded for the trial court to determine if an injunction was warranted under these circumstances.

The dissenting judge would have held that plaintiff could not object to the use of Lot 52 as a dog park, because "common sense would . . . suggest that while [Lot 52] has been a park for the past seventy-five years, people have brought their dogs to this park." *Id*., slip op at 2. For that reason, the use of Lot 52 as a dog park did not constitute a " 'more serious violation of the deed restrictions.' " *Id*. We granted defendant's application for leave to appeal. 477 Mich 958 (2006).

II. STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Saffian v Simmons*, 477 Mich 8,

12; 727 NW2d 132 (2007). The scope of a deed restriction is a question of law that is reviewed de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002).

III. ANALYSIS

A. VIOLATION OF DEED RESTRICTION

A deed restriction represents a contract between the buyer and the seller of property. *Uday v City of Dearborn*, 356 Mich 542, 546; 96 NW2d 775 (1959). "Undergirding this right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is . . . deeply entrenched in the common law of Michigan." *Terrien*, *supra* at 71 n 19, citing *McMillan v Mich S & N I R Co*, 16 Mich 79 (1867). The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 US 3, 22; 3 S Ct 18; 27 L Ed 835 (1883). We "respect[] the freedom of individuals freely to arrange their affairs via contract" by upholding the "fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*," unless a contractual provision "would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 468, 470; 703 NW2d 23 (2005) (emphasis in original). As one court has stated:

> Courts do not make contracts for parties. Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways. [*Rarities Group, Inc v Karp*, 98 F Supp 2d 96, 106 (D Mass, 2000).]

" 'Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains . . . .' " *Fed Deposit Ins Corp v Aetna Cas & Surety Co*, 903 F2d 1073, 1077 (CA 6, 1990), quoting *St Paul Mercury Ins Co v Duke Univ*, 849 F2d 133, 135 (CA 4, 1988). Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract." *Rich Products Corp v Kemutec, Inc*, 66 F Supp 2d 937, 968 (ED Wis, 1999). Rather than attempt to apply an abstract notion of "justice" to each particular case arising out of a contract, we recognize that refusal to enforce a contract is "contrary to the real justice as between [the parties]." *Mitchell v Smith*, 1 Binn 110, 121 (Pa, 1804). See also *Brown v Vandergrift*, 80 Pa 142, 148 (1875) (holding that enforcing a contract is "essential to do justice"). Consequently, when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not "contrary to public policy."[1] *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). When contracts are formed, the parties to the contract are the lawmakers in such realm and deference must be shown to their judgments and to their language as with regard to any other lawmaker.

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[1] Defendant has not attempted to show that the deed restriction violated public policy; indeed, we have consistently supported the right of property owners to form deed restrictions. See *Terrien*, *supra* at 71.

Because of this Court's regard for parties' freedom to contract, we have consistently "support[ed] the right of property owners to create and enforce covenants affecting their own property." *Terrien*, *supra* at 71. Such deed restrictions " 'generally constitute a property right of distinct worth.' " *Rofe v Robinson*, 415 Mich 345, 350; 329 NW2d 704 (1982), quoting *Cooper v Kovan*, 349 Mich 520, 531; 84 NW2d 859 (1957). Deed restrictions " 'preserve not only monetary value, but aesthetic characteristics considered to be essential constituents of a family environment.' " *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983), quoting *Bellarmine Hills Ass'n v Residential Systems Co*, 84 Mich App 554, 559; 269 NW2d 673 (1978). If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom "freely to arrange their affairs" by the formation of contracts to determine the use of land. *Rory*, *supra* at 468. Such contracts allow the parties to preserve desired "aesthetic" or other characteristics in a neighborhood, which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties.

The deed restriction at issue here states:

> Each lot or lots shall be used for *strictly residential purposes only*, and no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots except that Lot 1 may be used for four dwelling houses and the necessary out-buildings, and that three houses may be erected on Lots 40 and 41. [Emphasis added.]

At issue then is the meaning of the phrase "strictly residential purposes only." Although the deed restriction does not define "residential," where a term is not defined in a contract, "we will interpret such term in accordance with its 'commonly used meaning.' " *Terrien*, *supra* at 76-77, quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Moreover, under the doctrine of *noscitur a sociis*, " 'a word or phrase is given meaning by its context or setting.' " *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002), quoting *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 437; 628 NW2d 471 (2001).

The deed restriction limits the use of restricted land to "strictly residential purposes only." The term "residential" means "pertaining to residence or to residences." *Random House Webster's College Dictionary* (1997). "Residence" means "the place, esp[ecially] the house, in which a person lives or resides; dwelling place; home." *Id*. The term "residential" in the deed restriction thus refers to homes where people reside. By using the terms "strictly" and "only," the deed restriction seeks to underscore or emphasize that restricted land may only be used for this purpose.

This conclusion is bolstered by the remaining language in the deed restriction, which states that "no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots." This language indicates that when the deed restriction refers to "residential purposes," the intended use is as a "single dwelling house" and immediately related purposes. The only exceptions listed—"that Lot 1 may be used for four dwelling houses and the necessary out-buildings, and that three houses may be erected on Lots 40 and 41"—further clarify that the

term "residential" refers to a "single dwelling house." Neither of the two listed exceptions allows for use of Lot 52 as a park. Therefore, the phrase "strictly residential purposes only" precludes use of Lot 52 as a park and such use violated the deed restriction.

Because use of the restricted land as a park violated the deed restriction, the use of Lot 52 as a dog park violated the deed restriction as well. Our prior holdings support this conclusion. Cf. *Wood v Blancke*, 304 Mich 283, 288-289; 8 NW2d 67 (1943) (The raising of 40 carrier pigeons for private use did not constitute use for "residence purposes."). Defendant argues that the deed should be construed to allow a broad range of activity to be considered "residential." Although our courts have noted that "[a] restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses," *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 326; 317 NW2d 611 (1982), those cases have concerned a landowner who was using his or her home for business purposes *in addition to residential use*. In *Beverly*, the Court of Appeals permitted a homeowner to run a small day care facility from her home because this use was indistinguishable from the use resulting if the homeowner "simply ha[d] a large family."[2] *Id*. at 328. In *Miller v Ettinger*, 235 Mich 527; 209 NW 568 (1926), we allowed a landowner burdened by a restriction that the land be used "solely for residence purposes" to build an apartment building on the land. Here, Lot 52 is being used as a park, and prospectively as a dog park. Neither of these uses involves the use of Lot 52 as a dwelling place, and consequently these uses do not conform to the deed restriction.

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[2] Cf. *Terrien*, *supra* at 60, which held that use of land as a day care center was not permitted under a deed restriction that prohibited use of the land " 'for any commercial, industrial, or business enterprises.' "

Defendant further argues that using the land to allow dogs to roam constitutes a "residential" use because homeowners may allow dogs to wander in their own backyards under "residential purposes only" restrictions. However, the instant case is distinguishable from the backyard scenario. Most importantly, a backyard is attached to a home, and hence fits within the actual meaning of the term "residential." That is, a backyard is an extension of a residence. A dog park is not attached to a home, and hence does not accord with the meaning of the term "residential." Moreover, a dog park lacks two characteristics of a backyard, which suggests that a dog park is not included within the commonly understood meaning of "residential" use. First, because a backyard is attached to a home, the master exercises some level of control over the backyard. Here, no one person controls the dog park. Second, the dog park may permit use by a great multitude of dogs at one time, while a backyard generally contains at most a few dogs.[3] These characteristics sufficiently distinguish a dog park from the meaning normally ascribed to "residential" use, thereby indicating that the dog park violates the deed restriction limiting Lot 52 to "residential" use.[4]

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[3] Moreover, the number of dogs in a yard may be limited by local ordinance, while the dog park in this case had no limits on the number of dogs permitted.

[4] Defendant and the dissent argue that we should construe the deed restriction in light of the applicable zoning ordinances, citing *Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 152 (1935). However, we later said that *Brown* confirmed the rule that "*ambiguous* restrictions may be interpreted in the light of a general plan." *Smith v First United Presbyterian Church*, 333 Mich 1, 8; 52 NW2d 568 (1952) (emphasis added). Because the deed restriction in this case is not ambiguous, consideration of the zoning ordinances is not necessary. Defendant and the dissent further argue that the deed restriction should be construed in favor of the free use of property. See *O'Connor v Resort Custom Builders,*

Thus, use of Lot 52 as both a park and a dog park violates the deed restriction, which limits the use of the land to "residential purposes only."

B. CONTESTING USE OF LOT 52

Defendant argues that, even if the deed restriction was violated by use of Lot 52 as a dog park, plaintiff cannot enforce the deed restriction in light of its acquiescence to prior violations of the deed restriction. That is, defendant contends that the deed restriction was effectively waived.

> With regard to whether a restriction has been waived, we likewise have said that "whether or not there has been a waiver of a restrictive covenant or whether those seeking to enforce the same are guilty of laches are questions to be determined on the facts of each case as presented." [*Id*., quoting *Grandmont Improvement Ass'n v Liquor Control Comm*, 294 Mich 541, 544; 293 NW 744 (1940).]

We have found that waiver did not occur if a plaintiff "promptly filed" suit "[w]hen it became apparent to plaintiff that the owner of [a restricted lot] was about to use it for commercial purposes [in violation of a deed restriction]." *Baerlin v Gulf Refining Co*, 356 Mich 532, 536; 96 NW2d 806 (1959). Defendant asserts that plaintiff's failure to "promptly file" suit to preclude the use of Lot 52 as a park effectively waived plaintiff's ability to contest the use of Lot 52 as a dog park.

Plaintiff argues, however, that though it has never contested the use of Lot 52 as a park, it may still contest the proposed use of Lot 52 as a dog park. In *Jeffery v Lathrup*, 363 Mich 15; 108 NW2d 827 (1961), we stated

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Inc, 459 Mich 335, 341-342; 591 NW2d 216 (1999). However, this rule "should not be applied in such a way as to defeat the plain and obvious purposes of a contractual instrument or restriction." *Brown*, *supra* at 560.

the general rule that if a plaintiff has not challenged previous violations of a deed restriction, the restriction "does not thereby become void and unenforceable when a violation of a *more serious and damaging degree occurs*." *Id*. at 22 (emphasis added). See also *Sheridan v Kurz*, 314 Mich 10, 13; 22 NW2d 52 (1946); *Cherry v Bd of Home Missions of Reformed Church in United States*, 254 Mich 496, 504; 236 NW 841 (1931); *Goodlove, supra* at 629 ("Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions."). When determining whether prior acquiescence to a violation of a deed restriction prevents a plaintiff from contesting the current violation, we compare the character of the prior violation and the present violation. Only if the present violation constitutes a "more serious" violation of the deed restriction may a plaintiff contest the violation despite the plaintiff's acquiescence to prior violations of a less serious character. In general, a "more serious" violation occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation. See, e.g., *Sheridan*, *supra* (holding that a more serious violation occurred when noise caused by a later violation represented a dramatic increase from noise caused by an earlier violation). That is, use that constitutes a "more serious" violation imposes a greater burden on the holder of a deed restriction than the burden imposed by a previous violation. Although determining whether a "more serious" violation occurred will hinge on the facts of a particular case, some relevant factors that may be considered include: (1) whether the later violation involved the erection of a structure where no such struc-

ture had previously been permitted;[5] (2) whether the later violation constituted a more extensive violation of restrictions on the size or extent of a building;[6] (3) whether the later violation increased the use of land from a sporadic violation of the restriction to a continuous violation;[7] (4) whether the later violation significantly increased the noise or pollutant level on restricted land;[8] (5) whether the later violation increased the level of traffic occasioned by the prior violation;[9] (6) whether the later violation permitted an action that had been previously prohibited; and (7) whether the later violation altered in some material respect the character of the use of the restricted property.[10]

The dog park constitutes a "more serious" violation of the deed restriction than the previous uses of Lot 52. First, the dog park includes a permanent structure—an enclosed, fenced area—on Lot 52. Before the dog park, no such structures existed on the restricted lots. Second, the dog park will create continuous and systematic use of Lot 52, whereas previously the use of the restricted lots was irregular and sporadic. Third, the dog park will affirmatively encourage people to bring their dogs to Lot 52. Before Lot 52 was used as a dog park, dogs were prohibited from the park by posted "No

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[5] See *Goodlove*, *supra*.

[6] See *Kelman v Singer*, 222 Mich 454; 192 NW 580 (1923).

[7] See *Woughter v Van Marter*, 281 Mich 408; 275 NW 236 (1937).

[8] See *Sheridan*, *supra*.

[9] *Id*.

[10] For example, if the later violation consisted of an "exclusively commercial" use of restricted land, such as a gas station, whereas prior violations consisted of commercial activity taking place within a residence, such as a home-based dressmaking or computer repair establishment, the later violation might well be determined to alter the character of the use of the restricted property. *Polk Manor Co v Manton*, 274 Mich 539, 541-543; 265 NW 457 (1936).

Dogs" signs. Hence, an activity that was once expressly *prohibited* is now *sanctioned* and *encouraged* by the creation of the dog park. Fourth, by encouraging more regular use of Lot 52, the dog park will generate more traffic in the surrounding neighborhoods than the previously irregular and sporadic use of the restricted lots. In summation, use of Lot 52 as a dog park effectively transforms the property from a vacant park to something akin to a public kennel. Consequently, this use constitutes a "more serious" violation of the deed restriction than the previous use as an open section of Springdale Park.

Because plaintiff has previously objected to "more serious" violations of the deed restrictions that also raised similar concerns of noise and the erection of permanent structures on restricted land, plaintiff has not, in our judgment, waived its ability to contest this "more serious" violation.

Defendant raises several arguments in opposition to the application of this rule. It argues that the park had previously been subject to noisy uses, and thus plaintiff acquiesced to noisy uses of the park, pointing to the park's previous use for overnight Girl Scout camping, large dances, and baseball on permanent baseball diamonds. However, these uses occurred in sections of the park that were *unburdened* by the relevant deed restrictions.[11] Defendant would thus require plaintiff to object to "violations" of the deed restriction that occurred on *unrestricted* land, i.e., land uses that simply did not violate deed restrictions. However, plaintiff would have no authority or basis on which to object to violations of deed restrictions that did not apply to the land on which

[11] As described earlier, plaintiff objected to use of the park for baseball games when those games occurred on lots burdened by the deed restrictions.

the "violations" occurred. We have never imposed such an obligation on the holders of a restricted deed. See, e.g., *Brideau v Grissom*, 369 Mich 661, 667; 120 NW2d 829 (1963) (allowing the plaintiff property owners to enforce a deed restriction on adjacent property even though the plaintiffs had not objected to similar violations that occurred several blocks away).[12]

Defendant also argues that allowing plaintiff to contest the dog park after acquiescing to the park itself will permit those with the right to enforce deed restrictions to "pick and choose" which violations will be tolerated. However, allowing a plaintiff to enforce a deed restriction against a "more serious" violation does not grant that plaintiff an unlimited right to "pick and choose" which violations to allow and which violations to contest. A plaintiff can only contest "more serious" violations of the relevant deed restriction. Therefore, a plaintiff who acquiesces to one violation is thereafter prevented from contesting violations of an equivalent nature. However, a plaintiff who acquiesces to a seemingly innocuous violation would not forever be prevented from challenging more serious violations.

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[12] Citing *Goodlove*, *supra* at 629, defendant further argues that the original violation must have been a "slight deviation" from the deed restriction, and that the use of Lot 52 as a park was not a "slight deviation." But see contra *Jeffery*, *supra* at 22 ("Where the restriction has been violated *in some degree*, it does not thereby become void and unenforceable when a violation of a more serious and damaging degree occurs.") (emphasis added); *Cherry*, *supra* at 504 ("[*T*]*o the extent* plaintiffs had for a long time acquiesced in defendant's violation of the restrictions they were estopped from asking injunctive relief.") (emphasis added). Moreover, the facts in *Sheridan*—in which the prior violation consisted of the owner's operation of an engine repair business in a garage—could hardly be considered a "slight deviation" from a "residence purposes only" deed restriction. Hence, the touchstone of the rule regarding waiver is the disparity between the prior and the present violations, and not the initial existence of a "slight deviation."

Defendant essentially proposes a rule that would require those with the right to enforce deed restrictions to challenge every arguable violation of the deed restrictions, even minor technical violations, in order to ensure that the deed restrictions retain their effect. A plaintiff "should not be impelled to engage in overzealous covenant enforcement fearing possible waiver of future enforcement rights." 2 Restatement Property, 3d, Servitudes, § 8.3, comment f, p 502. In this case, defendant's proposed rule would prevent plaintiff from challenging the use of Lot 52 for a zoo, a waterpark, or a motocross track. Adopting defendant's rule would create increasing chaos in the enforcement of deed restrictions.

IV. RESPONSE TO THE DISSENT

The dissent first concludes that the dog park constitutes a "residential" use under the terms of the deed restriction. To reach this conclusion, instead of simply examining the language that the parties themselves employed, the dissent defines the terms in the deed restriction by considering how other states have construed altogether different deed restrictions.[13] This in-

[13] The dissent offers two reasons for its rejection of our interpretation of the deed restriction. First, the dissent relies on the proposition that "restrictive covenants are to be strictly construed against the party seeking to enforce them and all doubts resolved in favor of the free use of property." *Post* at 230. However, this rule is " 'applicable only as a last resort, when other techniques of interpretation and construction have not resolved the question of which of two or more possible reasonable meanings the court should choose.' " *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 472-473; 663 NW2d 447 (2003) (citation omitted). Second, the dissent asserts that the majority "reduces to a redundancy the language prohibiting buildings other than single dwelling houses," *post* at 231, by concluding that the term "residential purposes only" in this particular deed refers to a "single dwelling house." However, the dissent mischaracterizes this opinion. We first conclude that the term "residential" refers to a residence or a dwelling home. Only then, because

terpretative technique fails for two reasons. First, the intent of the parties is properly determined from the words used by the parties themselves, not from the decisions of foreign (or even Michigan) courts addressing different deeds containing different language. Second, the majority of the cases cited by the dissent involve deed restrictions that merely limit the use of property to "residential purposes," and hence are readily distinguishable.[14] Furthermore, *Baker v Smith*, 242 Iowa 606; 47 NW2d 810 (1951), merely held that a restriction limiting use to a "dwelling place" did not preclude use as an apartment building. The instant case obviously does not involve the use of Lot 52 as a residence in any form. See also *Isbrandtsen v North Branch Corp*, 150 Vt 575; 556 A2d 81 (1988) (restriction limiting use to "single-family residence purposes only" did not preclude an owner from inviting guests to spend the night).

After arguing that the dog park is a "residential" use, the dissent further concludes that, even if the dog park is not "residential," it does not constitute a "more serious" violation of the deed restriction. The dissent principally relies on *Cherry* to conclude that a "more serious" violation did not occur because a "dog park is of the same nature as a park." *Post* at 238. However,

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the deed restriction explicitly limits the use of Lot 52 to a "single dwelling house," do we conclude that the deed restriction limits the use of Lot 52 to a "single dwelling house" and immediately related purposes. Hence, the dissent's assertion that we make the term "single dwelling house" a "redundancy" is completely without basis.

[14] See *Bagko Development Co v Damitz*, 640 NE2d 67 (Ind App, 1994); *Voedisch v Town of Wolfeboro*, 136 NH 91; 612 A2d 902 (1992); *Winn v Ridgewood Dev Co*, 691 SW2d 832 (Tex App, 1985); *Shermer v Haynes*, 248 Ark 255; 451 SW2d 445 (1970). The dissent fails to acknowledge that the deed restriction in this case limits the use of Lot 52 to a "single dwelling house," thereby making this case distinguishable from the cases cited.

Cherry addressed whether a plaintiff could contest the defendant's erection of a new church on restricted land after the plaintiff had allowed the defendant to continuously operate a church building on the same property for several years. We held that the plaintiff could not contest the new church building because "a church is a church," and the plaintiff had previously acquiesced to the prior church building. *Cherry*, *supra* at 501. Unlike the church in *Cherry*, the use of Lot 52 as a dog park differs considerably from its previous use as a vacant park.

In rejecting our determination that the dog park constitutes a "more serious" violation, the dissent criticizes this opinion by arguing that "there are no court findings" in support of our conclusion that the dog park constitutes a "more serious" violation. *Post* at 239. However, no "court findings" are necessary. When a city affirmatively encourages the use of a park for a purpose that previously has been prohibited,[15] the record supports the conclusion that a "more serious" violation is shown because some number of people will, in fact, use the park for that purpose.[16]

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[15] The dissent asserts that "the facts must be considered in the light most favorable to defendant," *post* at 239 n 13, to support its contention that the facts in this case do not indicate that the dog park constitutes a "more serious" violation. When considering a motion for summary disposition under MCR 2.116(C)(10), a court should "draw[] all *reasonable* inferences in the nonmovant's favor." *de Sanchez v Dep't of Mental Health*, 455 Mich 83, 89; 565 NW2d 358 (1997) (emphasis added). The dissent would apparently find that a reasonable inference may be drawn that fewer people will use Lot 52 after the erection of the dog park. However, because Lot 52 has been transformed from a vacant lot to a dog park, and defendant is actively encouraging the use of Lot 52 by dog owners after such use was previously prohibited, such an inference is not reasonable, in our judgment.

[16] The dissent claims that "we do not know whether dogs were prohibited from the park" or, if dogs were prohibited, "how long" such a prohibition existed. *Post* at 239 n 12. However, the record is clear that, before the introduction of the dog park, dogs were prohibited. Further, defendant failed to demonstrate that the prohibition was of recent origin,

The dissent further criticizes this opinion by stating that a new structure has not been permitted on Lot 52 because, before the dog park, "it appears that three sides of the lot were already fenced." *Post* at 240. However, even accepting this fact, the dissent ignores the fact that the building of the dog park required still another fence to be built, which then fully enclosed the area. Before the dog park, no such enclosure existed. Moreover, the dissent completely disregards the other factors that suggest that the dog park constitutes a "more serious" violation.

In conclusion, the dissent's argument that the parties intended to include a dog park within the ambit of "residential" use erroneously relies on foreign precedent rather than on the actual language used by the parties to the deed restriction. Moreover, although the dissent relies on *Cherry* to support its claim that a "more serious" violation did not occur here, *Cherry* does not support its argument because, unlike the instant case, the prior use in *Cherry* was indistinguishable from the use objected to. Further, the dissent's arguments that the dog park is not a "more serious" violation of the deed restriction fail to demonstrate that we have improperly applied the relevant factors in this case.[17]

V. CONCLUSION

We affirm the Court of Appeals holding that the use of Lot 52 both as a park and as a dog park violates the

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acknowledging several times at oral argument that "we don't know when the ['No Dogs'] sign went up." Even supposing that dogs were permitted in the park for some unknown period before their prohibition, the dissent simply ignores the difference between an occasional dog in the park and the regular and continuous use encouraged by a dog park.

[17] Although the dissent asserts that this decision will "increase lawsuits," *post* at 241, we have applied this rule for at least 80 years without any appreciable flood of litigation.

deed restriction that limits the use of Lot 52 to "strictly residential purposes only." We further affirm the Court of Appeals conclusion that plaintiff may enforce the deed restriction despite plaintiff's failure to contest the use of Lot 52 as a park, because the use of Lot 52 as a dog park constitutes a "more serious" violation of the deed restriction. We remand this case to the trial court for the entry of an order of summary disposition in favor of plaintiff, and for a determination of the appropriate remedy.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. I concur in the result only.

KELLY, J. (*dissenting*). This is a dispute over a dog park. Three years ago, defendant city of Birmingham fenced off one acre of property in a city park[1] to allow dogs to run off-lead under the supervision of their owners. Plaintiff Bloomfield Estates Improvement Association, Inc., sued to block defendant from this use by seeking to enforce a deed restriction that limited portions of the park to residential purposes. A majority of this Court holds that using the lot as a dog park violates the deed restriction. It also holds that plaintiff can enforce the deed restriction even though plaintiff failed to object to use of the lot as a park for over 75 years. Because I disagree on both points, I respectfully dissent.

FACTS

This case arises out of defendant's use of lot 52 of Bloomfield Estates Subdivision. Deed restrictions on

[1] The record suggests that the park itself is fenced and restricted to residents of the city of Birmingham, perhaps only to fee-paying residents. Others may be admitted, if at all, only as guests of residents or on an increased fee basis.

the lot were recorded in 1915 by the Bloomfield Estates Company. The relevant language states that "[e]ach lot or lots shall be used for strictly residence purposes only and no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots . . . ." In 1928, Bloomfield Township purchased lot 52. It planned to use the land as part of a park. Later that year, the township opened the park, and lot 52 has been parkland since that date. In 1938, defendant city of Birmingham acquired the park from the township and renamed it Springdale Park. Since its opening, various improvements have been made, including addition of a baseball diamond, golf course, community house, and clubhouse.

In 2004, defendant fenced off a grassy part of lot 52 to be used exclusively as a dog park.[2] After construction of the off-leash dog area, plaintiff, which had been deeded the rights of Bloomfield Estates Company in 1955, sued to close the dog park. Defendant moved for summary disposition, and the trial court granted the motion, finding that plaintiff had not shown that defendant's use of the lot violated the deed restriction. Plaintiff appealed. In a two-to-one decision, the Court of Appeals reversed. Unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 255340). The Court of Appeals majority found that use of the lot as a park violated the deed restriction. It also found that plaintiff had acquiesced in the use and that plaintiff could no longer seek enforcement of the deed restriction against that use. However, the majority limited the acquiescence to the actual use to which plaintiff had acquiesced. And because it found that a dog park was a

[2] Defendant asserts that three sides of the lot were already fenced before it became a dog park. Appellant's reply brief, p 2. Plaintiff does not contest that statement.

more serious violation of the restrictive covenant, the majority held that plaintiff could enforce the deed restriction against that use. Accordingly, the majority remanded the case to the trial court for entry of summary disposition in plaintiff's favor. Judge BORRELLO dissented. He would have found that plaintiff waived its objection and was barred from bringing an action to enforce the deed restriction.

Plaintiff applied for leave to appeal in this Court. We granted the application and directed the parties to include among the issues to be briefed "whether the use of Bloomfield Estates Subdivision lots in Springdale Park violates the deed restrictions, whether plaintiff is estopped from seeking enforcement of the deed restrictions, and what remedies may be available if there are violations of the deed restriction." 477 Mich 958 (2006).

STANDARD OF REVIEW

This court reviews de novo a decision whether to grant or deny a motion for summary disposition. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). The scope of a deed restriction is also reviewed de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002).

USING THE LOT AS A DOG PARK DOES NOT VIOLATE THE DEED RESTRICTION

The relevant portion of the deed restriction provides that lot 52 must be used for residential purposes. The initial consideration, therefore, is whether a dog park is consistent with a residential purpose. If it is, then the restriction has not been violated. Only if use as a dog park is not a residential purpose must the Court decide whether to enforce the restriction against the dog park.

In giving meaning to the phrase "residential purpose," an important concept should be considered. This Court has long held that restrictions on the otherwise free use of land must be explicit in terms and cannot be enlarged or extended by construction. *In re Nordwood Estates Subdivision*, 291 Mich 563, 568; 289 NW 255 (1939). As recently as eight years ago, we reiterated our rule: restrictive covenants are to be strictly construed against the party seeking to enforce them and all doubts resolved in favor of the free use of property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 340; 591 NW2d 216 (1999).

Although Michigan courts have been called on to construe restrictions containing language similar to the covenant involved here, no Michigan court has ever explicitly defined the phrase "residential purpose." The majority now does that. In giving meaning to the phrase, it relies heavily on a dictionary and defines "residential purpose" to include only "a 'single dwelling house' and immediately related purposes." *Ante* at 215. On the basis of this definition, the majority finds that use as a dog park is not a residential purpose.

The majority's decision is flawed for several reasons. First, ignoring this Court's long-established principle of construction, it construes the deed restriction against, not in favor of, the free use of property. The majority spends pages discussing the right to contract, never even mentioning the fundamental right of a landowner to use his or her property as he or she sees fit.[3] Because of the vital importance of this right, any restriction on

[3] The legal concept of property includes the right to freely use the property. " 'Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.' " *James S Holden Co v Connor*, 257 Mich 580, 592; 241 NW 915 (1932) (citation omitted).

the future use of real property must be drawn with particularity. *O'Connor*, 459 Mich at 340. The restriction at issue allows the property to be used for residential purposes. Rather than interpreting this phrase broadly to protect the owner's right to use the property, the majority interprets it in an extremely narrow fashion. This is error.

Second, the majority's definition essentially reads language out of the deed restriction. The full restriction provides that "[e]ach lot or lots shall be used for strictly residence purposes only and no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots . . . ." There are two components to the restriction, one limiting the use of the lots to residential purposes and a second prohibiting "buildings except a single dwelling house and the necessary out-buildings." By defining residential purposes to include only single dwelling homes and immediately related purposes, this Court reduces to a redundancy the language prohibiting buildings other than single dwelling houses. If residential purposes include only "a 'single dwelling house' and immediately related purposes,"[4] then the language in the restriction explicitly limiting buildings to single dwelling houses would be unnecessary. It is well established that a construction that would entirely neutralize part of the language that is being construed should be discarded. See, e.g., *DeBoer v Geib*, 255 Mich 542, 544; 238 NW 226 (1931).

Because the majority's dictionary-derived definition of "residential purposes" violates well-established rules of construction and reduces other language in the restriction to a redundancy, it must be rejected. In its place, I would accept the definition adopted by most other states.

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[4] *Ante* at 215.

Here are but a few of them: In 1994, the Indiana Court of Appeals decided whether the defendants' use of their property as a baseball facility violated a restrictive covenant limiting the property to residential purposes. *Bagko Dev Co v Damitz,* 640 NE2d 67, 68 (Ind App, 1994). Because the covenant did not define the term "residential purposes," the court found it necessary to give it meaning. *Id.* at 70. After reviewing caselaw from other jurisdictions, the court concluded that a use is for residential purposes as long as the use is " 'distinguishable from commercial or business use.' " *Id.* at 70 (citation omitted). And because the defendants were not using the baseball diamond for business or commercial purposes, the court held that the restrictive covenant had not been violated. *Id.* at 71.

Similarly, in 1992, the New Hampshire Supreme Court decided that using property as a dock did not violate a deed restriction that limited its use to residential purposes. *Voedisch v Town of Wolfeboro*, 136 NH 91, 96; 612 A2d 902 (1992). The court held that "covenants restricting the use of property to 'residential purposes' merely limit the use of the property to living purposes as distinguished from business or commercial purposes." *Id.*

And in 1985, the Texas Court of Appeals was called upon to decide whether building a tree house on a lot violated a residential purposes restriction that ran with the deed. *Winn v Ridgewood Dev Co*, 691 SW2d 832, 833 (Tex App, 1985). The court held:

> The term "residential purposes" requires the use of property for living purposes as opposed to business or commercial purposes. Considering only the evidence favorable to the jury's finding, we can find no evidence that Lot 2 was not being used for living purposes. Since there was no evidence that Lot 2 and the treehouse were being used for business or commercial purposes, the only logical conclu-

> sion is that it was being used for "living purposes" and that the character of the treehouse is consistent with a residential use. [*Id.* at 835 (citations omitted).]

These three decisions are illustrative of how other states have treated residential purposes restrictions. They are far from exhaustive. As recognized by the American Law Reports, "[a]s a general proposition, restrictive covenants built around the terms 'residence' or 'residential purposes'. . . merely limit the use of the property to living purposes as distinguished from business or commercial purposes."[5] Many more state court decisions have employed the same reasoning.

These decisions not only reflect the weight of authority across the country, they are consistent with Michigan caselaw. See, e.g., *O'Connor*, 459 Mich at 340 (" '[a] restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business use' ") (citation omitted); *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 326; 317 NW2d 611 (1982) ("A restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses.").

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[5] Anno: *Restrictive covenant limiting land use to "private residence" or "private residential purposes": Interpretation and application*, 43 ALR4th 71, 76, § 2[a]. See, e.g., *Isbrandtsen v North Branch Corp*, 150 Vt 575, 581; 556 A2d 81 (1988) (a deed restricting use to " 'residence purposes' simply limits the use to residential [as opposed to business or commercial] purposes"); *Shermer v Haynes*, 248 Ark 255, 260; 451 SW2d 445 (1970) (" '[i]t is the weight of authority that [a residential purposes restriction], in and of itself, does not prohibit use of the land for the various types of multiple dwellings, the courts frequently remarking that the effect of the term is only to limit the use of the property to living as distinguished from business or commercial uses' ") (citation omitted); *Baker v Smith*, 242 Iowa 606, 609; 47 NW2d 810 (1951) ("it is the weight of authority that restrictions built around the terms 'residence' or 'residential purposes', without more, merely limit the use of the property to living purposes as distinguished from business or commercial purposes").

Yet, rather than consider and give weight to these decisions, the majority simply takes out a dictionary and crafts its own definition of "residential purposes." It ignores learned jurists from this and other jurisdictions representing decades of experience in interpreting the law.

It is not uncommon for this Court to adopt other states' definitions of legal terms when those states have grappled with similar facts and law.[6] In this case, I would take instruction from some of these jurisdictions

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[6] See, e.g., *Glass v Goeckel*, 473 Mich 667, 674 n 4; 703 NW2d 58 (2005) ("We refer to a similarly situated sister state . . . for a credible definition of a term long employed in our jurisprudence."); *Dep't of Civil Rights v Gen Motors Corp*, 412 Mich 610, 646; 317 NW2d 16 (1982) (opinion by WILLIAMS, J.) ("while we are certainly not controlled by such case law from other jurisdictions, we can be guided by it when it is determined to be appropriate and sound"). Indeed, it is appropriate to "construe 'technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law' according to such peculiar and appropriate meaning." *Greene v A P Products, Ltd*, 475 Mich 502, 509; 717 NW2d 855 (2006) (citation omitted). The fact that a large number of sister states have identically defined "residence purposes" indicates that this phrase has attained a peculiar and appropriate meaning in the law. The definition that so many have given the expression is sound.

The majority criticizes me for seeking guidance from sister-state decisions. It would do better to hold a mirror up to its own decision than to criticize mine. As far as I can tell, this Court is the only court in the country that has defined a residential-purpose deed restriction solely by reference to a dictionary definition. The majority may want to consider why no other court in the country has employed the method that it has adopted. Other courts uniformly have followed a method, similar to the one I use, of considering sister-state decisions and established rules of construction. See, e.g., *Bagko*, 640 NE2d at 70-71; *Shermer*, 248 Ark at 260.

The majority also claims that the decisions I cite are distinguishable. The deed restriction in this case limits the property to residential purposes. The deed restrictions in the cases I cite limited the properties involved there to residential purposes. Therefore, these sister-state decisions are instructive in interpreting the restriction at issue in this case.

and hold that covenants restricting property to residential purposes "merely limit the use of the property to living purposes as distinguished from business or commercial purposes." *Voedisch*, 136 NH at 96.

Here, nothing suggests that the dog park has any business or commercial purpose. Rather, owning dogs and walking them is a typical, generally accepted activity for the residents of Birmingham. Accordingly, because a dog park for residents is a living use of municipal land, I would hold that the deed restriction has not been violated.[7] The trial court was correct and its decision should be reinstated.

PLAINTIFF WAIVED THE RIGHT TO OBJECT TO USE OF THE LOT AS A DOG PARK

Because I would hold that the use as a dog park is a residential purpose, I find it unnecessary to determine whether plaintiff waived the right to enforce the deed restriction. But, because the majority holds that plaintiff can enforce it, I will offer my thoughts on this issue.

The majority finds that plaintiff is estopped from contesting use of the lot as a park. Lot 52 has been in a park for at least 75 years. Plaintiff was well aware of this use. Yet, at no time did it object to or take action to stop it. Even now, plaintiff does not ask the Court to prevent lot 52 from reverting to being part of Springdale Park. Even if it did, the majority opines, equity would bar plaintiff from preventing use of the land as a

[7] The zoning ordinances of the city of Birmingham and Bloomfield Township list such things as parks, playgrounds, and recreational facilities as principal uses in residential districts. Because deed restrictions are to be construed in light of surrounding circumstances, these zoning ordinances add support to my conclusion that use as a dog park is a residential purpose. See *Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 152 (1935).

park. See *Cherry v Bd of Home Missions of Reformed Church in United States*, 254 Mich 496, 503-504; 236 NW 841 (1931).

Nonetheless, the majority holds that plaintiff may challenge use of the lot as a dog park. The reason it gives is that a dog park is a more serious violation of the deed restriction than a city park. Once again, I disagree.

In *Boston-Edison Protective Ass'n v Goodlove*,[8] this Court was called upon to decide whether the plaintiff homeowners association was estopped from enforcing deed restrictions limiting the property in question to single dwelling houses. *Goodlove,* 248 Mich at 627. The defendant, a practicing physician, had incorporated his medical office into his home and worked there for years without objection. *Id.* at 628. When the defendant, because of increasing business, decided to build an office building on the land, the plaintiff objected, claiming that this use violated the deed restrictions running with the property. The issue was whether the plaintiff had waived the right to enforce the restriction by failing for years to object to use of the property as a doctor's office. *Id.* at 629. The Court decided that the plaintiff could enforce the restriction. It stated:

> While it is true that there has been no objection made to the defendant's practicing medicine at his home and using it as a doctor's office where patients consulted him, nevertheless, the defendant should not be able to violate further rights of plaintiffs on account of his theretofore slight breach of the restrictive covenants in his deed. Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions. While it is true that by their acquiescence they may not be able to enjoin defendant from continuing to use

[8] 248 Mich 625; 227 NW 772 (1929).

> his present home to the extent that it has been heretofore used as a doctor's office, they are still in a position to stop the more serious violation of the restrictions that would result from the erection of a new or adjoining building, one story in height, without basement, etc., which does not conform with the restrictions of the subdivision. [*Id.* at 629-630.]

Accordingly, the general rule is that a plaintiff is "not estopped from preventing a *most flagrant violation* of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions." *Id.* at 629 (emphasis added). See also *Jeffery v Lathrup*, 363 Mich 15, 22; 108 NW2d 827 (1961) (a deed restriction that has been violated in some degree "does not thereby become void and unenforceable when a violation of a more serious and damaging degree occurs").

In *Cherry*, this Court applied this rule and decided whether the plaintiff property owners should be estopped from enforcing deed restrictions that limited use of certain property. *Cherry,* 254 Mich at 497-499. Despite the fact that the deed restricted the property to dwelling house purposes, the defendant planned to replace its existing church with a new church on the same property. *Id.* at 499. Ultimately, this Court refused to allow the plaintiffs to enforce the deed restriction.

> We are not impressed with plaintiffs' claim that defendant's building program will constitute an extension of the violation of the building restrictions which has already been countenanced. It is true the new building as planned will be somewhat larger, will occupy a different portion of the lots and will face on Dexter boulevard instead of Joy road. But a church is a church; and it cannot well be asserted that only so much of a church site as is actually occupied by the edifice located thereon is used for church purposes. It is common practice to use the adjacent lot area for parking purposes. It is by no means uncommon for

> outdoor church gatherings to make use of the whole or any part of the church yard. Defendant clearly has the right so to use its premises. [*Id.* at 501.]

Cherry is important because it illustrates that a use that is of the same nature as a previous, unobjected-to use will not amount to a "flagrant violation."[9] Here, plaintiff acquiesced in the use of the lot as a park. Plaintiff objected only when defendant began using the lot as a dog park. A dog park is of the same nature as a park. Hence, because the proposed use is of the same nature as the unobjected-to use, plaintiff cannot enforce the deed restriction against the dog park. Indeed, just as *Cherry* determined that the plaintiffs there could not enforce the deed restrictions because "a church is a church," plaintiff here cannot enforce the deed restriction because a park is a park.[10]

The majority reaches the opposite conclusion and decides that a dog park is a more serious violation. In so doing, it considers a number of statements presumably drawn from the briefs and affidavits used during the

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[9] This is consistent with prior decisions of this Court. See, e.g., *Sheridan v Kurz*, 314 Mich 10, 13; 22 NW2d 52 (1946) (The plaintiff could enforce a restriction against the defendant's use of the property as a commercial garage. Even though the prior owner violated the restriction, the prior owner used the garage for research, not commercial, purposes.); *Rich v Isbey*, 291 Mich 119; 288 NW 353 (1939) (The plaintiffs could not enforce a height restriction against the defendant's fence because previously the plaintiff had failed to object to hedges that violated the height restriction.); *Polk Manor Co v Manton*, 274 Mich 539, 541-543; 265 NW 457 (1936) (The plaintiff could enforce a restriction even though the plaintiff had failed to object to prior violations. Unlike the prior violations that mingled residential and commercial activity, the defendant's use of the property was to be solely for commercial purposes.).

[10] The majority recognizes that the plaintiff in *Cherry* could not contest the new building because "a church is a church." Nonetheless, the majority claims that my reliance on *Cherry* is misplaced. Its position is inconsistent. There is no principled reason for finding that "a church is a church," but a park is not a park.

motion for summary disposition. *Ante* at 220-221. However, there are no court findings substantiating these statements. For example, the majority takes as fact that the dog park has generated more automobile traffic. The trial court made no such finding.[11] Also, the majority incorrectly asserts that dogs were prohibited from being on the property before lot 52 was transformed into a dog park. The trial court did not make this finding.[12] Given that defendant contests most or all of these points, it is error for the majority to rely on them as true.[13] See appellant's brief, pp 26-28.[14]

No factual findings were ever made to suggest that the dog park has brought continual and systematic use of lot 52 where before the use was irregular. Yet, the majority relies on this as a fact. The majority also assumes that establishment of the dog park required a

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[11] Two affidavits offered by plaintiff contain this statement: "I have no doubt that we will experience increased noise from barking dogs and traffic, the presence of strangers and strange dogs, the risk of residents being bitten and dogs jumping the fence, odors from dog droppings, and a deterioration in property values as to any property within sight or sound of Lot 52."

[12] Without factual findings by the trial court, we do not know whether dogs were prohibited from the park before the lot was made into a dog park. The fact that someone once saw a "No Dogs" sign proves only that a sign was posted by someone for an unknown period. Without knowing how long the sign was up and whether its command was actually followed, the majority should be wary of concluding that dogs generally were absent from the park.

[13] Aside from the fact that defendant contests plaintiff's version of the facts, there is an additional problem with the majority accepting plaintiff's rendition of the facts as truth. Because the issue is whether plaintiff is entitled to summary disposition (the Court of Appeals remanded the case for the entry of an order of summary disposition for plaintiff), the facts must be considered in the light most favorable to defendant. The majority should not accept as true contested facts asserted by plaintiff.

[14] E.g., defendant wrote: "No traffic or noise studies or any other impact analysis have been performed by Appellee or anyone else." Appellant's brief, p 26.

structure where no structure had previously been permitted. No factual findings support that assumption. In fact, it appears that three sides of the lot were already fenced. Given that three sides of the lot were already fenced, it is bizarre, and obviously wrong, for the majority to conclude that no structure previously existed on the lot. If these "facts" are disregarded, as they must be, only one of the statements identified and relied on by the majority remains to support its conclusion: residents of Birmingham have been encouraged to bring their dogs to run off-leash in the dog park. This cannot constitute a more serious violation of the restriction.[15]

Another serious fault of the majority decision is that it effectively gives people broad discretion to pick and choose which violations of the restrictive covenant will be tolerated. This will encourage someone to try to enforce a restriction after a very minor change in usage. Using today's decision, a plaintiff could disregard for years a use that is arguably contrary to a deed restric-

[15] The majority even goes so far as to claim that no court findings are necessary for its decision. As support for this position, it makes the blanket assertion that "[w]hen a city affirmatively encourages the use of a park for a purpose that previously has been prohibited, the record supports the conclusion that a 'more serious' violation is shown . . . ." *Ante* at 225. This cannot be true. For example, assume that a deed restriction prohibited people from using city park property. Assume, also, that the city allowed touch football but prohibited meditation in the park. Assume it was concerned that an oblivious meditator might be injured by an errantly tossed football. But after a public outcry from those who greatly enjoy meditating in the open air, the city decides to reverse course and prohibit all activity except meditation. This example illustrates the fallacy of the majority's blanket assertion. It cannot seriously be argued that meditation is a more serious violation of the deed restriction than touch football. Accordingly, it does not follow from the fact that a city affirmatively encourages a use that was previously prohibited that the use constitutes a more serious violation of a deed restriction. Factual findings are necessary.

tion, then object and prevent another use that is only marginally different. Besides being fundamentally unfair, permitting this pick-and-choose approach will enhance unpredictability in the law and increase lawsuits.

As a result of the above problems, the majority's approach should be rejected. In its place, I would hold that a use that is of the same nature as a previously unobjected-to use cannot amount to a "flagrant violation." And because a dog park is of the same nature as a city park, I would find that plaintiff cannot enforce the deed restriction that runs with lot 52.

CONCLUSION

The city of Birmingham has set aside a small fenced portion of one of its parks for the use of city residents and their dogs. Nothing indicates that this grassy acre, called a "dog park," has actually occasioned annoyance to anyone in the area. There is no evidence that it has been heavily used, is noisy, smelly, or has drawn increased automobile traffic. On the contrary, during the past three years, the dog park appears to have admirably filled a genuine need of dogs and dog owners in the community. It has provided a spot where canine pets can exercise off-leash, safely, under supervision, and without disturbing people.

The only nonspeculative objection raised about this community service is that a deed restriction, confining the land to residential purposes, outlaws it. On this basis, a majority of the Court has effectively closed the dog park. Presumably, now, the land will again be used as a city park, as it was for more than 70 years before. In that way, in the eyes of the law, the use will be proper.

I have great difficulty accepting that the use of this land as a city park conforms to the deed restriction

better in any sense than its use as a dog park. My thinking is, if a park is a residential use of the land, so is a dog park. Conversely, if a dog park is not a residential use of the land, then neither is a city park.

No one claims that the dog park exists for a business purpose or for an industrial purpose. In a legal sense, what other purpose remains, aside from a residential purpose? Most other courts have followed this reasoning and have defined a residential purpose to include such things as a baseball diamond, a boat dock, and a tree house. I agree with them.

But even if I did not, and assuming the use is nonconforming, the time has long since passed when plaintiff could be heard to complain. For over seven decades, plaintiff's members have acquiesced in the use of this property as a park. Even now, they express no displeasure in it once again reverting to parkland. But they object to the dog park. How can it be that the Court allows plaintiff to pick and choose which nonconforming use of the land to object to and which to ignore? Surely, in the eyes of the law, after all these years, plaintiff has waived its claim.

This decision is a doggone shame. It has alarming implications for tomorrow's interpretations of restrictive covenants in Michigan. And, coming as it does during the dog days of summer when all four-legged creatures long to romp outdoors unrestrained, it marks a howling defeat for Birmingham's canine residents.

WEAVER, J., concurred with KELLY, J.

VEGA v LAKELAND HOSPITALS AT NILES AND ST JOSEPH, INC

Docket No. 129436. Argued April 11, 2007 (Calendar No. 9). Decided July 18, 2007.

Jodie Vega, as the conservator of the estate of Jeffrey Hurley, a minor, brought a medical malpractice action in the Berrien County Trial Court, Civil Division, against Lakeland Hospitals at Niles and St. Joseph, Inc., and others, including Beth Vanderah and Michael Speers, the personal corepresentatives of the estate of David A. Speers, M.D., deceased. The action alleged injuries, including brain damage, as a result of Speers's failure to diagnose Jeffrey Hurley's medical condition. The trial court, John N. Fields, J., granted summary disposition for the defendants on the ground that the plaintiff had not filed her complaint within the period of limitations. The plaintiff appealed. The Court of Appeals, HOEKSTRA, P.J., and KELLY, J. (JANSEN, J., dissenting), affirmed, concluding that MCL 600.5851(1) and (7) unambiguously exclude both minor and adult medical malpractice claimants from using the saving provision provided in MCL 600.5851(1) for the disabilities of minority and insanity. 267 Mich App 565. The plaintiff sought leave to appeal, which the Supreme Court granted. 477 Mich 957 (2006).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

The insanity saving provision of MCL 600.5851(1) applies to medical malpractice claims. In general, the saving provision of MCL 600.5851(1) applies to claimants who are less than 18 years of age or insane, except as otherwise provided in MCL 600.5851(7), and it allows a claimant to file an action within one year after the disability is removed. MCL 600.5851(7) states that if a medical malpractice claimant is less than eight years old when the claim accrued, the claimant must file suit before he or she is ten years old or before the period of limitations expires, whichever is later; but, if the medical malpractice claimant is eight years old or older when the claim accrued, the claimant must file suit before the period of limitations expires. MCL 600.5851(7) states nothing about when an insane medical malpractice claimant must com-

mence an action. Therefore, MCL 600.5851(7) does not preclude application of the insanity saving provision of MCL 600.5851(1).

Justice CAVANAGH, joined by Justices WEAVER and KELLY, concurring, stated that under the plain language of the statutes involved, Jeffrey Hurley or a person suing on his behalf has until one year after Hurley's disability is removed to bring his claim. The trial court erred by dismissing the claim as untimely, and the Court of Appeals erred by affirming that result.

Reversed and remanded to trial court for reinstatement of the plaintiff's claim.

NEGLIGENCE — MEDICAL MALPRACTICE — SAVING PROVISIONS — INSANITY.

A medical malpractice claimant who is insane is entitled to the insanity saving provision set forth in MCL 600.5851(1).

Charfoos & Christensen, P.C. (by *David R. Parker*), and *Michael D. Marrs, P.C.* (by *Michael D. Marrs*), for Jodie Vega.

Smith Haughey Rice & Roegge (by *William L. Henn, Paul M. Oleniczak,* and *Brian A. Molde*) for Lakeland Hospitals at Niles and St. Joseph, Inc.

Fraser Trebilcock David & Dunlap, P.C. (by *Graham K. Crabtree*), for St. Joseph Medical Association, P.C., Beth Vanderah, and Michael Speers.

Amici Curiae:

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Regina T. Delmastro* and *Richard A. Joslin, Jr.*), for Bortz Health Care Facilities, Inc., and Warren Geriatric Village, Inc.

MARKMAN, J. We granted leave to appeal to determine whether the insanity saving provision of MCL 600.5851(1) applies to medical malpractice claims. The trial court granted defendants' motion for summary disposition, concluding that the insanity saving provision of § 5851(1) does not apply to medical malpractice

claims and, thus, that plaintiff's claim was time-barred. The Court of Appeals affirmed. Because we conclude that the insanity saving provision of § 5851(1) does apply to medical malpractice claims, we reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of plaintiff's claim.

I. FACTS AND PROCEDURAL HISTORY

The alleged medical malpractice occurred on December 13, 1999, when the claimant was 11 years old. Plaintiff, the claimant's mother, alleges that, as a result of the defendant physician's misdiagnosis, the claimant sustained severe, permanent mental impairment. Plaintiff sent a notice of intent to bring an action to defendants on November 8, 2001. As a result, the period of limitations was tolled for 182 days from November 8, 2001, to May 9, 2002, and the period of limitations expired on June 12, 2002. Plaintiff filed a complaint on December 11, 2002. The trial court granted defendants' motion for summary disposition, concluding that the insanity saving provision of § 5851(1) does not apply to medical malpractice claims and, thus, that plaintiff's claim was time-barred. In a two-to-one decision, the Court of Appeals affirmed. 267 Mich App 565; 705 NW2d 389 (2005). After initially denying plaintiff's application for leave to appeal, 475 Mich 854 (2006), this Court granted plaintiff's motion for reconsideration, vacated its previous order denying leave to appeal, and granted plaintiff's application for leave to appeal. 477 Mich 957 (2006).

II. STANDARD OF REVIEW

A trial court's ruling on a summary disposition motion is a question of law that this Court reviews de novo. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d

488 (2007). Questions of statutory interpretation are also questions of law that this Court reviews de novo. *Id.*

III. ANALYSIS

Generally, a medical malpractice action must be commenced within two years after the action accrued. MCL 600.5805(6). Plaintiff concedes that she did not file a complaint within the two-year period of limitations. However, plaintiff argues that the claimant is insane and, thus, that the insanity saving provision of § 5851(1) applies.[1]

MCL 600.5851(1) provides, in pertinent part:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.[2]

MCL 600.5851(7) provides, in pertinent part:

> Except as otherwise provided in subsection (8), if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or

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[1] MCL 600.5851(2) defines "insane" as "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." Whether the claimant is "insane" is not at issue in this appeal.

[2] It is undisputed that § 5851(8), which applies to claimants who have suffered injuries to their reproductive systems, does not apply in this case.

> before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

MCL 600.5838a(2) provides, in pertinent part:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856 . . . .

The lower courts held that the insanity saving provision of § 5851(1) does not apply to medical malpractice claims. The Court of Appeals dissent, on the other hand, concluded that "although MCL 600.5851(7) may limit a claim for malpractice that accrued before the age of eight, its plain language does not limit those plaintiffs whose claims accrued after the age of [eight]—as in the present case." 267 Mich App at 577 (JANSEN, J., dissenting).

The saving provision of § 5851(1) applies to claimants who are under 18 years of age or insane "[e]xcept as otherwise provided in subsection[] (7)," and it allows a claimant to file an action within one year after the disability is removed.[3] The first sentence of § 5851(7) states that if the medical malpractice claimant was less

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[3] MCL 600.5838a(2) provides, in pertinent part, "except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim." Therefore, even under the insanity saving provision of § 5851(1), a medical malpractice claimant only has six years to file a complaint. The only medical malpractice claimants who would have longer than six years to file a complaint would be those claimants whose claims accrued at a very young age. See § 5851(7) and (8) (the longest time claimants would have under these provisions is 10 and 15 years, respectively, and they would only have that long if their claims accrued at birth).

than eight years old when the claim accrued, the claimant must file a complaint before his tenth birthday or before the period of limitations expires, whichever is later. The medical malpractice claimant in the instant case was 11 years old when the claim accrued, and, thus, the first sentence of § 5851(7) is not applicable. The second sentence of § 5851(7) states that if a medical malpractice claimant was eight years of age or older when the claim accrued, as in this case, the period of limitations set forth in § 5838a applies. MCL 600.5851(7) does not state anything about when an insane medical malpractice claimant must commence an action. Therefore, § 5851(7) does not preclude application of the insanity saving provision of § 5851(1).[4]

Section 5851(7) states that if the claimant was eight years old or older when the claim accrued, "the period of limitations set forth in § 5838a" applies; contrary to defendants' suggestion, it does not state the corollary, i.e., that the saving provision of § 5851(1) does not apply. See *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004) (a saving provision is not a period of limitations). As the Court of Appeals dissent explained:

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[4] Defendants argue that if the insanity saving provision of § 5851(1) applies to medical malpractice claimants, the entire second sentence of § 5851(7) will be rendered meaningless. We respectfully disagree. The first sentence of § 5851(7) states that if the medical malpractice claimant was less than eight years old when the claim accrued, the claimant must file suit before his tenth birthday. Therefore, it is logical to include a second sentence that explains when a medical malpractice claimant must file a suit if that claimant's claim accrued when the claimant was eight years old or older. The fact that the second sentence does not change the outcome of the instant case does not make it meaningless. In addition, the second sentence could be read to mean that the minority saving provision of § 5851(1) does not apply to medical malpractice claimants whose claims accrued when they were eight years old or older. We do not address this issue because plaintiff does not argue for application of the minority saving provision of § 5851(1); plaintiff only argues for application of the insanity saving provision of § 5851(1).

> Clearly, the first part of MCL 600.5851(7) sets out a specific time that a person under the age of eight must file his or her claim, i.e., before the tenth birthday if the claim accrued before the age of eight. MCL 600.5851(7). But the second sentence, which is applicable here because plaintiff was over the age of eight at the time of claim accrual, contains no language limiting the application of the saving provision for insanity. MCL 600.5851(7). The second sentence of MCL 600.5851(7) only states what the limitations period will be for those plaintiffs whose claim accrues past the age of eight. In other words, although the standard two-year limitations period applies for those plaintiffs past age eight, it does not simultaneously limit the saving provision of subsection 1, which provides that the period of limitations for an insane plaintiff does not begin to run until, "1 year after the disability is removed . . . *although the period of limitations has run*." MCL 600.5851(1) (emphasis added).[5]
>
> * * *
>
> Therefore, I would find that, although MCL 600.5851(7) may limit a claim for malpractice that accrued before the age of eight, its plain language does not limit those plaintiffs whose claims accrued after the age of [eight]—as in the present case.[6] The only direction the statute gives is to the "period of limitations set forth in section 5838a . . . ." MCL 600.5851(7). This plain language does not simultaneously limit the application of MCL 600.5851(1). [267 Mich App at 576-578 (JANSEN, J., dissenting).]

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[5] This last sentence is not altogether correct, in our judgment, because the period of limitations begins to run when the claim accrues, but § 5851(1) allows minors and insane persons to bring their claims within one year after the disability is removed "although the period of limitations has run."

[6] To the extent that the Court of Appeals dissent can be read to mean that if a medical malpractice claimant was under the age of eight when the claim accrued, he cannot rely on the insanity saving provision of § 5851(1), we respectfully disagree because, as discussed throughout this opinion, we believe that the insanity saving provision of § 5851(1) applies to all insane claimants.

The insanity saving provision of § 5851(1) applies "[e]xcept as otherwise provided in subsection[] (7) . . . ." MCL 600.5851(7) states that if a medical malpractice claimant is less than eight years old when the claim accrued, the claimant must file suit before he is ten years old or before the period of limitations expires, whichever is later; but, if the medical malpractice claimant is eight years old or older when the claim accrued, the claimant must file suit before the period of limitations expires. MCL 600.5851(7) states nothing about an insane medical malpractice claimant. That is, nothing in § 5851(7) prohibits an insane medical malpractice claimant from taking advantage of the insanity saving provision of § 5851(1).[7]

Defendants argue that the first phrase of § 5851(1) conditions the application of all remaining clauses in that subsection on the inapplicability of § 5851(7). That is, they argue that if § 5851(7) is applicable, i.e., if the plaintiff is bringing a medical malpractice claim, § 5851(1) is not applicable. We respectfully disagree.

MCL 600.5851(1) begins, "Except as otherwise provided in subsection[] (7) . . . ." Contrary to defendants' contention, this language does not mean that if § 5851(7) is applicable, § 5851(1) is not applicable. Instead, it simply means that if § 5851(1) is inconsistent with § 5851(7), § 5851(7) is controlling. For example, if

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[7] This position is consistent with this Court's order in *Dantzler v Hughett,* 456 Mich 922 (1998). In *Dantzler,* the Court of Appeals had held that the medical malpractice claimant was not insane for purposes of § 5851(1). This Court reversed the Court of Appeals and remanded the case to the trial court because there was a genuine issue of material fact regarding whether the medical malpractice claimant was insane for purposes of § 5851(1). There would have been no need to remand the case to the trial court for a determination whether the medical malpractice claimant was insane if the insanity saving provision of § 5851(1) does not apply to medical malpractice claimants.

the claimant was four years old when his medical malpractice claim accrued, under § 5851(1), the claimant would have until he was 19 years old to file a complaint. However, under § 5851(7), the claimant would only have until he was ten years old to file a complaint. Because § 5851(1) states "[e]xcept as otherwise provided in subsection[] (7)," § 5851(7) would be controlling under those circumstances. On the other hand, if the claimant was four years old when the medical malpractice claim accrued and was insane, the insanity saving provision of § 5851(1) would apply because nothing in § 5851(7) prohibits application of the insanity saving provision of § 5851(1). That is, § 5851(7) does not "otherwise provide[]" anything with regard to the insanity saving provision of § 5851(1). Therefore, § 5851(7) does not prohibit application of the insanity saving provision of § 5851(1) to medical malpractice claims.

IV. CONCLUSION

Because we conclude that the insanity saving provision of § 5851(1) does apply to medical malpractice claims, we reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of plaintiff's claim.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*concurring*). Under the plain language of the statutes involved, Jeffrey Hurley or a person suing on his behalf has until one year after Jeffrey's disability is removed through death or otherwise to bring his claim. Accordingly, I concur with the majority opinion's conclusion that the trial court erred by dis-

missing plaintiff's claim as untimely, and the Court of Appeals erred by affirming that result.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

PEOPLE v GILLAM

Docket No. 131276. Argued April 10, 2007 (Calendar No. 10). Decided July 18, 2007.

Willie R. Gillam was charged in the Ingham Circuit Court with several controlled substances violations. He moved to suppress evidence found in his apartment after he was arrested without a warrant, which arrest occurred when he left the apartment in response to the requests of police officers. The defendant alleged that the officers' requests that he come out of his apartment to talk with them constituted a constructive entry into the apartment for Fourth Amendment purposes, thereby invalidating the arrest and the subsequent seizure of the evidence, which occurred when an officer entered the apartment at the defendant's request to get the defendant's coat and shoes and observed the evidence in plain sight. The court, Thomas L. Brown, J., granted the motion to suppress. When the prosecution declined to proceed with a trial, the court granted the defendant's motion to dismiss, but the dismissal was without prejudice. The prosecution appealed and the Court of Appeals, NEFF, P.J., and SAAD and BANDSTRA, JJ., affirmed in an unpublished opinion per curiam, issued April 4, 2006 (Docket No. 259122). The Supreme Court granted the prosecution's application for leave to appeal. 477 Mich 969 (2006).

In an opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

Even if the Supreme Court were to adopt the constructive entry doctrine recognized by several federal circuit courts of appeals, the defendant would fail to establish that the police constructively entered his apartment in violation of his Fourth Amendment right to privacy.

1. A constructive entry occurs when a suspect leaves his or her home in response to coercive police conduct. The actions of the officers in this case merely involved knocking on the front door of the apartment and asking the defendant to step outside. An officer's request that an individual step out of his house to speak with the officer is not coercive. The defendant failed to identify any specific statements of compulsion by the police. The presence of the three police officers whom the defendant observed did not

constitute an overwhelming show of force. The officers did not draw their weapons or use language indicating that the defendant might be compelled to leave the apartment, and the officers did not touch the defendant until he crossed the threshold.

2. There was no improper entry, constructive or otherwise, the defendant was legally arrested, and the trial court erred in suppressing the evidence.

Justice WEAVER, concurring in the result only, stated that if the constructive entry doctrine were to be adopted in Michigan, the focus should be on police conduct with respect to crossing the threshold of a home rather than a person's belief that he or she must comply with a police officer's request to come out of the home. The facts of this case do not indicate that the police made a show of force or threatened to enter the defendant's apartment. Thus, the constructive entry doctrine would not apply to this case.

Reversed and remanded to the trial court.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that the widely recognized constructive entry doctrine is applicable in this case because the police created an excited environment, refused to respect the defendant's repeated refusals to leave his apartment, and coerced the defendant into leaving his apartment. The constructive entry doctrine recognizes that police officers cannot do through coercive tactics and the abuse of authority what they cannot do physically—they cannot enter someone's home to effectuate an arrest without a warrant. The decision regarding whether the doctrine applies requires a case-by-case analysis and should be made on the basis of the degree of coerciveness of the police conduct. The most relevant question is whether a reasonable person would feel compelled to leave his or her home. Coercive statements alone may be sufficient to invoke the constructive entry doctrine. The facts of this case indicate that the police made a constructive entry. The judgment of the Court of Appeals should be affirmed.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *J. Nicholas Bostic*, Assistant Prosecuting Attorney, for the people.

Roman J. Tyszkiewicz for the defendant.

Amicus Curiae:

David Gorcyca, President, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman,* Chief of Research, Training, and Appeals, for Prosecuting Attorneys Association of Michigan.

TAYLOR, C.J. At issue in this case is whether repeated requests by police officers for defendant to come out of his apartment constituted constructive entry into his home for Fourth Amendment purposes, thereby invalidating his arrest without a warrant and rendering subsequently obtained evidence inadmissible. We conclude that even if we were to adopt the constructive entry doctrine recognized by several federal circuit courts of appeals, defendant in this case would fail to establish that the police constructively entered his home in violation of his Fourth Amendment right to privacy. Accordingly, we reverse the judgment of the Court of Appeals that held to the contrary and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Defendant's alleged accomplice was arrested after at least twice selling drugs to an undercover officer. On the basis of information gathered during the drug transactions, the police learned that defendant (who was on probation) was on a tether in his apartment, and determined that they had probable cause to arrest defendant. On March 30, 2004, three plain clothes officers and two uniformed patrol officers drove to defendant's apartment to effectuate the arrest. While one plain clothes officer, Officer Del Kostanko, watched the back terrace window in case defendant tried to flee, and one plain clothes officer, Officer Jerry Blow, stood behind a wall in the stairwell of the apartment building,

the remaining plain clothes officer, Officer Donald Bey, and the two uniformed officers approached the front door of defendant's apartment and knocked.

Defendant testified that when the police knocked on the door, he checked to make sure his tether was not malfunctioning before he opened the door. He testified:

> [T]he police asked me to come out, I told them: No, I couldn't come out because I was on tether. We went back and forth. They kept telling me: Come out the door. I kept telling them: No, I'm on tether. We went back and forth, back and forth.

According to Officer Bey, the "back and forth" with defendant about coming out took place in a matter of seconds, and defendant was cooperative. Bey did not recall defendant saying that he could not come out of his apartment because of the tether. Officer Blow stated that while he only heard bits and pieces of the conversation, he did not hear defendant say he could not come out because he was on a tether. Defendant claimed he eventually came out of the apartment "because there was an officer to my right. There was something about it that made me feel threatened. So I came on out and they arrested me." In any event, although he claimed that he was coerced, he admitted that he physically walked out of the apartment and that no officers touched him before he crossed the threshold.

Officer Bey testified that the entire arrest incident was calm, and no weapons were drawn. Officer Kostanko similarly testified that the arrest took place without incident and that defendant was cooperative. In contrast, when specifically asked, "Were people yelling, were people excited or was this fairly calm?" defendant testified that he "guessed" that the atmo-

sphere was excited and it "could have been" excited.[1] Officers Kostanko and Bey both testified that after defendant was arrested, Kostanko entered the apartment at defendant's request to get defendant's coat and shoes. While inside, Officer Kostanko observed a piece of paper in plain view that contained the undercover officer's undercover name and telephone number, and he confiscated it as evidence.

At the preliminary examination, defense counsel objected to admission of the piece of paper on the ground that he believed the police could not enter defendant's apartment without a warrant. The preliminary examination was adjourned, and a suppression hearing was conducted, after which the trial court, evidently crediting defendant's version of the events, concluded that defendant was coerced into leaving his apartment and granted defendant's motion to suppress evidence of the piece of paper.[2]

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[1] The dissent claims that "[t]he uniformed police officers created an excited and coercive atmosphere," *post* at 276, that the instant facts "reveal excited, repeated demands for a person under house arrest to leave his residence," *id.* at 277, and that this establishes the coercive conduct necessary to find constructive entry. However, as clearly indicated from the testimony of the officers and not unequivocally repudiated by defendant himself, the atmosphere regarding the encounter at defendant's apartment door was calm.

[2] The dissent claims that the trial court did not clearly err when it found that an excited atmosphere existed. Contrary to the dissent's version of events, while the trial court credited defendant's version of events, defendant never unequivocally stated that there was an excited atmosphere, and the trial court did not explicitly find that there was an excited atmosphere. Rather, the trial court stated:

> Well, I listened to the evidence and . . . what is before the Court is this arrest which really troubles me. These officers had an address, had a name. They knew what the gentleman looked like. They went there, and I think they found it more expeditious than appropriate to just go there and arrest him on this probable cause they had from Officer Tran, who wasn't even present at the time

After the suppression hearing, the prosecutor moved to adjourn to allow him to consider whether to appeal the suppression decision. The trial court denied the motion. The next day, at what was to be the start of trial, the prosecutor cited the suppression decision along with the failure to obtain a plea from defendant's accomplice and respectfully declined to proceed. The

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> of the arrest. . . . I believe they were told by Mr. Gillam: Look, I'm on tether. The gentleman has a record. He has a record here as long as my arm. So he certainly is familiar with the system. And I'm certain he knows the meets [sic] and bounds of a tether system. And he knows he was told, apparently he was told, he said he didn't want to step outside. He was somehow or other—the officers say he really steps outside. I find that hard to believe. *In any event, I think he was, in some manner or another, caused to step outside and be arrested*. (Emphasis added.)

Thus, there was no "finding" of an excited atmosphere and, accordingly, any assessment of trial court error, much less clear error, in a "finding" the court never made is not possible.

Nevertheless, the dissent also claims that the "trial court's finding that there was a coercive environment was not clearly erroneous, given the quantity and weight of the testimony that supported it." *Post* at 275 n 12. If, as the dissent contends, *id.*, the trial court "explicitly" found there was a coercive environment when it stated, "He was somehow or other—the officers say he really steps outside. I find that hard to believe. In any event, I think he was, in some manner or another, caused to step outside and be arrested," the trial court's conclusion would be clearly erroneous because the finding was contrary to the testimony of the officers as well as defendant. As previously noted, the officers essentially testified that defendant was cooperative and stepped outside when asked, and defendant himself acknowledged that he physically walked out of the apartment and that no officers touched him before he crossed the threshold. Moreover, defendant could not identify any specific statement or action by an officer that would indicate coercion; rather, he testified generally that the officers kept telling him to come outside, and that something about the officer standing to his right made him feel threatened. To the extent the trial court found that the officers created a coercive environment, the clear error in such finding is apparent where the trial court itself was unable to articulate how the officers' actions or statements were coercive.

trial court granted defense counsel's motion to dismiss, but the dismissal was without prejudice.

The prosecutor appealed the suppression decision and the dismissal in the Court of Appeals, which affirmed in an unpublished opinion per curiam, issued April 4, 2006 (Docket No. 259122). The Court explained that (1) the evidence was suppressed not because it was seized without a search warrant but because defendant was arrested without an arrest warrant, and (2) while a warrant is not needed to arrest someone on probable cause outside the person's home, a warrant is required, absent exigent circumstances, to arrest someone inside the person's home. It phrased the issue as whether "the trial court had a reasonable evidentiary basis for concluding that the police actually coerced defendant to leave his place of residence and thus expose himself to [an arrest without a warrant]." Slip op at 2. After reciting defendant's testimony, the Court of Appeals stated:

> [The prosecutor] argues that defendant did not describe any actual coercion, but that he left the apartment voluntarily. However, defendant did describe his reluctance to leave because of his tether. The trial court credited this testimony, and observed that defendant was in a position to understand the implications of breaking that tether. Defendant additionally described a pattern of repeated police entreaties to leave the apartment. Such persistence on the part of uniformed police officers in response to defendant's initial stated disinclination to leave the premises could reasonably be taken to constitute actual coercion. [*Id.*]

The prosecutor applied in this Court for leave to appeal. We granted leave to appeal, asking the parties to address, among the issues to be briefed, whether the police conduct "constituted a constructive entry into a citizen's home for purposes of a Fourth Amendment search and seizure analysis." 477 Mich 969 (2006).

II. STANDARD OF REVIEW

The scope of the constructive entry doctrine and whether the police conduct in the instant case constituted a constructive entry of defendant's dwelling raises Fourth Amendment implications. Issues of constitutional dimension are reviewed de novo. *People v Drohan,* 475 Mich 140, 146; 715 NW2d 778 (2006). A trial court's factual findings are generally reviewed for clear error. *People v Williams,* 475 Mich 245, 250; 716 NW2d 208 (2006).

III. ANALYSIS

The Fourth Amendment of the United States Constitution provides:

> 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.]

In *Payton v New York,* 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980), the United States Supreme Court held that the police were prohibited by the Fourth Amendment from entering a suspect's home without a warrant or consent for the purpose of making an arrest. *Id.* at 576. In doing so, it noted that the amendment applied equally to seizures of persons and to seizures of property, and that the chief purpose was to protect against physical entry of the home. *Id.* at 587. The Court summarized:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent

> circumstances, that threshold may not reasonably be crossed without a warrant. [*Id.* at 590.]

Hence, *Payton* prohibited only the actual physical entry by the police into a suspect's home. Since *Payton,* however, the Sixth Circuit Court of Appeals has expanded the bar against actual physical entry to encompass situations involving constructive entry, which occurs when a suspect leaves his or her home in response to coercive police conduct. *United States v Morgan,* 743 F2d 1158, 1166 (CA 6, 1984). The Third, Ninth, and Tenth circuit courts of appeals have likewise recognized the doctrine of constructive entry. *Sharrar v Felsing,* 128 F3d 810, 819 (CA 3, 1997); *United States v Al-Azzawy,* 784 F2d 890, 893 (CA 9, 1985); *United States v Maez,* 872 F2d 1444, 1450 (CA 10, 1989).

However, several other federal circuit courts of appeals have declined to adopt the doctrine, and the United States Supreme Court has yet to address the issue. *United States v Carrion,* 809 F2d 1120, 1128 (CA 5, 1987); *United States v Berkowitz,* 927 F2d 1376, 1386 (CA 7, 1991); *Knight v Jacobson,* 300 F3d 1272, 1277 (CA 11, 2002). Although state courts are bound by United States Supreme Court decisions construing federal law, they are not similarly bound by the decisions of the lower federal courts, and when there is a conflict of authority among the lower federal courts, this Court is free to follow the authority it deems the most appropriate. *Abela v Gen Motors Corp,* 469 Mich 603, 606; 677 NW2d 325 (2004). Indeed, even when there is no conflict among the lower federal courts, we are free to follow or reject their authority. *Id.* at 607.

Amicus curiae, the Prosecuting Attorneys Association of Michigan (PAAM), urges us to reject the constructive entry doctrine. It argues that (1) the United States Supreme Court has always held that probable

cause rather than a warrant is required for an arrest; (2) in *Payton, supra,* the Court held that a warrant was required *not* to accomplish the arrest, but rather to invade the privacy of the dwelling; and (3) *Morgan* and its progeny have erred in focusing on *arrests* without a warrant when the concern expressed in *Payton* was the *crossing of thresholds* without a warrant. However, we need not decide whether to adopt the constructive entry doctrine in this case because, even assuming that the constructive entry doctrine applies, we conclude that defendant here has not established that the police constructively entered his apartment in violation of his Fourth Amendment right to privacy.

Unlike the siege tactics employed in *Morgan, supra* at 1161, 1164, namely the encircling of the suspect's house with nine officers and several patrol cars, the strategic blocking of the suspect's car with one of the patrol cars, and the use of floodlights and a bullhorn in the dark of night to summon the suspect from the home, the actions of the officers in the instant case, according to defendant himself, merely involved knocking on his front door and asking him to step outside.[3]

Similarly, the facts of this case do not approach those of *United States v Saari,* 272 F3d 804, 806-807 (CA 6, 2001), in which four officers, with weapons drawn, surrounded the only entrance to the defendant's apartment, one officer carried a shotgun, and the officers announced, "Police." When the defendant opened the door, he was instructed to come outside. He testified that he walked outside with his hands in the air because he was afraid of being shot. In suppressing the evidence seized incident to the arrest, the *Saari* court gave

[3] Although there were five officers at the scene, defendant testified that there were only three at his front door at the time he opened it.

several examples of situations in which a reasonable person would not believe that he or she was free to leave:

> "[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." [*Id.* at 808, quoting *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980).]

In the instant case, while there was one more officer at the scene than in *Saari*, there was one less officer at defendant's door, and there is no indication that defendant knew of the presence of the other two officers at the time he left the apartment. Of the three officers at his door, only two were in uniform. This did not constitute an overwhelming show of force. Further, there was no evidence that the officers drew their weapons or used language that indicated that defendant might be compelled to leave his apartment, and defendant specifically testified that they did not touch him until after he crossed the threshold.

Nor did the officers' behavior approach that of the officers in *Al-Azzawy, supra* at 893 (the police completely surrounded the trailer with weapons drawn and, with a bullhorn, ordered the suspect to leave the trailer and drop to his knees), or *Sharrar, supra* at 819 (the police surrounded the house, pointed machine guns at the windows, and ordered the suspects to come out). Each of those cases involved overbearing police tactics.

Here, rather, the officers acted consistently with those in *United States v Thomas,* 430 F3d 274, 276 (CA 6, 2005), in which four officers approached the suspect's house in the daytime, two at the front door and two at the back door (which served as the primary entrance to

the house), while one officer stayed in a patrol car; the two who approached the primary entrance knocked, asked the suspect to step outside when he answered the door, and arrested him when he refused to speak with them. The Sixth Circuit found no Fourth Amendment violation because "the police officers did not enter the house and . . . defendant . . . did not exit the house as a result of physical force or any other conspicuous show of authority by the police." *Id.* at 275.

The court noted that consensual encounters between the police and citizens were permitted, and they did not become nonconsensual merely because they took place at the entrance of someone's home. *Id.* at 277. The court explained that the difference between a consensual encounter and a constructive entry is the show of force by the police. *Id.*

Lastly, the court reasoned that the number of officers present did not always indicate coercion; in finding that four officers was reasonable, the court noted the potential danger of approaching a house believed to contain a drug operation and stated that the officers were permitted to take reasonable security precautions. *Id.* at 280. Similarly here, the three officers approached defendant's apartment to arrest him for conspiracy to deliver controlled substances. While one of the officers testified that he did not expect to find evidence of drug trafficking in the apartment because defendant was on probation and, thus, was subject to random searches by his probation officer, the potential for danger still existed, and the officers reasonably sent three officers to defendant's door.

Moreover, while defendant claims he was coerced into leaving his apartment by the repeated requests of the officers, he fails to indicate how a second request that he step out of the apartment is any more coercive than

a single request. And, as noted in *Thomas,* an officer's request that an individual step out of his house to speak with the officer is not coercive. Additionally, defendant failed to identify any specific statements of compulsion. Compare, for example, the case of *Boykin v Van Buren Twp,* 479 F3d 444 (CA 6, 2007), in which the circuit court noted in a footnote that if the plaintiff had brought a claim alleging violation of his Fourth Amendment rights as a result of a constructive entry by the police, instead of bringing a civil rights action under 42 USC 1983, he likely would have had considerably more success. *Id.* at 450 n 2. In doing so, it found the following comments demonstrated an unequivocal show of force, " 'I'm trying to avoid coming into your home and dragging you out of your home. . . . And we're going to do that if you don't listen to us.' " *Id.* The statements in *Boykin* indicate that had the suspect not complied, the police would have physically compelled his compliance. In contrast here, defendant merely testified that the "Police said come out . . . . They kept telling me to come out the door." These statements do not threaten the use of physical force to compel compliance or, in fact, threaten in any manner.[4]

Although this case is somewhat complicated by the fact that defendant wore a tether and initially refused to leave the apartment, the suspect in *Boykin* apparently also refused to leave his home. While the tether

[4] The dissent claims that we have missed a crucial part of the dicta in *Boykin* that "recognized that coercive statements alone could invoke the constructive entry doctrine." *Post* at 278. We reiterate that we have not yet decided whether to adopt the constructive entry doctrine in Michigan. Even assuming arguendo that the constructive entry doctrine as articulated by the Sixth Circuit in *Boykin* were to apply, however, no coercive statements were made in this case. It is, therefore, unnecessary to decide whether coercive statements alone can invoke the constructive entry doctrine.

may have given defendant a greater incentive to stay in his apartment, this alone does not lead to a presumption that defendant's will was overborne by a show of police force. Rather, the tether, backed by a court order to remain in the apartment, instead of supplying a basis for a reasonable person to have felt coerced to leave his apartment as claimed by the dissent, would seem to provide more resolve to the person wearing it to remain inside. In other words, armed with a court order, defendant should have felt reasonably confident in refusing police requests that he leave the apartment. Thus, with the caselaw we have discussed in mind, it being clear that there was no improper entry, constructive or otherwise, defendant was arrested legally, and the trial court erred in suppressing evidence of the piece of paper containing the undercover officer's name and telephone number.

IV. CONCLUSION

In summary, even if we were to recognize the constructive entry doctrine, defendant in this case would fail to establish that police constructively entered his home in violation of his Fourth Amendment right to privacy. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for proceedings consistent with this opinion.

Reversed and remanded to the trial court.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

WEAVER, J. (*concurring in the result only*). I concur in the majority's holding that, if the constructive entry doctrine were to be adopted in Michigan, defendant Gillam would not be able satisfy the requirements of the

doctrine under the facts of this case. I write separately to offer a different analysis, truer to the purpose of the Fourth Amendment of the United States Constitution, with regard to why the constructive entry doctrine does not apply in this case.

The constructive entry doctrine is derived from the Fourth Amendment, which protects the right of people to be secure in their homes. US Const, Am IV. The Fourth Amendment provides:

> 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. [*Id*.]

In the context of arrests, the United States Supreme Court has established that under the Fourth Amendment, a warrant is required before the police can enter a home to arrest a person, absent any exigent circumstances. *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). In *Payton*, the Court stated that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id*.

While the holding in *Payton* protects people's Fourth Amendment rights in situations where the police physically enter a home, some courts have expanded on *Payton* to provide Fourth Amendment protection when the actions of the police lead to a constructive entry of a home. The constructive entry doctrine has been adopted by several federal circuit courts of appeals, including the Sixth Circuit Court of Appeals, to deal

with situations in which a person was arrested outside his or her home after police conduct compelled that person to leave the home.[1]

Both the majority and the dissent characterize the constructive entry doctrine as applying when a person is arrested after the police use coercive[2] conduct that would compel a reasonable person to comply with the police and leave his or her home. I generally agree with this characterization, but I find that the Fourth Amendment requires an application of the doctrine that focuses on police conduct with regard to crossing the threshold of the home rather than a person's belief that he or she must comply with an officer's request to leave his or her home. Any application that places more emphasis on a person's compliance with an officer's request, and less emphasis on the Fourth Amendment's protection of the home, undermines the Fourth Amendment and creates too broad of a doctrine. In applying the constructive entry doctrine, one should look to the facts of the case only to determine whether the police compelled the person into leaving his or her home by a show of force or threats *to cross the threshold into the person's home*.

The majority and the dissent argue over whether the facts of this case show that the police created an excited atmosphere that would have compelled defendant to leave his apartment. The more relevant question regarding constructive entry is whether the police actually displayed a show of force or made threats that

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[1] See *United States v Morgan,* 743 F2d 1158, 1166 (CA 6, 1984); *Sharrar v Felsing,* 128 F3d 810, 819 (CA 3, 1997); *United States v Al-Azzawy,* 784 F2d 890, 893 (CA 9, 1985); *United States v Maez,* 872 F2d 1444, 1450 (CA 10, 1989).

[2] To coerce is to compel by force or threat. Black's Law Dictionary (7th ed).

would lead a reasonable person to believe that if defendant did not come out of his apartment, the arresting officers would actually cross the threshold of the apartment to retrieve him.

Under the facts of this case, there appears to be no way in which the actions of the police could lead a reasonable person to believe that the police would have crossed the threshold of the apartment to arrest defendant. According to the testimony of defendant and the arresting officers, the only actions of the police were to approach defendant's apartment and ask him to come out.[3] Any other facts that relate to the atmosphere surrounding the arrest and whether defendant believed he needed to leave his apartment at the request of the police are not as relevant as the actions of the police under the test for constructive entry as stated above.[4]

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[3] Although there were several police officers standing outside defendant's door, and they asked defendant to come out even after he first refused, these facts do not show that the police at any time threatened to enter defendant's apartment to arrest him. Absent any condition indicating that the officers would enter the apartment, the number of officers present outside defendant's apartment is not relevant to the issue: one police officer or ten police officers could enter into an apartment to arrest someone.

[4] Although the majority and the dissent state that the presence of defendant's tether may have contributed to a coercive environment, my test does not give much weight to the environment surrounding the arrest. Because the focus should be on the actions of the police and whether the police acted with a show of force or threat to invade the home, the presence of the tether and defendant's reasonable belief that his tether restricted him to stay in his apartment does not factor into any decision regarding constructive entry. Rather, if the tether were to factor into the Fourth Amendment analysis of this case, the presence of the tether may actually reduce defendant's subjective and objective expectation of privacy in his home under the Fourth Amendment. See *United States v Smith*, 457 F Supp 2d 802 (ED Mich, 2006). The tether allows the police to monitor his movements at all times, including when he is in his home. If the police had improperly entered defendant's apartment, such entry would necessitate an analysis of defendant's expectation of privacy

Because this case lacks any fact showing that the police made a show of force or threatened to enter defendant's apartment, the constructive entry doctrine need not be applied in this case. Thus, I concur in the result reached by the majority.

KELLY, J. (*dissenting*). The issue here is whether certain police conduct constituted a constructive entry into defendant's home, violating the Fourth Amendment of the United States Constitution, invalidating the arrest, and rendering inadmissible the evidence later obtained.

The constructive entry doctrine is widely recognized. It is applicable in the instant case where the police created an excited environment and refused to respect defendant's repeated refusals to leave his home. Accordingly, I would affirm the judgment of the Court of Appeals and hold that the trial court properly suppressed the evidence that was seized after defendant's arrest.

THE APPLICABLE STANDARDS OF REVIEW

This Court reviews legal conclusions de novo and a trial court's findings of fact at a suppression hearing for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).[1] Constitutional questions are reviewed de novo. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

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under the Fourth Amendment. However, because the police did not improperly enter defendant's home, constructively or otherwise, an analysis of defendant's expectation of privacy is not necessary.

[1] I note that the Sixth Circuit Court of Appeals has concluded that the legal finding that a seizure occurred is reviewed de novo; the underlying factual findings are reviewed for clear error. See *United States v Buchanon*, 72 F3d 1217, 1222-1223 (CA 6, 1995).

THE CONSTRUCTIVE ENTRY DOCTRINE

The Fourth Amendment of the United States Constitution provides:

> 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.]

In Michigan, the police do not generally need a warrant to arrest a person when they have probable cause to believe that the person has committed a felony. *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). MCL 764.15(1) lists the circumstances under which a police officer may effectuate an arrest without a warrant.[2] However, a warrant is generally required to arrest a person in his or her home.

In *Payton v New York*,[3] the United States Supreme Court held that the Fourth Amendment prohibits the police from making a nonconsensual entry into a suspect's home without a warrant in order to make a routine felony arrest. *Payton*, 445 US at 576. The Court stated that " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Id.* at 585, quoting *United States v United States District Court*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

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[2] In the instant case, it is undisputed that the police did not obtain an arrest warrant before arriving at defendant's apartment. However, at the suppression hearing, the trial court determined that the police had probable cause to get an arrest warrant. I will assume that the police had probable cause to believe that defendant committed a felony and therefore could have effectuated a lawful arrest without a warrant.

[3] 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

The Court further recognized that it is a " 'basic principle of Fourth Amendment law' " that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton*, 445 US at 587 (citation omitted). The Court specifically drew the line between searches and seizures that do not violate the Fourth Amendment and those that do. The line was drawn at the entrance to the home:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." [*Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961).] In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. [*Id*. at 589-590.]

Numerous courts have interpreted *Payton* as prohibiting not only physical entries into a person's home to effectuate an arrest without a warrant, but constructive entries as well. The Third Circuit Court of Appeals, in *Sharrar v Felsing*,[4] found a constructive entry where there was a "clear show of physical force and assertion of authority." In *United States v Morgan*,[5] the Sixth Circuit Court of Appeals stated that either a constructive entry or a direct entry into the home would

[4] 128 F3d 810, 819 (CA 3, 1997).

[5] 743 F2d 1158, 1166 (CA 6, 1984).

constitute an arrest. The Ninth Circuit Court of Appeals in *United States v Al-Azzawy*,[6] found a constructive entry where the suspect was not free to leave, his movement was restricted, and the officers' show of force and authority was overwhelming. The Tenth Circuit Court of Appeals in *United States v Maez*,[7] found that *Payton* is violated where there is "such a show of force that a defendant comes out of a home under coercion and submits to being taken into custody."[8]

The constructive entry doctrine is a valid legal doctrine that protects individual liberties and safeguards individuals' Fourth Amendment rights. It respects the United States Supreme Court's decision in *Payton*, which drew a "firm line at the entrance to the house." *Payton*, 445 US at 590. Equally important, the constructive entry doctrine recognizes that officers cannot do through coercive tactics and the abuse of authority what they cannot do physically: they cannot enter someone's home to effectuate an arrest without a warrant. As noted by the Sixth Circuit Court of Ap-

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[6] 784 F2d 890, 893 (CA 9, 1985).

[7] 872 F2d 1444, 1451 (CA 10, 1989).

[8] A number of courts have not had the opportunity to discuss the constructive doctrine entry. See, e.g., *United States v Beaudoin*, 362 F3d 60, 68 (CA 1, 2004), citing *Joyce v Town of Tewksbury*, 112 F3d 19 (CA 1, 1997) (noting that a there is no settled answer to the constitutionality of doorway arrests), and *United States v Gori*, 230 F3d 44, 52 n 2 (CA 2, 2000) (declining to address the questions presented when the police surround a dwelling, flood it with search lights, and order evacuation over a bullhorn).

Other courts have indicated that the Fourth Amendment is not violated as long as the officers do not cross the physical threshold of the entrance to the home. See, e.g., *United States v Carrion*, 809 F2d 1120, 1128 (CA 5, 1987) (holding that *Payton* was not violated when the police, without crossing the threshold, pointed guns at and arrested the defendant when he was still in a hotel room), and *United States v Berkowitz*, 927 F2d 1376, 1386 (CA 7, 1991) (*Payton* prohibits an entry into a home without a warrant, not an officer's use of his or her voice to convey a message of arrest from outside the home).

peals, "[a] contrary rule would undermine the constitutional precepts emphasized in *Payton*." *United States v Morgan*, 743 F2d 1158, 1116 (CA 6, 1984).

Application of the constructive entry doctrine inherently requires a case-by-case analysis to determine whether the police conduct constituted a constructive entry. A majority of this Court concludes that the conduct in this case did not constitute a constructive entry. It arrives at this conclusion by noting that the facts are not as egregious as those in other cases. Here, the police did not use floodlights and bullhorns[9] or draw their weapons and place defendant in fear of being shot.[10] However, unlike the majority, I believe that a defendant's Fourth Amendment rights may be violated even though the police conduct was less egregious than that in the most extreme factual settings.

The decision should be made on the basis of the degree of coerciveness of the police conduct. The most relevant question is whether a reasonable person would feel compelled to leave the house.[11]

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[9] *Morgan*, 743 F2d at 1161, 1164.

[10] *United States v Saari*, 272 F3d 804, 806-807 (CA 6, 2001).

[11] See *United States v Thomas*, 430 F3d 274, 278 (CA 6, 2005) (there was no constructive entry where there was no indication that "a reasonable person, confronted with a knock on the door by police officers, would believe without more that he was either under arrest or otherwise compelled to leave the house"); *Sharrar*, 128 F3d at 819 (no reasonable person would have believed himself free to remain in the house when the police surrounded the house, pointed machine guns at the windows, and ordered the occupants out).

Justice WEAVER agrees that the constructive entry doctrine applies when a person is arrested after the police engage in coercive conduct that would compel a reasonable person to leave his or her home. However, she proposes a new test for determining whether a constructive entry has occurred and the Fourth Amendment has been violated. Under her theory, a constructive entry occurs when the police conduct would lead a reasonable person to believe that he or she must step outside his or her home. Otherwise, it must appear to the person, the officers would cross the threshold to arrest him or

In this case, the trial court believed defendant's version of the events. Defendant explained that, at the time in question, he had been confined to his apartment on house arrest and was on a tether. The police knocked on his door. He opened it, and the police asked him to come out. According to defendant, he replied that he could not come out because he was on a tether. It is undisputed that there was a repeated verbal exchange between the police and defendant in which the police told defendant to come out and he declined to do so. Defendant eventually emerged from the apartment "because there was an officer to [his] right [and] something about it [made him] feel threatened." Defendant testified that he came out in what he described as an exited atmosphere,[12] that he did not leave his apartment voluntarily, and that he felt coerced by the officers.

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her. I cannot agree that the police may use any degree of coercive conduct or threats so long as they stop short of indicating that they will physically cross the threshold. Under Justice WEAVER's test, the police could station machine guns, bullhorns, floodlights, and barking attack dogs outside a person's door indefinitely. As long as they did not threaten to physically cross the threshold of the person's home, there would be no constructive entry. It seems beyond argument that the Fourth Amendment affords greater protection than that.

[12] The majority takes issue with my characterization of the situation as an excited atmosphere. Defendant testified that the situation could be described as an excited atmosphere and, as recognized by the majority, the trial court believed his version of the events.

I do not find credible the majority's view that the police made no coercive statements to defendant. Even assuming that the officers' requests to defendant that he step outside were polite, by dint of their persistent repetition, they became coercive. That combined with the excited atmosphere created by the police, and the fact that defendant was on tether, enhanced the coercive environment. As recognized by the majority, the trial court stated, "In any event, I think [defendant] was, in some manner or another, caused to step outside and be arrested." Therefore, the trial court explicitly found that the police coerced defendant into leaving his apartment. The trial court's finding that there was a coercive environment was not clearly erroneous, given the quantity and weight of the testimony that supported it. The trial court, not the majority of this Court, was in the best position to judge the credibility of the witnesses and make findings of fact.

Given these facts, I would conclude that the police made a constructive entry. The uniformed police officers created an excited and coercive atmosphere. They refused to acknowledge or respect defendant's repeated refusals to leave his apartment. They made it clear that they would not take "no" for an answer and would continue to ask defendant to step out despite his repeated refusals to do so.

Moreover, before the police arrived at defendant's door, they knew that he was on house arrest with a tether. When they called out to him, defendant told them that he could not leave his apartment because he was on a tether. At the suppression hearing, the trial court believed defendant's testimony and noted that defendant knew the "meets [sic] and bounds" of the tether system. Moreover, when questioned by the trial court, an officer admitted that it was possible that defendant's tether had been set up so that he could not leave the apartment.

The fact that defendant was on a tether further supports the finding that there was a constructive entry. Defendant was under a court order to remain in his apartment, and yet the police officers repeatedly demanded that he leave it. Under this situation, a reasonable person would have felt coerced to leave his or her residence.[13] The majority contends that the facts of this case are similar to those in *United States v*

[13] The Michigan Court of Appeals has addressed what constitutes coercive conduct in a traditional knock-and-talk setting. In *People v Bolduc*, 263 Mich App 430, 441; 688 NW2d 316 (2004), the defendant testified that, after the police came to his home, he denied them permission to search his residence and requested that they leave the premises. The police ignored the defendant's repeated requests to leave his home and instead continued to question him. *Id.* The Court of Appeals found that the police officers' action constituted inherently coercive conduct. *Id.*

Thomas,[14] in which the Sixth Circuit Court of Appeals concluded that there was no constructive entry. In that case, officers knocked on the door of the defendant's residence. *Id.* at 276. When the defendant opened the door, the officers told him that the investigators wanted to talk to him and asked him to come out of the residence. *Id*. Without objection, the defendant came out of the residence, and the police arrested him. *Id.*

There are several important distinctions between the facts in *Thomas* and those in the instant case. In *Thomas*, the police made only one request of the defendant, who was not under house arrest, to come out of the residence. In the instant case, the police knew that defendant was under house arrest and refused to accept his repeated refusals to leave his residence. Unlike in *Thomas*, the instant facts do not reveal a calm single request to leave the residence. Rather, they reveal excited, repeated demands for a person under house arrest to leave his residence.

The majority attempts also to distinguish the instant case from *Boykin v Van Buren Twp*, 479 F3d 444 (CA 6, 2007). In *Boykin*, the police came to the defendant's house and stated, among other things, " 'I'm trying to avoid coming into your home and dragging you out of your home . . . . And we're going to do that if you don't listen to us.' " *Id.* at 450 n 2. The Sixth Circuit Court of Appeals opined that, had the issue been briefed, the

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This Court has not yet discussed the constitutionality of, or limits to, traditional knock-and-talk encounters. See *People v Frohriep*, 466 Mich 888 (2002) (KELLY, J., dissenting). In any event, the *Bolduc* decision indicates the willingness of the Court of Appeals to recognize that repeated refusals by police officers to leave a suspect's home when requested constitute coercive conduct.

[14] 430 F3d 274 (CA 6, 2005).

Court would have been inclined to find a constructive entry into the defendant's home in violation of *Payton*. *Id.*

In attempting to distinguish the instant facts from those of *Boykin*, the majority misses a crucial part of the *Boykin* commentary. Specifically, the Sixth Circuit recognized that coercive statements alone could invoke the constructive entry doctrine. This recognition necessarily belies the majority's inference that only overt physical acts, such as using a bullhorn or brandishing machine guns, could constitute a constructive entry.

It should be noted, also, that the majority opinion risks establishing bad public policy. It discourages people from opening their door to police officers. Essentially, it signals to the public that it is acceptable for the police to ignore a person's repeated refusals to leave his or her home and sanctuary. Hence, people might conclude that they should not open their doors when they see police officers on the other side. This Court should encourage, not discourage, the public to assist the police in their lawful investigations.[15]

CONCLUSION

For the reasons I have discussed, I would affirm the judgment of the Court of Appeals and hold that the trial court properly excluded the evidence seized. A constructive entry occurred when the police created an excited

[15] The majority claims that the tether would provide more resolve to the person wearing it to remain inside. However, as noted above, defendant did initially display his resolve to remain in the apartment, and the officers refused to respect it. It is apparent from the fact of the tether that defendant had prior contact with the police and the court system. Presumably, the judge who ordered the tether encouraged him to cooperate with the police while on the tether. The majority's opinion encourages both those who do and do not have an ongoing relationship with the court system to ignore police requests.

environment and coerced defendant who was on a tether into leaving his apartment in order to arrest him.

CAVANAGH, J., concurred with KELLY, J.

MICHIGAN CITIZENS FOR WATER CONSERVATION
v NESTLÉ WATERS NORTH AMERICA INC

Docket Nos. 130802, 130803. Decided July 25, 2007.

Michigan Citizens for Water Conservation (MCWC) and others brought an action in the Mecosta Circuit Court against Nestlé Waters North America Inc. and others, alleging that Nestlé's withdrawal of groundwater from an area spring violated various common-law doctrines and environmental statutes with respect to certain lakes, streams, and wetlands allegedly affected by the withdrawal. The trial court, Lawrence C. Root, J., ruled in the plaintiffs' favor on the common-law and statutory claims, and granted their request for a permanent injunction of Nestlé's pumping activities. In three separate opinions, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court. MURPHY, P.J., was joined by WHITE, J., in holding that the plaintiffs had standing to sue for damages in areas known as the Osprey Lake Impoundment and Wetlands 112, 115, and 301, although there was no evidence that the plaintiffs actually used or physically participated in activities in those areas, because environmental injuries to those areas played a role in harm caused to other areas that were not the subject of a standing challenge. SMOLENSKI, J., would have held that the plaintiffs lacked standing with respect to the Osprey Lake Impoundment and Wetlands 112, 115, and 301 because the plaintiffs did not use those areas and therefore could not demonstrate that they had suffered or would suffer an injury distinct from that of the public generally. 269 Mich App 25 (2005). The Supreme Court ordered and heard oral argument on whether to grant the applications for leave to appeal or take other peremptory action with respect to the standing issue only. 477 Mich 892 (2006).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The plaintiffs have standing to bring a claim under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., with respect to the Dead Stream and Thompson Lake because the individual plaintiffs enjoy riparian rights to those areas. MCWC has standing because the individual plaintiffs are members of that organization. The plaintiffs have not satisfactorily alleged that

they suffered an injury in fact with respect to the Osprey Lake Impoundment and Wetlands 112, 115, and 301. They have not shown that they use these areas or that they have any recreational, aesthetic, or economic interests in these areas. Accordingly, plaintiffs lack standing to bring a MEPA claim with respect to the Osprey Lake Impoundment and Wetlands 112, 115, and 301.

1. To preserve the separation of legislative, executive, and judicial powers among the coordinate branches of government to which those respective powers have been committed, the judiciary must confine itself to the exercise of the "judicial power" by vigilantly enforcing principles of standing, which ensure that a genuine case or controversy is before the court. Where a plaintiff claims an environmental injury, this Court lacks the "judicial power" to hear the claim if the plaintiff cannot allege facts to show that he or she has suffered or will imminently suffer a concrete and particularized injury in fact. An injury in fact is established in the environmental context when the defendant's activities directly affect the plaintiff's recreational, aesthetic, or economic interests in a particular area.

2. The plaintiffs have standing to bring a MEPA claim with respect to the Dead Stream and Thompson Lake because the individual plaintiffs enjoy riparian property rights to the Dead Stream and Thompson Lake. Therefore, if Nestlé's pumping activities have impaired their riparian property rights, they clearly have suffered an injury in fact. Because these individual plaintiffs are members of MCWC, they confer organizational standing on MCWC with respect to the Dead Stream and Thompson Lake. This part of the judgment of the Court of Appeals is affirmed.

3. The plaintiffs have not shown that they used or had access to the Osprey Lake Impoundment and Wetlands 112, 115, and 301, or that they enjoyed a recreational, aesthetic, or economic interest in them. Therefore, even though these areas may be hydrologically connected to the Dead Stream and Thompson Lake, the plaintiffs failed to establish any interest in the Osprey Lake Impoundment and Wetlands 112, 115, and 301 that was detrimentally affected by Nestlé's conduct and that was distinct from the interest of the general public. Neither the constitutional provision establishing the public interest in the protection of Michigan's natural resources nor the Legislature's grant of standing to "any person" to sue under MEPA lightens a plaintiff's burden to satisfy traditional standing requirements in environmental cases. Because separation of governmental powers requires the judiciary to exercise only its "judicial power" and decide only actual disputes, plaintiffs in environmental cases, like all other plaintiffs, must demonstrate

that they have suffered an actual injury with respect to each claim they raise. Thus, the absence of a concrete, particularized injury in fact is fatal to the plaintiffs' standing to bring a MEPA claim with respect to the Osprey Lake Impoundment and Wetlands 112, 115, and 301. This part of the judgment of the Court of Appeals is reversed.

4. The environmental "ecosystem nexus" theory of standing—premised on the idea that our environment is interconnected—if accepted would grant plaintiffs standing to assert claims as to particular harms to which they have alleged no direct interest. Such a theory of standing would obliterate traditional standing principles and permit anyone to contest activities occurring literally anywhere in Michigan because all water ecosystems are hydrologically connected. The judiciary lacks power to decide such attenuated claims. The plaintiffs have no greater interest in the Osprey Lake Impoundment and Wetlands 112, 115, and 301 than the general public.

Affirmed in part, reversed in part, and remanded to the trial court.

Justice WEAVER, joined by Justice CAVANAGH, dissenting, disagreed with the majority's reversal of the Court of Appeals holding that the plaintiffs have standing to bring a MEPA claim with respect to the Osprey Lake impoundment and Wetlands 112, 115, and 301 and would hold instead that the plaintiffs have standing with respect to all the affected properties at issue. The majority's test for standing, based on the federal standing doctrine, is not supported by the Michigan Constitution, which does not restrict the Legislature's ability to grant standing to the citizens of this state. The Michigan Constitution contains no corollary to US Const, art III, § 2, which limits the federal judicial power to cases and controversies. Moreover, Const 1963, art 4, § 52 specifically places a broad duty on the Legislature to protect the environment, and the Legislature has properly fulfilled that mandate by enacting MEPA, which authorizes any person to bring an action to protect the natural resources of the state. The majority's decision takes away this power of the people.

Justice CAVANAGH, dissenting, concurred fully in the dissenting opinion of Justice WEAVER and wrote separately to note that he would hold that the plaintiffs have standing because the evidence they presented soundly demonstrates that Nestlé's conduct is perpetrating environmental effects on the ecosystem about which the plaintiffs' complaint is concerned. It should be recognized that, at the very least, areas that a citizen does not use, but that are perceptibly affected by the same conduct that is affecting the areas

the citizen does use—are encompassed within the citizen's right to pursue a claim against the offending actor. Lawsuits brought to vindicate environmentally detrimental conduct are not merely "public policy-oriented." A person has an "immediate stake in the controversy" when an ecosystem that the person seeking standing is a part of suffers perceptible degradation.

Justice KELLY, dissenting, agreed with the conclusion and analysis in Justice Weaver's dissent regarding the test for standing adopted in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 472 Mich 608 (2004), but also recognized that those cases now constitute binding precedent of the Supreme Court. Because Justice KELLY would hold that the plaintiffs have established standing under *Lee* and *Nat'l Wildlife*, it is unnecessary to consider in this case whether those decisions should be overruled. This case turns on the correct application of the injury-in-fact component of the test for standing. Because, as conceded by the majority, the plaintiffs have standing to challenge Nestlé's pumping on the basis of its effects on the Dead Stream and Thompson Lake, they can also raise other inadequacies based on the public interest. Therefore, the plaintiffs have standing to challenge the total effects of the pumping, including its effects on the Osprey Lake impoundment and Wetlands 112, 115, and 301. Separation of powers concerns do not command a different result because a legitimate dispute exists in this case, given the plaintiffs' injury in fact, and the Supreme Court's role is to adjudicate that dispute, not to decide whether the Legislature's grant of a broad cause of action under MEPA was wise. By deciding otherwise, the majority oversteps its bounds, telling the Legislature how to function and extinguishing a valid cause of action.

1. ENVIRONMENT — STANDING — MICHIGAN ENVIRONMENTAL PROTECTION ACT.

The Michigan Supreme Court lacks the judicial power to hear an environmental claim if the plaintiff cannot aver facts to indicate that he or she has suffered or will imminently suffer a concrete and particularized injury in fact (MCL 324.1701[1]).

2. ENVIRONMENT — STANDING — MICHIGAN ENVIRONMENTAL PROTECTION ACT — INJURY IN FACT.

An environmental plaintiff adequately alleges an injury in fact by averring that he or she has a property interest or uses the affected area or is a person for whom the aesthetic and recreational values of the area will be lessened by the challenged activity (MCL 324.1701[1]).

Olson, Bzdok & Howard, P.C. (by *James M. Olson*, *Christopher M. Bzdok*, and *Scott W. Howard*), and *Chris A. Shafer* for the plaintiffs.

Mika Meyers Beckett & Jones PLC (by *John M. DeVries* and *Fredric N. Goldberg*), *Warner Norcross & Judd LLP* (by *Eugene E. Smary* and *Robert J. Jonker*), *Kilpatrick Stockton LLP* (by David M. Zacks and Adam H. Charnes), and *Porteous Law Office, P.C.* (by *David L. Porteous*), for Nestlé Waters North America Inc.

Amici Curiae:

Neil S. Kagan for the National Wildlife Federation, the Michigan United Conservation Clubs, the Tip of the Mitt Watershed Council, the Pickerel-Crooked Lakes Association, and the Burt Lake Preservation Association.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Timothy Sawyer Knowlton*, and *Brian T. Quinn*) for the Michigan Chamber of Commerce.

Clark Hill PLC (by *Fritz R. Damm*, *David D. Grande-Cassell*, and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Sara R. Gosman, S. Peter Manning*, and *Harold J. Martin*, Assistant Attorneys General, for the Michigan Department of Environmental Quality.

Law, Weathers & Richardson, P.C. (by *Clifford H. Bloom*), for Michigan Lake & Stream Associations, Inc.

YOUNG, J. The sole question presented in this case is whether plaintiffs have standing to bring a claim under

the Michigan Environmental Protection Act (MEPA)[1] as that claim relates to certain streams, lakes, and wetlands in Mecosta County.

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[2] we noted that " 'environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.' "[3] Plaintiffs indisputably have standing to bring a MEPA claim against Nestlé to protect their riparian property rights to Thompson Lake and the Dead Stream. However, plaintiffs have failed to demonstrate that they use the Osprey Lake Impoundment (Osprey Lake) and Wetlands 112, 115, and 301, and that, as a result, their recreational, aesthetic, or other interests have been impaired. Accordingly, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the Court of Appeals in part, but we reverse the Court of Appeals holding that plaintiffs have standing to bring a MEPA claim regarding Osprey Lake and Wetlands 112, 115, and 301, and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This highly publicized case concerns certain interconnected streams, lakes, and wetlands north of the Tri-Lakes region in Mecosta County, Michigan. These bodies of water include Osprey Lake, Thompson Lake,

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[1] MCL 324.1701 *et seq*.

[2] 471 Mich 608; 684 NW2d 800 (2004).

[3] *Id*. at 629, quoting *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 183; 120 S Ct 693; 145 L Ed 2d 610 (2000) (citation omitted).

the Dead Stream, and several wetlands that, for purposes of this case, have been enumerated Wetlands 112, 115, and 301. Osprey Lake is a man-made lake created by the damming and flooding of the Dead Stream. An earthen dam on the east end of Osprey Lake separates Osprey Lake and the Dead Stream. The Dead Stream flows southeast where it eventually joins the Tri-Lakes.[4] Just south of Osprey Lake is a small natural lake, Thompson Lake. To the west and north of Osprey Lake are Wetlands 112, 115, and 301.

Defendants Donald and Nancy Bollman own approximately 850 acres of land in an area known as the Sanctuary that surrounds Osprey Lake and several of the enumerated wetlands.[5] The Bollmans have operated the Sanctuary as a private hunting preserve since they acquired the property in the 1970s. They granted Nestlé the groundwater rights to a 139-acre area on the northern shore of Osprey Lake within the Sanctuary after preliminary tests indicated that the land contained a suitable and reliable source of spring water.[6]

In order to begin pumping and bottling the water, Nestlé also obtained permits from the Michigan Department of Environment Quality (MDEQ) that ensured its compliance with the standards of the Safe Drinking Water Act.[7] In August 2001, the MDEQ issued Nestlé a permit

[4] The trial court referenced the "Dead Stream wetlands" in addition to the Dead Stream. These wetlands are found in and around the Dead Stream. For purposes of this case, we refer to the Dead Stream itself and its related wetlands collectively as the Dead Stream.

[5] The Bollmans are not part of this appeal.

[6] In order for Nestlé to bottle and market its product as spring water, the source had to satisfy the definition of "spring water" established by the federal Food and Drug Administration (FDA).

[7] MCL 325.1001 *et seq*. The Legislature subsequently amended the Safe Drinking Water Act and other legislation to further regulate water diversion and bottling in Michigan. See, e.g., 2006 PA 33; 2006 PA 34;

to convert two test wells to production wells and to install water mains, pump stations, and booster stations to transport the spring water to Nestlé's soon-to-be-constructed bottling facility in Stanwood, Michigan. In February 2002, the MDEQ issued another permit, authorizing two additional production wells at the Sanctuary Springs site. The MDEQ permits authorized Nestlé to operate the four wells at a combined maximum pumping rate of 400 gallons per minute. Armed with the required permits, Nestlé commenced pumping operations in 2002.

Plaintiff Michigan Citizens for Water Conservation (MCWC) is a non-profit corporation of approximately 1,300 members that formed to protect and conserve water resources in Michigan, particularly in Mecosta County. It views Nestlé and its pumping activities as inimical to MCWC's mission. Two hundred sixty-five members are riparian owners in the Tri-Lakes area, including plaintiffs R.J. and Barbara Doyle, who own land on the Dead Stream, and plaintiffs Jeffrey and Shelly Sapp, who own land on Thompson Lake.

MCWC filed suit in June 2001, seeking temporary and permanent injunctive relief against Nestlé. The trial court denied plaintiffs' request for temporary injunctive relief to prevent Nestlé's construction of the Stanwood bottling facility while the parties litigated Nestlé's right to pump spring water from Sanctuary Springs. Later, in November 2001, plaintiffs filed a six-count second amended complaint.[8] Following

2006 PA 35; 2006 PA 37. Because these acts did not take effect until after the trial court and the Court of Appeals issued their decisions, we do not address this legislation in this opinion.

[8] Count I requested an injunction to prevent the construction of wells, wellhouses, and pipelines to transport water to the Stanwood facility. Count II alleged that Nestlé violated common-law riparian rights. Count III similarly claimed that the pumping violated common-law rules

Nestlé's and plaintiffs' cross-motions for summary disposition, the trial court dismissed all the counts except the common-law groundwater claim and the MEPA claim, which proceeded to trial.

After a lengthy bench trial, the trial court granted plaintiffs' request for a permanent injunction of Nestlé's pumping activities. In its opinion, the court made elaborate findings of fact identifying what it called the "zone of influence," the "hydrological effects," and the "ecological impacts" of Nestlé's pumping activities.[9] Relying on these factual findings, the court ruled that plaintiffs prevailed on both the common-law groundwater claim and the MEPA claim and that the only appropriate remedy was to grant a permanent injunction.[10]

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governing diversion of groundwater. Count IV alleged that Nestlé violated the public trust by withdrawing the spring water. Count V stated that Nestlé's use constituted an unlawful taking of public resources. Count VI claimed that Nestlé's activities violated MEPA. The second amended complaint also added the Doyles and the Sapps as co-plaintiffs.

[9] The "zone of influence" included the Dead Stream, Osprey Lake, Thompson Lake, and Wetlands 115, 112, and 301. The "hydrological effects" section of the opinion described the reduced flow and water levels in the lakes, streams, and wetlands that the court attributed to the pumping. The "ecological impacts" section of the opinion summarized the predicted ecological consequences that the court causally linked to the reduced flow and water level in those bodies of water.

[10] With respect to the common-law groundwater claim, the court found that this case involved an unprecedented intersection of Nestlé's groundwater rights with plaintiffs' riparian rights. After reviewing Michigan common law in this area, the court developed a test that, if groundwater and riparian rights clash and a hydrological connection is proven, riparian rights take priority above groundwater rights. If the groundwater use removes the water from the watershed, then any such use may not reduce natural flow to a riparian body. Applying this test, the court concluded that Nestlé's withdrawals of spring water impaired plaintiffs' riparian rights.

With respect to the MEPA claim, the court found that plaintiffs established an unrebutted prima facie case that Nestlé's pumping activi-

Both plaintiffs and Nestlé appealed and, in a published opinion, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court.[11] Appealing the MEPA claim, Nestlé argued that plaintiffs lacked standing to bring that claim with respect to Osprey Lake and Wetlands 112, 115, and 301.[12] Judges WHITE and MURPHY, forming the majority on the standing question, disagreed with Nestlé. Holding that plaintiffs had standing "with respect to all the natural resources at issue," Judge MURPHY wrote that

> plaintiffs have standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydrologic interaction, connection, or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestlé's pumping activities, whereby impact on one particular resource caused by Nestlé's pumping necessarily affects other resources in the surrounding area. Therefore, although there was no evidence that plaintiffs actually used or physically participated in activities on the Osprey Lake impound-

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ties violated environmental standards drawn from the inland lakes and streams act, MCL 324.30101 *et seq.*, and the wetland protection act, MCL 324.30113 *et seq*.

[11] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005). Before Nestlé's appeal of right, the Court of Appeals granted Nestlé's requested stay of the injunction and set a maximum pump rate of 250 gallons per minute. That rate was reduced to 200 gallons per minute after the Court of Appeals issued its opinion.

[12] Nestlé also appealed the common-law groundwater claim. The panel adopted a different test from that applied by the trial court. Derived from earlier Michigan cases, this "reasonable use" balancing test required a case-by-case application of principles of ensuring fair participation, protecting only reasonable uses, and prohibiting only unreasonable harms. See, e.g., *Dumont v Kellogg*, 29 Mich 420 (1874); *Maerz v United States Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). The Court of Appeals concluded that under this test Nestlé's pumping at 400 gallons per minute was unreasonable. It remanded this issue to the trial court to determine the appropriate level of pumping.

> ment and wetlands 112, 115, and 301, environmental injuries to those natural resources play a role in any harm caused to the Dead Stream, the Dead Stream's wetlands, and Thompson Lake, which are used by and adjacent to property owned by plaintiffs and not the subject of a standing challenge.[13]

Judge SMOLENSKI dissented. He would have found that plaintiffs lacked standing with respect to Osprey Lake and Wetlands 112, 115, and 301 because plaintiffs did not use those areas, so they could not demonstrate that they had suffered or would suffer a concrete or particularized injury distinct from that of the public generally.[14] Judge SMOLENSKI also would have declared unconstitutional MCL 324.1701(1),[15] which authorizes "any person" to bring a MEPA claim.[16] He considered that provision an unlawful attempt by the Legislature to confer standing broader than the constitutional limits set forth in *Lee v Macomb Co Bd of Comm'rs*,[17] and *Nat'l Wildlife*.[18]

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[13] *Michigan Citizens,* 269 Mich App at 113 (opinion of MURPHY, P.J.).

[14] *Id*. at 83.

[15] MCL 324.1701(1) states:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

[16] *Michigan Citizens,* 269 Mich App at 87.

[17] 464 Mich 726; NW2d 900 (2001).

[18] The Court of Appeals also resolved other issues. It rejected defendant's argument that the trial court's factual findings were clearly erroneous and that the trial court abused its discretion when it refused to grant defendant's request to reopen the proofs or supplement the record. It also affirmed the trial court's dismissal of plaintiffs' public trust claim. Additionally, the Court of Appeals agreed with defendant that the trial court erred by granting plaintiffs' motion for costs as prevailing parties.

Both parties sought leave to appeal in this Court. We ordered oral argument on the applications, directing the parties to address only "whether the plaintiffs have standing under *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), to bring claims related to the Osprey Lake impoundment and wetlands 112, 115, and 301."[19] Hence, we limit our decision to the issue of standing. We do not pass on the merits of the other issues raised on appeal.

II. STANDARD OF REVIEW

Whether a party has standing is a question of law that we review de novo.[20]

III. ANALYSIS

A. STANDING

This Court recently explained in *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*,[21] that

> [o]ur tripartite system of government is constitutionally established in both our state and federal constitutions. US Const, art III, § 1 confers upon the courts only "judicial power"; US Const, art III, § 2 limits the judicial power to "[c]ases and [c]ontroversies." Similarly, our state constitution, Const 1963, art 3, § 2, provides:
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> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers

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Judge WHITE also filed a separate opinion pertaining to a matter unrelated to the standing issue decided in this case.

[19] 477 Mich 892 (2006).

[20] *Lee*, 464 Mich at 734.

[21] 475 Mich 363, 369-370; 716 NW2d 561 (2006).

> properly belonging to another branch except as expressly provided in this constitution."
>
> The powers of each branch are outlined in the Michigan Constitution, which assigns to the Legislature the task of exercising the "legislative power," the Governor the task of exercising the "executive power," and the judiciary the task of exercising the "judicial power."[22]

Standing is an indispensable doctrine rooted in our constitution and the tripartite system of government it prescribes. We vigilantly enforce principles of standing in order to vindicate the separation of legislative, executive, and judicial powers among the coordinate branches of government to which those respective powers have been committed. Indeed, "neglect of [standing] would imperil the constitutional architecture" carefully constructed by its drafters and ratified by the people.[23] To neglect standing would empty the phrases "executive power," "legislative power," and "judicial power" of their intended significance and render the separation of powers demanded by Const 1963, art 3, § 2 meaningless. The purposely drawn boundaries within our tripartite government would vanish, removing the impediments that were intended to prevent one branch of government from exercising powers exclusively vested in the other, coequal branches.

As part of this endeavor to preserve separation of powers, the judiciary must confine itself to the exercise of the "judicial power" and the "judicial power" alone.

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[22] See also Const 1963, art 4, § 1 (vesting the "legislative power" in a senate and a house of representatives); Const 1963, art 5, § 1 (vesting the "executive power" in the governor); Const 1963, art 6, § 1 (vesting the "judicial power . . . exclusively in one court of justice").

[23] *Lee*, 464 Mich at 735. See generally *Nat'l Wildlife*, 471 Mich at 612-628 (thoroughly discussing standing, separation of powers, and the proper exercise of "judicial power").

"Judicial power" is an undefined phrase in our constitution, but we noted in *Nat'l Wildlife* that

> [t]he "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [471 Mich at 614-615.]

We went on in *Nat'l Wildlife* to distill this litany of considerations arising from the proper exercise of the "judicial power," and we determined that "the most critical element" is "its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute."[24]

Steadfast enforcement of standing principles and separation of powers demands remarkable judicial self-restraint. Before his appointment to the United States Supreme Court, Chief Justice John Roberts wrote that the doctrine of standing "implement[s] the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society' " so that "[s]tanding is thus properly regarded as a doctrine of judicial self-restraint."[25] He noted that "[s]eparation of powers is a zero-sum game" and the doctrine of standing

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[24] *Nat'l Wildlife*, 471 Mich at 615.

[25] See Comment: *Article III limits on statutory standing*, 42 Duke L J 1219, 1220, 1221 (1993); see also Scalia, *The doctrine of standing as an essential element of the separation of powers*, 17 Suffolk U L R 881, 890-893 (1983) (discussing the relationship between separation of powers and the doctrine of standing).

"ensures that the court is carrying out *its* function of deciding a case or controversy," and not fulfilling the responsibilities of the other branches.[26] More recently, writing for the Court in *DaimlerChrysler v Cuno*,[27] Chief Justice Roberts argued that a court has "no business" deciding a dispute that is not a proper case or controversy and quoted Chief Justice John Marshall's observation that

> "[i]f the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary."

Thus, the court that earnestly adheres to the doctrine of standing must exercise self-discipline to resist the temptation of usurping power from the other branches. The court that is willing to compromise the doctrine of standing and reach beyond the "judicial power" lacks such discipline.

Standing ensures that a genuine case or controversy is before the court. It " 'requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large.' "[28] To successfully allege standing, a plaintiff must prove three elements.

> "First, the plaintiff must have suffered an 'injury in fact'–an invasion of a legally protected interest which is (a)

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[26] *Article III Limits*, 42 Duke L J at 1230.

[27] 547 US __; 126 S Ct 1854, 1861; 164 L Ed 2d 589 (2006), quoting 4 Papers of John Marshall 95 (C Cullen ed, 1984).

[28] *Lee,* 464 Mich at 738-739, quoting *House Speaker v Governor*, 441 Mich 547, 554; 495 NW2d 539 (1993).

> 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.' " [*Nat'l Wildlife*, 471 Mich at 628-629, quoting *Lee,* 464 Mich at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).][29]

Where the plaintiff claims an injury related to the environment, this Court lacks the "judicial power" to hear the claim if the plaintiff cannot aver facts that he has suffered or will imminently suffer a concrete and particularized injury in fact. In this context, " 'environ-

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[29] Concerning Justice CAVANAGH's dissent, we are perplexed about how he would analyze standing cases. The United States Supreme Court decision in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992), is the most significant recent judicial pronouncement on standing. In *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 650-651; 537 NW2d 436 (1995), Justice CAVANAGH affirmatively cited *Lujan* to conclude that a labor union had standing. In *Lee*, 464 Mich at 750, joining Justice KELLY's dissent, he again "agree[d] with the majority's adoption of the *Lujan* test." Then, in *Nat'l Wildlife,* 471 Mich at 676, Justice CAVANAGH "disavow[ed]" his previous position and concluded that "*Lujan* should not be used to determine standing in this state." Finally, in this case, he favorably cites *Lujan*, *post* at 322-323, while also joining a dissent that concludes that *Lujan* is inapplicable in this state. In short, on an issue of enormous constitutional consequence, Justice CAVANAGH has, without much explanation, adopted a variety of seemingly inconsistent positions. Under these circumstances, it would seem to behoove Justice CAVANAGH to demonstrate somewhat greater reservation than he does before joining a dissenting opinion in which the political motivations of the majority justices are called into question without justification—justices who have consistently adhered to the same constitutional position on standing over the years without regard to the parties or interests involved. See, e.g., *Lee, supra; Nat'l Wildlife, supra; Michigan Chiropractic Council, supra; Rohde, infra*.

mental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.' "[30] An injury in fact is established when the defendant's activities directly affected the plaintiff's recreational, aesthetic, or economic interests.[31]

B. APPLICATION

Plaintiffs MCWC and the Doyles and Sapps must satisfy the three elements of standing to pursue a MEPA claim against Nestlé. In other words, they must have (1) suffered an injury in fact (2) causally connected to Nestlé's conduct that (3) can be redressed by a favorable decision. MCWC, as a nonprofit organization, must satisfy our requirement for organizational standing. A nonprofit organization has standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs.[32]

Defendant concedes, and we agree, that plaintiffs have standing to bring a MEPA claim with respect to the Dead Stream and Thompson Lake, because the Doyles and the Sapps enjoy riparian property rights to the Dead Stream and Thompson Lake, respectively. Therefore, if Nestlé's pumping activities have impaired their riparian property rights, they clearly have suffered an injury in fact. Moreover, because these individual plaintiffs are members of MCWC, they confer organizational standing on MCWC with respect to the Dead Stream and Thompson Lake.

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[30] *Nat'l Wildlife*, 471 Mich at 629, quoting *Laidlaw*, 528 US at 133 (citations omitted).

[31] *Laidlaw,* 528 US at 184.

[32] *Nat'l Wildlife*, 471 Mich at 629; *Trout Unlimited, Muskegon White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

However, turning to Osprey Lake and Wetlands 112, 115, and 301, the record below does not indicate that plaintiffs used or had access to these areas or that they enjoyed a recreational, aesthetic, or economic interest in them. Plaintiffs failed to establish that they have a substantial interest in these areas, detrimentally affected by Nestlé's conduct, that is distinct from the interest of the general public. The absence of a concrete, particularized injury in fact is fatal to plaintiffs' standing to bring a MEPA claim with respect to Osprey Lake and Wetlands 112, 115, and 301.

To be clear, we are refining, not dismissing, plaintiffs' MEPA claim. Plaintiffs enjoy the full protection that MEPA affords to vindicate their riparian property interests. Thus, they have standing insofar as Nestlé's pumping activities inflicted an injury in fact with respect to the Dead Stream and Thompson Lake. However, plaintiffs cannot similarly establish standing with respect to Osprey Lake and Wetlands 112, 115 and 301.[33]

In reaching this conclusion, we reject the Court of Appeals "interconnectedness" theory of standing as inconsistent with *Lee* and *Nat'l Wildlife*. The trial court found as fact that many of the streams, lakes and wetlands in the Tri-Lakes area are joined by an inextricable, hydrological link. Drawing from these facts, the Court of Appeals held that

> plaintiffs have standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydro-

[33] Of course, in the process of protecting plaintiffs' riparian rights in the Dead Stream and Thompson Lake, a successful MEPA claim may have the incidental effect of protecting Osprey Lake and Wetlands 112, 115, and 301 because the common source of the environmental harm that the trial court found in the entire region was Nestlé's pumping activity.

> logic interaction, connection, or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestlé's pumping activities, whereby impact on one particular resource caused by Nestlé's pumping necessarily affects other resources in the surrounding area. *Therefore, although there was no evidence that plaintiffs actually used or physically participated in activities on the Osprey Lake impoundment and wetlands 112, 115, and 301*, environmental injuries to those natural resources play a role in any harm caused to the Dead Stream, the Dead Stream's wetlands, and Thompson Lake, which are used by and adjacent to property owned by plaintiffs and not the subject of a standing challenge. [*Michigan Citizens*, 269 Mich App at 113 (emphasis added).]

The flaw in this "interconnectedness" theory of standing is that it permits plaintiffs to evade their burden to establish an injury in fact. As the United States Supreme Court stated in *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC)*,[34] the relevant inquiry in standing analysis is not whether the environment suffered injury, but whether the plaintiff suffered injury. If the hydrological links are as the trial court found, then a reduced flow or water level at one point in the interconnected hydrological system will have a measurable effect elsewhere in that system. But plaintiffs must still establish how *they* have suffered a concrete and particularized injury in fact within this interrelated ecosystem. The environmental peculiarities of the Tri-Lakes area, or any ecosystem for that matter, do not obviate constitutional standing requirements.

Plaintiffs defend the Court of Appeals standing analysis by arguing that all of the harm in this case is singularly traceable to Nestlé's pumping activity, and so their single MEPA claim cannot be divided into multiple

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[34] 528 US 167, 181; 120 S Ct 693; 145 L Ed 2d 610 (2000).

causes of action. They emphasize that they have raised *one* MEPA claim to address the multitude of harms allegedly caused by Nestlé's pumping activities and seek *one*, indivisible remedy: to halt Nestlé's withdrawals. According to plaintiffs, an entire ecosystem that includes Osprey Lake and Wetlands 112, 115, and 301 has been harmed.

Plaintiffs' argument misses the basic point that *plaintiffs* are the focus of the standing inquiry, not the Tri-Lakes region. We reject plaintiffs' bootstrapping approach to standing under which, as long as they have standing to redress *their* injury in fact, they have standing to redress all injuries conceivably related to their injury in fact. No matter how pervasive the environmental damage in an ecosystem, plaintiffs must still successfully and succinctly establish their injury in fact. Plaintiffs satisfy this requirement for the Dead Stream and Thompson Lake, but not Osprey Lake and Wetlands 112, 115, and 301.

The caselaw that plaintiffs cite to support their position actually confirms our analysis. The Supreme Court cases cited by plaintiffs consistently required that the plaintiff demonstrate an injury in fact in order to bring suit.[35] Indeed, in *Lujan v Defenders of Wildlife*,[36] the Court discredited an "ecosystem nexus" approach to standing that would grant standing to "any person who uses *any part* of a 'contiguous ecosystem' adversely affected . . . even if the activity is located a great distance away." The Court also held that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in

[35] See, e.g., *Sierra Club v Morton*, 405 US 727; 92 S Ct 1361; 31 L Ed 2d 636 (1972); *Warth v Seldin*, 422 US 490; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

[36] 504 US at 555, 565 (emphasis in original).

the vicinity' of it."[37] Yet, in this case, the Court of Appeals endorsed and plaintiffs advocate precisely the "ecosystem nexus" approach that the United States Supreme Court rejected in *Lujan*. All the water on the planet is connected in some way through the hydrological cycle. Were the "ecosystem nexus" approach consistent with the operant doctrine of standing, it would justify the standing of anyone but a Martian to contest water withdrawals occurring in Michigan. Traditional standing principles would be obliterated.

Plaintiffs also rely on *Cantrell v City of Long Beach*.[38] In *Cantrell*, the plaintiff birdwatchers brought several claims against the defendants arising from the defendants' plan to demolish a naval station. The gist of the birdwatchers' complaint was that this demolition would also destroy bird habitats on the site. The Ninth Circuit Court of Appeals reversed the district court's decision that the birdwatchers lacked standing to pursue a National Environmental Policy Act (NEPA) claim, holding that the birdwatchers sufficiently alleged an injury in fact because the defendants' actions impaired the birdwatchers' recreational and aesthetic interest in viewing these bird habitats. The Ninth Circuit did not decide whether the birdwatchers had a legal right to enter the naval station because "their desire to view the birds at the Naval Station from publicly accessible locations outside the station is an interest sufficient to confer standing."[39] Plaintiffs argue that, under *Cantrell*, they need not *own* Osprey Lake or Wetlands 112, 115, or 301, or possess a right to access them, to establish an injury in fact if those properties suffer environmental damage.

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[37] *Id*. at 565-566.

[38] 241 F3d 674 (CA 9, 2001).

[39] *Id.* at 680-681.

In *Nat'l Wildlife*, we held that affidavits from individuals alleging that their activities of birdwatching, canoeing, biking, hiking, skiing, fishing, and farming would be impaired by the defendant's activities were sufficient to meet the standing test articulated in *Lee*.[40] Therefore, without endorsing *Cantrell* but accepting arguendo that impairment of aesthetic and recreational interests such as birdwatching can satisfy constitutional standing, we note that plaintiffs' claim would fail even under *Cantrell*. In *Cantrell*, the birdwatchers *did* allege an injury in fact—their recreational and aesthetic interests in bird watching were impaired. In this case, plaintiffs have not similarly alleged an impairment of an aesthetic or recreational interest in Osprey Lake and Wetlands 112, 115, and 301.

Plaintiffs and their supporting amici[41] claim that two unique and related considerations render traditional standing analysis inappropriate in this case. First, they argue that Const 1963, art 4, § 52 establishes the public interest in the protection of Michigan's natural resources and that Const 1963, art 4, § 52 directs the Legislature to enact appropriate legislation to protect these natural resources.[42] Second, plaintiffs and amici argue that the Legislature carried out this constitutional directive by enacting MEPA, in which the Legis-

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[40] *Nat'l Wildlife*, 471 Mich at 630.

[41] In response to our order granting oral argument on the application, MDEQ and, collectively, the National Wildlife Federation, Michigan United Conservation Clubs, Tip of the Mitt Watershed Council, Pickerel-Crooked Lakes Association, and Burt Lake Preservation Association filed amicus briefs supporting plaintiffs.

[42] See Const 1963, art 4, § 52, which declares that "[t]he conservation and development of the natural resources of the state are . . . of paramount public concern in the interest of the health, safety and general welfare of the people." The provision then directs the Legislature to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

lature created a legally cognizable right to clean air, water, and other natural resources that "any person" can vindicate if that right is invaded.[43]

We disagree that either of these considerations changes the standing inquiry. Simply put, neither Const 1963, art 4, § 52 nor MCL 324.1701(1) lightens a plaintiff's burden to satisfy traditional standing requirements in environmental cases. In *Nat'l Wildlife*, we noted that "art 4, § 52 does not authorize the Legislature to ignore all other provisions of the constitution in enacting laws to protect the environment."[44] The elements of individual and organizational standing must be met in environmental cases as in every other lawsuit, unless the constitution provides otherwise.[45] Nothing in the language of this provision indicates that the paramount public concern for the conservation and development of Michigan's natural resources and the Legislature's responsibility to protect these resources compromises the principles of standing and renders them inapplicable to environmental plaintiffs.

Similarly, simply by enacting MCL 324.1701(1), the Legislature cannot compel this Court to exercise the "judicial power" beyond constitutional limits any more than this Court can legitimately enlarge or diminish the Legislature's constitutionally prescribed "legislative power."[46] We agree with plaintiffs and amici that the

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[43] MCL 324.1701(1).

[44] 471 Mich at 636.

[45] Cf. Const 1963, art 9, § 32 ("Any taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of Sections 25 through 31 . . . .").

[46] *Nat'l Wildlife*, 471 Mich at 636-637. See also *Rohde v Ann Arbor Pub Schools*, 479 Mich 336; 737 NW2d 158 (2007) (holding MCL 129.61 unconstitutional because it grants any resident taxpayer the right to sue even if the resident taxpayer fails to satisfy the three-part test for standing).

Legislature holds the power to create statutory causes of action. However, the exercise of this power must still respect separation of powers.[47] Moreover, plaintiffs' belief that MEPA authorizes citizen suits does not change the calculus. As we outlined in *Nat'l Wildlife* and more recently in *Rohde*, citizen suits historically have conferred on the litigant a concrete private interest in the outcome of the suit, and therefore involved only those who have suffered either a direct or assigned injury in fact.[48] Plaintiffs have not established their concrete interest in Osprey Lake and Wetlands 112, 115, and 301.

IV. RESPONSE TO JUSTICE KELLY

Justice KELLY quotes the United States Supreme Court's statement from *Warth* that " 'so long as the [standing] requirement is satisfied, persons to whom [the Legislature] has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.' "[49] She reasons by analogy from this statement that because plaintiffs have standing with respect to the Dead Stream and Thompson Lake, they can assert the interests of the

[47] Defendant and its supporting amici urge this Court to find MCL 324.1701(1) unconstitutional because it is an attempt by the Legislature to confer broader standing than what is constitutionally permitted. We decline this invitation. Although plaintiffs do not have standing with respect to every body of water identified by the trial court, they do have standing with respect to Thompson Lake and the Dead Stream, as defendant concedes. Therefore, this Court has no reason to consider the constitutionality of MCL 324.1701(1) because it is unnecessary to the resolution of this case.

[48] *Nat'l Wildlife*, 471 Mich at 636-637; see also *Rohde,* 479 Mich at 346-355.

[49] *Post* at 327, quoting *Warth*, 422 US at 501.

general public and challenge the total effects of defendant's pumping, including any effects on Osprey Lake and Wetlands 112, 115, and 301.

We conclude that Justice KELLY's reliance on that statement from *Warth* is misplaced. First, the above-quoted statement from *Warth* is taken out of context by Justice KELLY. *Warth* simply does not stand for the proposition that a plaintiff may bring a claim asserting the general public interest where the plaintiff lacks constitutional standing to bring that claim himself.[50] *Warth* plainly stated that plaintiffs "may invoke the general public interest *in support of their claim*," not that plaintiffs could bring a claim under the banner of the public interest even though *they* lacked standing to raise that claim.[51] Had the *Warth* Court held to the contrary, it would have created a glaring, untenable exception to Article III's case or controversy requirement inconsistent with its own decision. Such a holding also would have flatly conflicted with *Sierra Club v Morton*,[52] where the Court held that the plaintiffs lacked standing to challenge the commercial development of a national forest because the plaintiffs failed to allege how the development would injure the Sierra Club or its members. Thus, the plaintiffs could not bring suit as a "representative of the public" where they lacked individual standing.

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[50] Justice KELLY's position would, in fact, create a significant loophole in standing doctrine. Assuming that plaintiffs could assert the general public's interest in preventing environmental destruction in support of their MEPA claim, it is unclear how the general public interest, as Justice KELLY defines it in this case, could confer *standing* that plaintiffs otherwise lack with respect to Osprey Lake and Wetlands 112, 115, and 301.

[51] *Warth*, 422 US at 501 (emphasis added). See also *Cuno*, 126 S Ct at 1867 ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Laidlaw*, 528 US at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

[52] 405 US 727; 92 S Ct 1361; 31 L Ed 2d 636 (1972).

The above-quoted statement from *Warth* was also dictum. In the sentence immediately preceding that statement, the Court emphasized that even where Congress lowered the prudential bar to standing for a plaintiff, the minimum Article III requirements remain and the plaintiff "still must allege a distinct and palpable injury to himself."[53] It was in the context of this discussion that the Court ultimately held that none of the plaintiffs had standing to sue because none of the plaintiffs met the threshold standing requirements to bring suit against the defendants. Thus, its brief statement about the role of the "general public interest" in standing analysis was not essential to its decision.

In this case, plaintiffs cannot allege an injury in fact with respect to Osprey Lake and Wetlands 112, 115, and 301. It follows that they cannot bring a MEPA claim with respect to those particular bodies of water because they cannot satisfy the minimum threshold for standing. Thus, we fail to see how plaintiffs could invoke the general public interest "*in support of*" a MEPA claim that they could never bring with respect to Osprey Lake and Wetlands 112, 115, and 301. Some of the confusion in this case might stem from the fact that the alleged widespread environmental damage affecting the several bodies of water was reputedly traceable to Nestlé's pumping activities. Thus, if true, as a practical matter, injunctive relief ordering Nestlé to reduce or to stop its pumping activities could benefit Osprey Lake and Wetlands 112, 115, and 301. Nevertheless, we cannot confuse the potential effect of the remedy with plaintiffs' constitutional burden to prove that they have standing to bring a claim.

We have not, as Justice KELLY insists, selectively adopted favorable portions of federal standing law and

[53] *Warth*, 422 US at 501.

ignored others. Rather, we have parsed the language from *Warth* carefully and given attention to its proper context. It is Justice KELLY who, by contrast, selectively relied on dictum in *Warth*. Although Justice KELLY elevates this dictum to a foundational principle of federal standing jurisprudence,[54] we, for the aforementioned reasons, repudiate her conclusion.[55]

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[54] Justice KELLY overstates the significance that the "general public interest" language from *Warth* enjoys in federal standing jurisprudence. The United States Supreme Court in *Sierra Club*, one of the cases on which *Warth* relied, stated that a party with standing "may argue the public interest in support of his claim that [a federal] agency has failed to comply with its statutory mandate." *Sierra Club*, 405 US at 737. The *Sierra Club* Court focused on the standing requirements for a party seeking judicial review of federal agency actions. Thus, *Warth* clearly drew its dictum about the general public interest from the context of administrative law. Moreover, every post-*Warth* federal district court and circuit court case cited by Justice KELLY involved a federal agency's alleged failure to fulfill its statutorily prescribed administrative duties, which indicates that *Warth*'s dictum has not been expanded outside its original administrative law context. Assuming that we were bound to follow this line of cases, which Justice KELLY acknowledges that we are not, it would not have any bearing on this case in any event because plaintiffs have not alleged that a state agency such as MDEQ has neglected its statutory responsibilities. Finally, we are unaware of any United States Supreme Court decision, particularly one decided after *Lujan*, that has applied the dictum from *Warth* in the manner advocated by Justice KELLY. Indeed, two current members of the Court, Justices Scalia and Thomas, have recently criticized other language from *Warth* as dicta. See *Hein v Freedom from Religion Foundation, Inc*, ___ US ___; 127 S Ct 2553; 168 L Ed 2d 424 (2007) (Scalia, J. concurring in the judgment) (criticizing earlier Supreme Court cases that described the prohibition on generalized grievances as merely a prudential bar rather than an Article III standing consideration and characterizing *Warth* as the "fountainhead" of this dicta). Thus, we would be wise to carefully and critically consider dicta from *Warth*, and we believe we have done so.

[55] However, if *Warth* truly stood for the proposition urged by Justice KELLY, it would violate the separation of powers principles upon which Michigan's constitutional standing requirements rest and should be rejected on that ground.

V. RESPONSE TO JUSTICE WEAVER

Justice WEAVER's dissent merely reiterates objections she lodged in response to our prior standing cases—objections that this Court has considered and rejected. Because there is little to add to our previous colloquies with the dissenter (other than to direct the reader to our analyses in *Lee* and *Nat'l Wildlife*), we will briefly respond.

Justice WEAVER persists in her argument that the textual differences between the federal constitution and our state constitution prove that the exercise of "judicial power" or the doctrine of separation of powers in our constitution means something radically different than it does under the federal constitution.[56] This argument that separation of powers should be understood differently in the Michigan Constitution because the words "case" and "controversy" are not in our constitution suggests to us that Justice WEAVER fundamentally misunderstands the doctrine of separation of powers. She refuses to accept that there is a constitutional limit on the Legislature's authority to expand "judicial power" in the area of standing. In response, we stated in *Nat'l Wildlife* that

> [a]s the Michigan Constitution makes clear, the duty of the judiciary is to exercise the "judicial power," and, in so doing, to respect the separation of powers. While as a

[56] See *Nat'l Wildlife*, 471 Mich at 625-628. Interestingly, the Constitution of the Commonwealth of Massachusetts, which predated our federal constitution, articulates the principle of separation of powers in language quite similar to 1963 Const, art 3, § 2. See Scalia, *The doctrine of standing as an essential element of the separation of powers*, 17 Suffolk U L R 881 (1983) (quoting pt 1, art XXX of the Massachusetts Constitution, which states that "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers, or either of them . . . .").

> *general proposition*, the proper exercise of the "judicial power" will obligate the judiciary to give faithful effect to the words of the Legislature—for it is the latter that exercises the "legislative power," not the judiciary—such effect cannot properly be given when to do so would contravene the constitution itself. Just as the judicial branch owes deference to the legislative branch when the "legislative power" is being exercised, so too does the legislative branch owe deference to the judicial branch when the exercise of the "judicial power" is implicated. Even with the acquiescence of the legislative and executive branches, the judicial branch cannot arrogate to itself governmental authority that is beyond the scope of the "judicial power" under the constitution. The "textual" approach of [Justice Weaver] is a caricatured textualism, in which the Legislature is empowered to act *beyond* its authority in conferring powers upon other branches that are also *beyond* their authority. [*Nat'l Wildlife*, 471 Mich at 637 (citations omitted; emphasis in original).]

Equally perplexing is Justice WEAVER's continued insistence that by *refraining* from exercising our "judicial power" where plaintiffs fail to allege an injury in fact, we have actually failed to show judicial restraint. Such reasoning turns "reality on its head."[57] In response, we simply reiterate that by acting within the limits of the "judicial power" accorded by our constitution, we have not expanded our power and we have not encroached on the powers granted to the other branches of government.[58]

Her doctrinal misunderstandings aside, Justice WEAVER's core "political point" is that, in insisting on constitutional standing requirements, we have eviscerated environmental laws intended to protect Michigan's natural resources, leaving Michigan residents helpless

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[57] *Nat'l Wildlife*, 471 Mich at 639; see also text and accompanying footnotes at pp 293-294 of this opinion.

[58] *Nat'l Wildlife*, 471 Mich at 639-640.

to protect those resources threatened by environmental harm. Needless to say, her bleak, apocalyptic visions are false. Our holding today does not strip the Legislature or Michigan residents of their ability to protect this state's natural resources. What we have done is recognized an established constitutional line on our judicial authority to adjudicate what would otherwise be public policy-oriented lawsuits brought by persons who have no immediate stake in the controversy.

Environmental laws, such as MEPA (or any statutory law for that matter), may be vindicated by persons who have suffered a real injury in fact and thus have a stake in the controversy. Such is the case here with respect to plaintiffs' MEPA claim to protect the Dead Stream and Thompson Lake. Moreover, environmental laws are also always enforceable by the executive branch through entities such as the MDEQ. If the people are unhappy with how the executive branch fulfills its enforcement functions, the remedy is not a lawsuit, but a political one at the ballot box.

Finally, just as we stated in *Nat'l Wildlife*, we have yet to find any support, textual or otherwise, other than Justice WEAVER's assertion, for her contention that Const 1963, art 4, § 52 renders standing principles inapplicable in matters of environmental concern.[59] In *Nat'l Wildlife*, we noted that with respect to the mandates stated in constitutional provisions such as art 4, § 52, "it is implicit . . . that the Legislature is to pursue these goals *by appropriate means*" rather than by unconstitutional methods.[60] Therefore, there is no reason to presume that the Legislature can discard standing requirements in order to carry out its mandate in art 4, § 52, and Justice WEAVER fails to provide one.

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[59] *Nat'l Wildlife*, 471 Mich at 634-635.

[60] *Id.* at 635 (emphasis in original).

VI. CONCLUSION

Plaintiffs have standing to bring a MEPA claim against Nestlé to protect their riparian property rights in Thompson Lake and the Dead Stream. However, plaintiffs have not alleged an injury in fact with respect to the Osprey Lake Impoundment and Wetlands 112, 115, and 301 because there is no evidence that they use these areas and that their recreational, aesthetic, or economic interests have been impaired by Nestlé's pumping activities. Accordingly, we affirm the Court of Appeals in part, but we reverse the Court of Appeals holding with regard to this issue and remand this case to the trial court for further proceedings consistent with this opinion.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

WEAVER, J. (*dissenting*). I dissent from the majority's reversal of the Court of Appeals holding that plaintiffs have standing to bring a claim under the Michigan environmental protection act (MEPA)[1] with respect to the Osprey Lake impoundment and wetlands 112, 115, and 301. I would hold that plaintiffs have standing under MCL 324.1701(1)[2] to bring an action to enjoin water pumping and bottling production activities that plaintiffs allege will irreparably harm natural resources. I would therefore affirm the Court of Appeals

[1] MCL 324.1701 *et seq*.

[2] MCL 324.1701(1) states:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

decision holding that plaintiffs have standing with respect to all the affected properties at issue.

The majority's holding in this case marks the culmination of a line of cases in which the same majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) has eroded Michigan's traditional rules of standing.

Beginning with *Lee v Macomb Co Bd of Comm'rs*,[3] the majority overruled Michigan precedent establishing prudential standing as the traditional doctrine of legal standing in Michigan. In place of Michigan's doctrine of prudential standing, the majority erroneously adopted a constitutional doctrine of standing based on the federal courts' doctrine of standing, as stated in *Lujan v Defenders of Wildlife*.[4]

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[5] the majority of four, through lengthy dicta, attacked the statute at issue in this case, MEPA, while stating that the majority was declining to address whether MEPA represented an increase in the power of this Court, because the plaintiffs in that case met the federal constitutional standing doctrine adopted by the majority in *Lee*.

In my *Nat'l Wildlife* concurrence, I wrote: "The majority can wait for a future case that has not drawn public attention to openly and directly declare the MEPA citizen-suit standing provision unconstitutional."[6] Although this case has been highly publicized,

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[3] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001).

[4] *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

[5] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004).

[6] *Id*. at 653-654 (WEAVER, J., concurring in the result only).

the majority held in a less-publicized case, *Rohde v Ann Arbor Pub Schools*,[7] that a statute in which the Legislature purports to grant standing to a citizen beyond that recognized in *Lee* is unconstitutional.

Now, the majority of four has taken this case as the opportunity to finish what it started in *Nat'l Wildlife*: to deprive the people of Michigan of the ability to protect the natural resources of this state. I dissent because the Michigan Constitution does not restrict the ability of the Legislature to grant standing to the citizens of this state. Further, the Michigan Constitution places a broad duty on the Legislature to protect the environment, and the Legislature has properly fulfilled its constitutional mandate through its enactment of MEPA.

I. THE MAJORITY OF FOUR'S ASSAULT ON STANDING IN MICHIGAN

Before *Lee*, no Michigan case had held that the issue of standing posed a constitutional issue.[8] Nor did any case hold that Michigan's judicial branch was subject to the same case-or-controversy limitation imposed on the federal judicial branch under article III of the United States Constitution.[9] In fact, article III standing derived

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[7] *Rohde v Ann Arbor Pub Schools*, 479 Mich 336; 737 NW2d 158 (2007).

[8] Before *Lee*, the Michigan standing requirements were based on prudential, rather than constitutional, concerns. See, generally, *House Speaker v State Administrative Bd*, 441 Mich 547, 559 n 20; 495 NW2d 539 (1993), and Justice RILEY's concurrence in *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 643; 537 NW2d 436 (1995).

[9] As I wrote in my concurrence in *Lee*:

> In *House Speaker* we stated that "this Court is not bound to follow federal cases regarding standing," pointing out that "[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts

from *Lujan* was not even an issue raised or briefed by the parties in *Lee*. On its own initiative, the majority of four raised *Lujan*'s standing test and erroneously transformed standing in Michigan into a constitutional question.

In *Lee*, a case involving MCL 35.21, the majority adopted the three-part test set out in *Lujan*. The majority, quoting *Lujan*, stated:

> "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 . . . trace[able] to the challenged action of the defendant, and not . . . th[e] 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*, *supra* at 739, quoting *Lujan*, *supra* at 560-561.]

The majority erroneously adopted the *Lujan* test as a constitutionally based test for standing, under a theory that Const 1963, art 6, § 1, which vests the state courts with "judicial power,"[10] granted the Michigan judicial

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> may issue opinions only where there is an actual case or controversy." [*House Speaker*, *supra* at] 559, including n 20. Justice Kennedy, writing for the Court in *ASARCO Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989), acknowledged:
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> > "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." [*Lee*, *supra* at 743 n 2.]

[10] The Michigan Constitution does not define the judicial power. In the majority's attempt to delineate the similarities between the judicial power in Michigan and the federal courts, it quotes *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006), in which the same majority stated: "Our

branch only the same limited judicial power bestowed on the federal courts under article III of the United States Constitution. Obscuring the fact that the Michigan Constitution contains no corollary to US Const, art III, § 2, the *Lee* majority suggested that Michigan's standing doctrine developed on a parallel track by way of "an *additional* constitutional underpinning."[11] The additional underpinning referred to by the majority is Const 1963, art 3, § 2, which provides that "[t]he 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."[12]

After overruling Michigan's traditional prudential doctrine of standing in *Lee* by adopting the *Lujan* test, the majority next questioned the Legislature's ability to confer standing on citizens through the use of statutes

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tripartite system of government is constitutionally established in both our state and federal constitutions. US Const, art III, § 1 confers upon the courts only 'judicial power'; US Const, art III, § 2 limits the judicial power to 'cases' and 'controversies.' " The problem with the majority's comparison between Michigan's Constitution and the federal constitution is that only US Const, art III, § 2 sets out a case-or-controversy limitation. Similar to that contained in the Michigan Constitution, the general idea of judicial power contained in US Const, art III, § 1 is very broad. It is then specifically limited by US Const, art III, § 2. The Michigan Constitution contains no such limitation. Thus, the majority misinterprets what the general federal judicial power entails, and instead defines the power by its own limitations set out in a subsequent section of the federal constitution. To make matters worse, the majority then defines Michigan's judicial power by the federal limitations, even though the Michigan Constitution lacks a similar limitation.

[11] *Lee*, *supra* at 737 (emphasis added).

[12] The legislative branch has the authority to enact laws. Nowhere in the Michigan Constitution does it establish that the Legislature cannot enact laws granting standing. Nor does the Michigan Constitution establish that the judicial branch is the sole authority in determining who may have standing.

granting standing when a citizen alleges a specific wrong. In *Nat'l Wildlife*, the majority of four attacked MEPA by stating at length, all in dicta, that the Legislature cannot grant citizens standing. The majority based this argument on the premise that the Legislature would be taking away the power to enforce laws, an essential component of the "executive power," and giving that power to the judicial branch. The majority proudly proclaimed that it was "*resisting* an expansion of power —not an everyday occurrence in the annals of modern government."[13] Unfortunately, that statement was not accurate, because the majority showed its lack of judicial restraint by compromising the Legislature's constitutional duty to enact laws for the protection of the environment and enlarging the Court's capacity to overrule statutes under the guise of the majority's self-initiated, erroneous "constitutional" doctrine of standing.[14]

Further, as the majority mistakenly believed, MEPA does not purport to give the judiciary the power of the executive branch to enforce the laws, because that power is given to the people of Michigan.[15] A court's role in these cases differs in no way from its role in any other controversy that comes before it: the court hears the case, interprets the applicable law, and renders a decision.

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[13] *Nat'l Wildlife*, *supra* at 639 (emphasis in original).

[14] "[F]aux judicial restraint is judicial obfuscation." *Federal Election Comm v Wisconsin Right to Life, Inc*, __ US __, __; 127 S Ct 2652, 2684; 168 L Ed 2d 329, 365 (2007) (Scalia, J., concurring in part and concurring in the judgment).

[15] It can even be argued that the Legislature did not give any power to the people, because a reading of Const 1963, art 1, § 1 suggests that the people have retained the power, given that the provision states that "[a]ll political power is inherent in the people."

By holding that plaintiffs in this case cannot bring suit with respect to the Osprey Lake impoundment and wetlands 112, 115, and 301 pursuant to the standing granted by MEPA, the majority takes away the people's power to ensure protection of Michigan's natural resources. Through MEPA, the Legislature has given "the private citizen a sizable share of the initiative for environmental law enforcement."[16] The majority has taken away that initiative. By basing the decision on faux and inapplicable constitutional principles, short of a constitutional amendment even more explicit than Const 1963, art 4, § 52, the majority has taken away the Legislature's ability to ever give that initiative back to the people.

II. ART 4, § 52 OF THE MICHIGAN CONSTITUTION

Const 1963, art 4, § 52 creates a duty in the Legislature to ensure that Michigan's natural resources are protected.[17] As I stated in *Nat'l Wildlife*, the majority completely brushes off and ignores the will of the people to force the Legislature to ensure that the natural resources of this state are protected. I wrote:

> Among the reasons why *Lee's* article III-based standing test or any judge-created standing test should not be applied to MEPA plaintiffs, the most important is that to do so defeats the clear, unambiguous, and readily understand-

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[16] *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975).

[17] Const 1963, art 4, § 52 provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

> able purpose of art 4, § 52 of the Michigan Constitution.[18] Through art 4, § 52, the people of Michigan directed the Legislature "to provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Art 4, § 52 provides that this mandate serves the people's express "paramount concern in the interest of the health, safety and general welfare of the people" specifically with respect to the "conservation and development of the natural resources of the state." Employing the precise words of art 4, § 52, the Legislature enacted MEPA in fulfillment of art 4, § 52's mandate. [*Nat'l Wildlife*, *supra* at 665.]

Before *Nat'l Wildlife*, this Court had noted that the Legislature conferred standing under MEPA to any person who alleges that a defendant's conduct has or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust therein.[19]

Inexplicably, the majority of four has decided that the very specific mandate of art 4, § 52 requiring the Legislature to protect the natural resources does not allow the Legislature to grant standing to citizens of the state and, instead, has usurped that mandate in place of the federal case-or-controversy limitation specifically placed by the United States Constitution on the federal courts' judicial power. I strongly dis-

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[18] See, e.g., *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 393; 151 NW2d 797 (1967) (addressing principles of constitutional construction).

[19] See *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975). That MEPA grants standing to "any person" has been unquestioned for more than 30 years. See, also, *Eyde*, *supra* at 454; *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495; 320 NW2d 668 (1982); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 195 Mich App 343; 489 NW2d 188 (1992); *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998).

agree with the majority because the majority has, mistakenly or intentionally, replaced a clear mandate of the will of the people of Michigan with irrelevant, misinterpreted, and nonbinding federal law. It is a tragic day for Michigan.

III. APPLICATION

Plaintiff Michigan Citizens for Water Conservation (MCWC) is a nonprofit corporation formed to protect and conserve water resources in Michigan. It consists of approximately 1,300 members; 265 of those members are riparian owners in the Tri-Lakes area of Mecosta County. Among the members are plaintiffs R.J. and Barbara Doyle, who own land on the Dead Stream, and plaintiffs Jeffrey and Shelly Sapp, who own land on Thompson Lake.

In 2002, after receiving the required permits from the Michigan Department of Environmental Quality (DEQ), defendant Nestlé Waters North America Inc. began pumping and bottling water on a 139-acre area on the northern shore of the Osprey Lake impoundment.[20] The permits allowed defendant to operate the four wells at a combined maximum pumping rate of 400 gallons a minute.

Plaintiffs brought suit under MCL 324.1701(1), alleging that defendant's water pumping and bottling would cause damage to various interconnected streams, lakes, and wetlands north of the Tri-Lakes region. Specifically, plaintiffs alleged damage to the Osprey Lake impoundment, Thompson Lake, the Dead Stream, and wetlands 112, 115, and 301. Plaintiffs sought temporary and permanent injunctive relief in the form of preventing defen-

[20] The Osprey Lake impoundment and several of the wetlands at issue in this case are contained within a parcel of land owned by defendants Donald and Nancy Bollman.

dant from pumping and bottling water in the Tri-Lakes area. The trial court granted plaintiffs injunctive relief.

On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court.[21] On the issue of standing, a majority consisting of Judges WHITE and MURPHY held that plaintiffs had standing to bring claims with respect to all of the natural resources at issue. The separate opinion written by Judge MURPHY, held that

> plaintiffs have standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydrologic interaction, connection, or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestlé's pumping activities, whereby impact on one particular resource caused by Nestlé's pumping necessarily affects other resources in the surrounding area. Therefore although there was no evidence that plaintiffs actually used or physically participated in activities on the Osprey Lake impoundment and wetlands 112, 115, and 301, environmental injuries to those natural resources play a role in any harm caused to the Dead Stream, the Dead Stream's wetlands, and Thompson Lake, which are used by and adjacent to property owned by plaintiffs and not the subject of a standing challenge. [*Michigan Citizens*, *supra* at 113.]

The majority now erroneously reverses the Court of Appeals decision on plaintiffs' standing with respect to the Osprey Lake impoundment, and wetlands 112, 115, and 301, holding that "[p]laintiffs failed to establish that they have a substantial interest in these areas, detrimentally affected by Nestlé's conduct, that is distinct from the interest of the general public." *Ante* at 297.

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[21] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005).

For the reasons stated, I believe that plaintiffs satisfied Michigan's standing doctrine because they complied with MCL 324.1701(1). MCL 324.1701(1) gives standing to any citizen to protect the natural resources of Michigan, pursuant to the constitutional mandate requiring the Legislature to protect natural resources. I would affirm the Court of Appeals decision.

Furthermore, plaintiffs argue that even if MEPA does not grant standing to any citizen to challenge any environmental harm, plaintiffs have met the majority's constitutional standing requirements with regard to the Dead Stream and Thompson Lake and that the United States Supreme Court has in the past stated that "[o]nce this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."[22] While I find that federal standing law is irrelevant to Michigan law and not binding on this Court, I do believe that plaintiffs raise a valid argument. Plaintiffs point to *Warth v Seldin*, 422 US 490; 95 S Ct 2197; 45 L Ed 2d 343 (1975), in which the United States Supreme Court seemed to contemplate federal standing in a situation similar to that of plaintiffs. The Court noted:

> In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. See *United States* v. *Raines*, 362 U.S. [17, 22-23; 80 S Ct 519; 4 L Ed 2d 524 (1960)]. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 [45 S Ct 571; 69 L Ed 1070] (1925); *Sullivan* v. *Little Hungtin Park, Inc.*, 396 U.S. 229, 237 [90 S Ct 400; 24 L Ed 2d 386] (1969). See generally

[22] *Sierra Club v Morton*, 405 US 727, 740 n 15; 92 S Ct 1361; 31 L Ed 2d 636 (1972).

> Part IV, *infra*. Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E.g.*, *United States* v. *SCRAP*, 412 U.S. 669 [93 S Ct 2405; 37 L Ed 2d 254] (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. *E.g.*, *Sierra Club* v. *Morton, supra* at 737; *FCC* v. *Sanders Radio Station*, 309 U.S. 470, 477 [60 St Ct 693; 84 L Ed 869 (1940). [*Id*. at 500-501.]

Whether dealing with federal constitutional standing or standing granted by statute, I find the rationale in *Warth* to be persuasive when the plaintiffs have established standing for their own claims.

IV. CONCLUSION

By holding that MEPA does not grant standing to plaintiffs to protect all the resources at issue,

> [t]he majority disregards the intent of the Legislature, erodes the people's constitutional mandate, and overrules 30 years of Michigan case law that held that the Legislature meant what it said when it allowed "any person" to bring an action in circuit court to protect natural resources from actual or likely harm.[23]

The majority of four has now completed what it started in *Lee* and *Nat'l Wildlife*; it has taken the power to protect the state's natural resources away from the

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[23] *Nat'l Wildlife*, *supra* at 652 (WEAVER, J., concurring in the result only).

people of Michigan, despite the people's stated belief that the natural resources of this state are of paramount concern.

I would affirm the Court of Appeals holding that plaintiffs have standing to bring suit under MEPA, because plaintiffs allege that the defendant's water pumping and bottling activities will irreparably harm Michigan's natural resources.

CAVANAGH, J., concurred with WEAVER, J.

CAVANAGH, J. (*dissenting*). I concur fully with Justice WEAVER's dissenting opinion because I, too, believe that the majority's systematic dismantling of our standing principles is seriously misguided. Moreover, I would find that plaintiffs properly have standing because the evidence they presented soundly demonstrates that the conduct of Nestlé Waters North America Inc. is perpetrating detrimental environmental effects on the ecosystem about which plaintiffs' complaint is concerned. I reject the sort of "piecemeal justice" the majority would afford plaintiffs because, in my view, there is no justifiable reason for preventing plaintiffs from holding defendants accountable for actions that affect this intricately connected area. I would recognize that, at the very least, areas a citizen does not use—but that are perceptibly affected by the same conduct that is affecting the areas the citizen does use—are encompassed within the citizen's right to pursue a claim against the offending actor.[1] See *Lujan v Defenders of Wildlife*, 504 US 555, 566; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (rejecting standing only for "persons who

[1] Such a restriction would alleviate the majority's grave concern about "anyone but a Martian" attaining standing with respect to environmental protection claims in Michigan. See *ante* at 300.

use portions of an ecosystem not perceptibly affected by the unlawful action in question").[2]

Only in this way can we attempt to fully ensure the protection of our environment. It is for this reason that I reject the majority's statement that "[w]hat we have done is recognized an established constitutional line on our judicial authority to adjudicate what would otherwise be public policy-oriented lawsuits brought by persons who have no immediate stake in the controversy." *Ante* at 309. I do not agree that lawsuits brought to vindicate environmentally detrimental conduct are merely "public policy-oriented," nor do I agree that when an ecosystem of which a person seeking standing is a part is suffering perceptible degradation, the person has no "immediate stake in the controversy." The divergence between the majority's viewpoint and my own stems from what is clearly a fundamentally different assessment of the interconnectedness of people and the environment in which we live.

KELLY, J. (*dissenting*). The sole issue we decide is whether plaintiffs have standing to challenge the effects of pumping activities by defendant Nestlé Waters North America Inc. on the Osprey Lake Impoundment and wetlands 112, 115, and 301. The majority holds that plaintiffs have failed to establish standing to challenge the pumping in these areas. In dissent, Justice WEAVER reaches the opposite conclusion. In so doing, she rejects the standing test adopted by the majority in *Lee v Macomb Co Bd of Comm'rs*[1] and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co.*[2] While I agree with Justice

[2] It should be clear that by appropriating an insightful proposition from *Lujan*, I am not endorsing the balance of the *Lujan* Court's standing analysis. See *ante* at 295 n 29.

[1] 464 Mich 726; 629 NW2d 900 (2001).

[2] 471 Mich 608; 684 NW2d 800 (2004).

WEAVER's conclusion and her analysis of these decisions, I also recognize that *Lee* and *Cleveland Cliffs* now constitute binding precedent of this Court. And because I would hold that plaintiffs have established standing under *Lee* and *Cleveland Cliffs,* I find it unnecessary to consider whether these decisions should be overruled.

FACTS

This case involves a number of interconnected bodies of water in Mecosta County, Michigan. The Osprey Lake impoundment (Osprey Lake) is a man-made body of water created by damming the Dead Stream. South of Osprey Lake is Thompson Lake. Wetlands 112, 115, and 301 are located to the west and north of Osprey Lake. The wetlands, the Dead Stream, and the lakes are directly connected to and part of the same shallow, unconfined spring aquifer.

In December 2000, defendant Nestlé purchased the groundwater rights to the area known as Sanctuary Springs, located to the north of Osprey Lake. Shortly afterwards, it announced plans to build a spring water bottling plant. Plaintiff Michigan Citizens for Water Conservation (MCWC) was formed then to represent the interests of the riparian property owners in the area. MCWC has over 2,000 members, including plaintiffs R.J. and Barbara Doyle, who own land on the Dead Stream, and plaintiffs Jeffrey and Shelly Sapp, who own land on Thompson Lake.

In 2001, Nestlé installed four wells on the Sanctuary Springs property. The combined maximum pumping rate permitted for the wells was 400 gallons a minute. Later that year, plaintiffs filed their complaint. The complaint consisted of (1) a claim for an injunction, (2) a claim that withdrawal of water violated the common law applicable to riparian water rights, (3) a claim that

the withdrawal violated the common law applicable to groundwater, (4) a claim that the water of Sanctuary Springs is subject to the public trust doctrine, (5) a claim that Nestlé's use of the water would be an unlawful taking, and (6) a claim that the water extractions violated the Michigan Environmental Protection Act (MEPA). MCL 324.1701 *et seq*.

A trial was held on the groundwater and MEPA claims only. It lasted 19 days, and the transcript contains more than 3,700 pages. Ultimately, the trial court held that plaintiffs had stated a prima facie case under MEPA with respect to Osprey Lake, Thompson Lake, the Dead Stream, the Dead Stream wetlands, and wetlands 115, 112, and 301. The court found the appropriate remedy to be an injunction against all pumping operations at the site.

In reaching its decision, the trial court made a number of findings of fact. It found that, for every gallon of water diverted or removed by the pumping, there is a corresponding loss of water to Osprey Lake, the Dead Stream, Thompson Lake, and the wetlands. It found that the pumping activities would cause Dead Stream's surface level to drop two inches and that the Dead Stream wetlands would lose at least 2 inches. It found that wetland 115 would suffer a drop in water level of 1.5 feet, wetland 112 would drop at least 3 inches, and wetland 301 would drop 2 to 4 inches. And it found that Osprey Lake and Thompson Lake would drop by as much as 6 inches. The court found that the result would be that the Dead Stream's use as a fishery and recreational area would be reduced; that the bottom of the wetlands would become exposed, which could cause the areas to become choked with vegetation; and that a level-control structure would need to be installed to maintain the lakes' water levels.

Defendants appealed from the trial court's injunctive order, arguing, among other things, that plaintiffs lacked standing with respect to Osprey Lake and wetlands 112, 115, and 301. Writing for a divided court, Judge MURPHY concluded that plaintiffs had standing to assert MEPA claims over all the areas identified by the trial court. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 113; 709 NW2d 174 (2005) (opinion by MURPHY, J.).

Judge SMOLENSKI dissented on the standing issue. He would have found that plaintiffs do not have standing to assert claims over Osprey Lake and wetlands 112, 115, and 301. He believed that, in regard to these areas, plaintiffs had not suffered harm that was different from the citizenry at large. *Id.* at 83 (opinion by SMOLENSKI, J.).

Both sides applied for leave to appeal in this Court. We scheduled oral argument on the applications, directing the parties to address "only whether the plaintiffs have standing under *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), to bring claims related to the Osprey Lake impoundment and wetlands 112, 115, and 301." 477 Mich 892 (2006).

THE STANDING ISSUE

In *Lee v Macomb Co Bd of Comm'rs*, this Court expressly adopted the standing test articulated by the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). The test has three elements:

> "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 . . . trace[able] 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.]

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, this Court re-affirmed *Lee*'s adoption of the *Lujan* test and applied the three factors to environmental plaintiffs. *Nat'l Wildlife Federation,* 471 Mich at 628-629.

The resolution of the case before us turns on the correct application of the injury-in-fact component of the test. In applying that component, the majority overlooks a basic purpose of the standing doctrine. As stated in *Nat'l Wildlife Federation*, the purpose of requiring plaintiffs to show injury in fact is to ensure that "a genuine case or controversy [exists] between the parties, one in which there is a real, not a hypothetical, dispute." *Nat'l Wildlife Federation*, 471 Mich at 615. See *ante* at 293. However, the injury-in-fact requirement is not meant to prevent plaintiffs from protecting the public interest when the concerns underlying the requirement have been satisfied. The United States Supreme Court has instructed:

> [S]o long as the [standing] requirement is satisfied, persons to whom [the Legislature] has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. [*Warth v Seldin*, 422 US 490, 501; 95 S Ct 2197; 45 L Ed 2d 343 (1975).]

The federal courts have consistently applied the principle that, once a plaintiff has established standing to challenge an activity, that plaintiff also has standing to invoke the general public interest. In *Citizens Com-*

mittee Against Interstate Route 675 v Lewis,[3] the plaintiffs alleged that the defendants' plan to build a segment of I-675 violated the National Environmental Policy Act (NEPA). 542 F Supp at 522. The defendants conceded that plaintiff Mione had standing to challenge the construction of the highway because he used the land that would be taken to build the road. *Id.* at 523. However, the defendants claimed that the plaintiffs had no standing to challenge the "socio-economic impacts upon the City of Dayton, because [neither Mione nor any of the other plaintiffs had claimed injury] which arises from that act." *Id.* The court disagreed, concluding that, since plaintiff "Mione has standing to advance his environmental injury in fact, it is clear, . . . that Mione has standing, based upon the public interest, to raise other alleged inadequacies of the [final environmental impact statement], including . . . the socio-economic impacts of I-675 upon the City of Dayton." *Id.* at 524.

Likewise, in *Sierra Club v Adams*,[4] the plaintiffs brought suit seeking an injunction to stop the government from constructing a highway because the government had failed to prepare an environmental impact statement. The defendants conceded that the plaintiffs had standing to challenge the failure to adequately consider the potential spread of aftosa.[5] But the defendants argued that the plaintiffs did not have standing to challenge the failure to consider the effect of the construction on the Cuna and Choco Indians. *Id.* at 149. Considering this argument, the court found that the plaintiffs had not alleged that the government's failure to consider the effect of construction on the Indian

[3] 542 F Supp 496 (SD Ohio, 1982).

[4] 188 US App DC 147, 148; 578 F2d 389 (1978).

[5] Aftosa is also known as foot-and-mouth disease. *Id.* at 149.

tribes caused any specific harm to them. *Id.* at 149-150. Nonetheless, the court decided that, because the plaintiffs had standing to challenge the action on at least one ground, they could also raise other inadequacies in the environmental impact statement. These included the failure to consider the effects on the Indian tribes. *Id.* at 150.

In *Alaska Ctr for the Environment v Browner*,[6] the plaintiffs brought suit to compel the Environmental Protection Agency (EPA) to establish total maximum daily loads (TMDLs) for Alaskan waters. *Id.* at 982. The EPA challenged the lower court's statewide remedy, claiming that the plaintiffs had demonstrated an injury in fact with respect to only a limited number of waters in the state. *Id.* at 984. According to the EPA, it was proper to order it to establish TMDLs only for the bodies of water that the plaintiffs actually used. The Court of Appeals for the Ninth Circuit rejected this argument, concluding that the plaintiffs could challenge the failure to establish TMDLs on the basis of how the EPA's actions affected them. But the plaintiffs could challenge the failure, also, on the basis of the total effect of the EPA's actions. *Id.* at 985. The court explained that, once standing is established, " 'the appropriate scope of the remedy goes to the merits of plaintiffs' claims and is ultimately limited by the statutory authority,' " not by the standing doctrine.[7] *Id.* (citation omitted).

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[6] 20 F3d 981 (CA 9, 1994).

[7] See also *American Littoral Society v Environmental Protection Agency*, 199 F Supp 2d 217 (D NJ, 2002) (ruling that the plaintiffs had standing to object to the EPA's failure to establish TMDLs for New Jersey waters); *Sierra Club v Browner*, 843 F Supp 1304 (D Minn, 1993) (ruling that the plaintiffs had standing to object to the EPA's failure to establish TMDLs for Minnesota waters).

This discussion illustrates that, once a plaintiff has standing to challenge contested activity, it can raise other inadequacies on the basis of the public interest.[8] As the majority concedes, plaintiffs have standing to challenge the pumping on the basis of its effects on the Dead Stream and Thompson Lake. Because plaintiffs have standing to challenge that pumping, they can assert not only their own interests but also the interests of the general public.[9] Therefore, plaintiffs have standing to assert a MEPA claim challenging the total effects of the pumping, including its effects on Osprey Lake and wetlands 112, 115, and 301.[10]

The majority disagrees and determines that plaintiffs cannot assert the general public interest in support of their claim because they do not have standing to assert a claim. This decision contradicts other findings in the majority opinion. The majority concedes that plaintiffs have standing to challenge the pumping as it relates to the Dead Stream and Thompson Lake. As a result, the majority necessarily decides that plaintiffs have a claim under MEPA. Simultaneously, however, the majority concludes that plaintiffs cannot invoke the general

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[8] I recognize that this Court is not bound by federal caselaw. But specifically because the standing test set forth in *Lee* and *Cleveland Cliffs* is derived from federal law, I find federal standing decisions instructive here.

[9] The majority claims that I do not define "the general public interest." *Ante* at 304 n 50. As I think is obvious, "the general public interest" here is preventing the destruction of our environment.

[10] The majority portrays my position as creating a loophole in standing jurisprudence. It states that I believe that plaintiffs can assert a claim invoking the general public interest even when they do not have standing. This is incorrect. It is only if plaintiffs have standing to challenge the activity at issue that they can assert the general public interest. In this case, plaintiffs have standing to challenge the pumping. Accordingly, they can also invoke the general public interest to challenge all effects of the pumping on the environment.

public interest in support of their MEPA claim because plaintiffs do not have a claim under MEPA.[11]

The majority also finds that the statement from *Warth* on which I rely is dictum. The statement in *Warth* echoes similar statements from earlier United States Supreme Court decisions. See *Sierra Club v Morton,* 405 US 727, 740 n 15; 92 S Ct 1361; 31 L Ed 2d 636 (1972); *Fed Communications Comm v Sanders Bros Radio Station*, 309 US 470, 477; 60 S Ct 693; 84 L Ed 869 (1940). It would be odd for the Supreme Court to repeatedly rely on this statement in its decisions if it did not consider the statement to be a binding rule of law. Moreover, numerous federal cases that I have discussed proceed as if the statement from *Warth* is a holding. E.g., *Lewis*, 542 F Supp at 523; *Adams*, 578 F2d at 392. If the federal courts treat the statement as precedent, there is every reason for this Court to do so, as well.[12]

The majority implies that the federal cases I discuss should be ignored because the statement I rely on from *Warth* is unique to the area of federal administrative law. There are numerous fallacies in this position. First, a large number of federal standing decisions, notably *Lujan v Defenders of Wildlife*, are from cases in which one party is a governmental entity. Thus, it is not surprising that the decisions I discuss include some of these cases. What the majority fails to demonstrate is that the United States Supreme Court has separated its

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[11] By finding that these plaintiffs cannot invoke the general public interest, the majority essentially finds that no plaintiff can invoke the general public interest.

[12] In support of its claim that the statement from *Warth* is dictum that need not be followed, the majority cites criticism of *Warth* by Justices Thomas and Scalia. But unless the majority can show that three other justices share the view of Justices Thomas and Scalia, it has no bearing on the continuing viability of *Warth* and, frankly, is irrelevant.

law regarding standing in administrative law cases from its law regarding standing in other cases.

Second, there is no principled reason for this Court to make such a distinction. In *Warth*, the plaintiffs challenged a zoning ordinance of the defendant town, claiming that the ordinance violated their constitutional rights by excluding persons of low income from living in the town. 422 US at 493. In this case, plaintiffs claim that Nestlé's pumping has injured them by harming the environment. The majority has not explained the relevance of the fact that, in *Warth*, the defendant is a governmental entity and here, the defendant is a private corporation. In short, the majority has advanced no principled reason for refusing to apply to this case standing decisions from cases where the defendant is a governmental entity.

By refusing to follow the federal decisions that I discuss, the majority indulges in a serious inconsistency. For example, in this case and in *Rohde v Ann Arbor Pub Schools*,[13] which also was decided today, the majority finds that plaintiffs lacked standing, despite the fact that they would have standing under federal law.

But Michigan's current standing test is derived exclusively from federal law. Hence, it should follow that plaintiffs in the instant case and the plaintiffs in *Rohde* have standing. The majority has adopted only a portion of federal standing law. It would seem rational that either Michigan's standing law is consistently the same as federal standing law or it is consistently different. If it is the same, the majority should accept and follow the decisions I have relied on here. If it is different, then there is no reason to follow other federal standing

[13] 479 Mich 336; 737 NW2d 158 (2007).

decisions, including *Lujan*. The majority should settle on one consistent approach to standing.

THE MAJORITY'S SEPARATION OF POWERS ARGUMENT

One final point merits addressing. The majority claims that my interpretation of *Warth* cannot be correct because it "would violate the separation of powers principles upon which . . . standing requirements rest." *Ante* at 306 n 55. I disagree.

It is uncontested that plaintiffs have standing to assert a MEPA claim challenging defendant Nestlé's pumping. Accordingly, the issue is not whether plaintiffs have standing to assert a claim under MEPA. The issue is the proper scope of the claim. And the answer is that, because plaintiffs have standing to challenge the pumping, " 'the appropriate scope of the remedy goes to the merits of plaintiffs' claims and is ultimately limited by the statutory authority,' "[14] not by the standing doctrine. The majority's decision to limit the scope of plaintiffs' cause of action on the basis of standing actually undermines the separation of powers. By extinguishing a valid cause of action, the majority usurps power rightly belonging to the Legislature.

This Court has recognized that the injury-in-fact component of the standing doctrine is necessary to prevent "the judicial branch [from establishing itself] as first among equals, being permitted to monitor and supervise the other branches, and effectively possessing a generalized commission to evaluate and second-guess the wisdom of their policies." *Cleveland Cliffs*, 471 Mich at 616. Injury in fact is the factor that separates hypothetical policy disputes from genuine cases or controversies. *Id.* at 615. By requiring a plaintiff to

[14] *Browner,* 20 F3d at 985 (citation omitted).

establish an injury in fact, the courts ensure that they do not overstep their bounds by deciding an issue that rightly belongs to another branch of government. *Id.* at 616-617.

But once a plaintiff has established standing to challenge the activity at issue, the concern that the judiciary is overstepping its bounds disappears. This is because after a plaintiff has shown that the activity caused him or her an injury in fact, any concern that the court is getting dragged into a hypothetical policy dispute evaporates. Rather, a legitimate controversy then exists between the parties, one that the courts can properly resolve. As the United States Supreme Court has stated, "[t]he test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims . . . ." *Sierra Club,* 405 US at 740 n 15. Therefore, once a plaintiff has standing to challenge a given activity, it is not the court's place to decide whether the Legislature's grant of a broad cause of action is wise. The Court's role is simply to adjudicate the dispute.

The law of standing is meant to limit courts to deciding actual cases and to keep them out of the business of "prescribing how the other two branches should function . . . ."[15] Today, a majority of this Court oversteps its bounds by telling the Legislature how it should function. It fails to exercise appropriate judicial self-restraint. It extinguishes a valid cause of action for no reason other than its belief that the cause of action granted by the Legislature is too broad. Sadly, the majority does not recognize that this decision is not its to make.

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[15] Scalia, *The doctrine of standing as an essential element of the separation of powers*, 17 Suffolk U L R 881, 894 (1983).

CONCLUSION

Properly applied, the standing doctrine is a shield used to protect the integrity of our tripartite system of government. In its decision today, the majority allows defendant Nestlé to use the doctrine as a sword to insulate its questionable activity from legal challenge. I dissent from this erroneous decision.

ROHDE v ANN ARBOR PUBLIC SCHOOLS

Docket No. 128768. Argued January 11, 2007 (Calendar No. 4). Decided July 25, 2007.

Teri Rohde and other resident taxpayers in the Ann Arbor school district brought an action in the Washtenaw Circuit Court against the Ann Arbor Public Schools, the Board of Education for the Ann Arbor Public Schools, and the president and treasurer of the board, challenging the schools district's expenditure of public funds to provide health insurance benefits to same-sex domestic partners of school employees and alleging that such expenditure violates MCL 551.1, which defines marriage to exclude same-sex unions. The Ann Arbor Education Association, MEA/NEA, was allowed to intervene as a defendant on behalf of its members. The trial court, David S. Swartz, J., granted the defendants' motion for summary disposition, concluding that the plaintiffs had not brought their action on behalf of or for the benefit of the treasurer, as required by MCL 129.61, and had failed to comply with the requirement of that statute that they must first demand that the treasurer bring suit. The Court of Appeals, CAVANAGH, P.J., and JANSEN and GAGE, JJ., affirmed the judgment of the trial court. 265 Mich App 702 (2005). Although the Court of Appeals disagreed with the trial court that the plaintiffs had failed to bring suit on behalf of the treasurer, the Court of Appeals nevertheless affirmed the dismissal of the lawsuit on the basis that the plaintiffs' letters sent to the board of education and other governmental officials, including the Attorney General, requesting that they halt the illegal use of public funds were insufficient to satisfy the specific-demand requirement of MCL 129.61. The plaintiffs sought leave to appeal in the Supreme Court, and the Supreme Court ordered the clerk to schedule oral argument on whether to grant the application, asking the parties to address only the issue of what constitutes an effective demand under MCL 129.61. 474 Mich 1120 (2006). After hearing oral argument, the Supreme Court granted leave to appeal, asking the parties to submit briefs regarding whether the plaintiffs had standing to bring their action. 477 Mich 924 (2006).

In an opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The plaintiffs' letters containing a "request" that the governmental officials halt the illegal use of public funds were sufficient to satisfy the "demand" requirement of MCL 129.61. The Court of Appeals erred in holding that the letters did not constitute a demand under MCL 129.61. However, the plaintiffs lack constitutional standing to sue because the plaintiffs lack a concrete and particularized injury in fact, and therefore the judgments of the trial court and the Court of Appeals that held that the plaintiffs could not proceed with their lawsuit must be affirmed and the matter must be remanded to the trial court for the entry of an order dismissing the plaintiffs' lawsuit.

1. Although the plaintiffs did not use the word "demand" in their letters, their "request" is properly considered a "demand." The plaintiffs were not required to use the word "demand." All that is required is a communication that would reasonably be understood as a demand.

2. MCL 129.61 does not require that the demand refer to the statute, that the demand must specifically be for an accounting or the recovery of funds, that the demand convey a sense of urgency, or that the demand be for a lawsuit.

3. MCL 129.61 is unconstitutional to the extent that it confers standing on taxpayers who do not meet the three-part test for determining whether a party has constitutional standing. The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest that is concrete and particularized and 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.

4. The definition of judicial power in the federal and the state constitutions require an injury in fact that is both concrete and particularized, as well as actual or imminent, in order to establish standing. The Legislature may not confer jurisdiction upon the courts unmoored from any genuine case or controversy.

5. The Legislature may not confer standing on a party that does not otherwise meet the constitutional injury-in-fact test for

standing; however, the Legislature may create qui tam actions whereby a statute partially assigns the government's injury-in-fact claim to a private citizen.

6. MCL 129.61 does not create a qui tam action or an action similar enough to a qui tam action to constitutionally confer standing on the plaintiffs.

7. No court rule or statute can eliminate the injury-in-fact requirement for constitutional standing.

Justice KELLY, concurring, agreed with the decision to affirm the Court of Appeals decision because the plaintiffs did not satisfy the demand requirements of MCL 129.61. In order to make an effective demand under MCL 129.61, a plaintiff must ask the party responsible for maintaining a suit for an accounting or the recovery of unlawfully spent funds. The plaintiffs' letters, which requested only an investigation and a halt of future expenditures, failed to satisfy the requirements of MCL 129.61. However, Justice KELLY disagreed with the majority's analysis of the standing issue because the majority ignored federal law that confers constitutional standing on municipal taxpayers like the plaintiffs in this case.

Justice CAVANAGH, concurring in the result only, agreed with Justice KELLY that the plaintiffs did not meet the demand requirements of MCL 129.61. Accordingly, the Court of Appeals properly dismissed the plaintiffs' case, and there is no need to address the issue of standing.

Affirmed and remanded to the trial court.

Justice WEAVER, concurring in part and dissenting in part, agreed with the majority that the plaintiffs satisfied the demand requirement of MCL 129.61, but disagreed that the plaintiffs lack standing. The majority's test for standing, based on the federal standing doctrine, is not supported by the Michigan Constitution, which does not restrict the Legislature's ability to grant standing to the citizens of this state. The Michigan Constitution contains no corollary to US Const, art III, § 2, which limits the federal judicial power to cases and controversies. The majority's opinion reads language into the Michigan Constitution in order to conclude that MCL 129.61 is unconstitutional, and thus takes a valuable power away from the Legislature and the people of this state. Under the traditional test applied to determine standing, MCL 129.61 grants standing to parties that meet the statute's requirements. Because the plaintiffs did so with respect to the demand requirement, they have standing to challenge the school district's expenditure of public funds for same-sex domestic-partnership benefits. While the

judgment of the Court of Appeals that the plaintiffs failed to meet the demand requirement should be reversed, the matter should not be remanded to the trial court to decide the substantive issues raised by the plaintiffs; instead, this case should be held in abeyance for the Supreme Court resolution of the issue of same-sex benefits. See *Nat'l Pride at Work, Inc v Governor*, 274 Mich App 147 (2007), lv gtd 478 Mich 862 (2007).

CONSTITUTIONAL LAW — SUITS BY TAXPAYERS — STANDING.

MCL 129.61, which provides, in part, that any person paying taxes to a political unit may institute actions at law or in equity on behalf of the treasurer of the political subdivision for an accounting or recovery of moneys misappropriated or unlawfully expended by a public officer of the political subdivision, is unconstitutional to the extent that it confers standing on taxpayers who do not meet the three-part test for determining whether a party has constitutional standing; standing requires that the plaintiff must have suffered an injury in fact, that there be a causal connection between the injury and the conduct complained of, and that it is likely, not speculative, that the injury will be addressed by a favorable decision.

Thomas More Law Center (by *Patrick T. Gillen*) for the plaintiffs.

Dykema Gossett PLLC (by *James M. Cameron, Jr.*, *Jill M. Wheaton,* and *Cara J. Edwards Heflin*) for the defendants.

Arthur R. Przybylowicz and *Theresa J. Alderman* for the intervening defendant.

TAYLOR, C.J. The first issue in this case is whether a letter sent by a resident taxpayer to a public official that "request[s]" the official "investigate and halt" the use of public funds for illegal purposes is adequate to constitute a "demand" pursuant to MCL 129.61 so as to allow the taxpayer, should the public official not act, to undertake a legal challenge to the expenditure of the public funds. We conclude that a letter that conveys a call to act is sufficient to constitute a demand. Having

concluded that the plaintiffs' letters did constitute a demand as contemplated by MCL 129.61, we are required to consider whether plaintiffs have constitutional standing to pursue the lawsuit authorized by the statute. We conclude that they do not and hold that MCL 129.61 is unconstitutional to the extent that it confers standing on taxpayers who do not meet the three-part test for determining whether a party has constitutional standing.

Although we disagree with that part of the Court of Appeals opinion that determined that plaintiffs' letters did not constitute a demand under MCL 129.61, on the basis that the plaintiffs lack constitutional standing to sue, we affirm the lower court judgments that held that plaintiffs could not proceed with their lawsuit.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs are Ann Arbor public school district taxpayers who brought suit to challenge the school district's expenditure of public funds to provide health insurance benefits to same-sex domestic partners of school employees. Their complaint alleged that the expenditure of public funds for that purpose violates MCL 551.1, which defines marriage to exclude same-sex unions.[1] Before filing their lawsuit, several of the plain-

[1] MCL 551.1 provides:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

At the same time MCL 551.1 was enacted in 1996, MCL 551.271, which provides for recognition of marriages contracted in other states, was amended to state:

tiffs sent identical letters to various school board members and other local and state officials, including the county prosecutor, the Attorney General, and the Governor. Each letter stated:

> I [We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [We] ask that you halt this illegal use of public funds at your earliest possible convenience.

After the Ann Arbor Education Association, MEA/NEA, intervened as a defendant on behalf of its

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> This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state . . . . [MCL 551.271(2).]

Also enacted at the same time was MCL 551.272, which provides:

> This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by [MCL 551.1], and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

It is also the case that after this lawsuit was filed, effective December 18, 2004, Const 1963, art 1, § 25 was added by vote of the people to provide:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

The Court of Appeal recently issued a published opinion holding that art 1, § 25 forbids public employers from offering same-sex health-care benefits. A motion for reconsideration was denied by that Court on March 6, 2007. *Nat'l Pride at Work, Inc v Governor,* 274 Mich App 147; 732 NW2d 139 (2007), lv gtd 478 Mich 862 (2007).

members, defendants moved for summary disposition pursuant to MCR 2.116(C)(5) (The party asserting the claim lacks the legal capacity to sue.). The trial court granted the motion, determining that plaintiffs failed to bring their suit on behalf of the school district treasurer. The trial court also ruled that plaintiffs' letters failed to comply with the statute in that they did not make a "demand."

Plaintiffs appealed, and the Court of Appeals affirmed in a published opinion.[2] Although the panel disagreed with the trial court that the plaintiffs had failed to bring suit on behalf of the treasurer, the Court nevertheless affirmed the dismissal of the plaintiffs' lawsuit because it agreed that plaintiffs' requests to the board of education and other governmental officials that they halt the "illegal use of public funds" were insufficient to satisfy the statute's specific-demand requirement.

Plaintiffs filed an application for leave to appeal in this Court. We first ordered oral argument on whether to grant the application or take other peremptory action pursuant to MCR 7.302(G)(1), asking the parties to address only the issue of what constitutes an effective demand under MCL 129.61.[3] Thereafter, we granted leave to appeal, asking the parties to brief whether plaintiffs had standing.[4]

II. STANDARDS OF REVIEW

We review de novo a grant or denial of summary disposition. *Nastal v Henderson & Assoc Investigations,*

[2] *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702; 698 NW2d 402 (2005).

[3] 474 Mich 1120 (2006).

[4] 477 Mich 924 (2006).

Inc, 471 Mich 712, 720; 691 NW2d 1 (2005). Whether plaintiffs' letters constituted a "demand" under MCL 129.61 is a matter of statutory interpretation. We review questions of statutory interpretation de novo. *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005).

III. ANALYSIS OF MCL 129.61

As relevant to the question whether plaintiffs' letters constituted a demand under MCL 129.61,[5] the statute provides, in relevant part, "Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto."

The Court of Appeals noted that the term "demand" is defined in the *Random House Webster's College Dictionary* (1997) as "to ask for with proper authority; claim as a right,"[6] and that the statutory phrase "main-

[5] The full statute reads as follows:

> Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

[6] Black's Law Dictionary (8th ed) defines "demand" as "[t]he assertion of a legal or procedural right." This is consistent with the legal definition

tain such suit" indicates that "the purpose of the demand requirement is to inform the appropriate party that legal action is forthcoming." 265 Mich App at 710. It then concluded that plaintiffs' letters did not constitute a "demand" because they were "merely a request that the alleged misappropriation stop; they are not a demand for legal action." *Id*.

We disagree with the Court of Appeals analysis and conclude that plaintiffs' "request" was sufficient to satisfy the statute's "demand" requirement. Indeed, a request that the Attorney General halt something asserted to be illegal can only be reasonably understood, in the context of a demand to the state's top legal officer, as a demand that he or she take steps to stop such actions up to and including bringing a lawsuit. While plaintiffs did not use the word "demand" in their letters, their "request" is properly considered a "demand." Plaintiffs were not required to use the word "demand."[7] All that is required is a communication that would reasonably be understood as a demand. We agree with plaintiffs that utilization of the more civil, polite term "request" is more likely to secure the desired result of halting an unlawful expenditure than a more provocative "demand." After all, the apparent object of the statute is to halt unlawful expenditures, not to engender litigation.

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of a "demand letter," which is: "A letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued." *Id.*

[7] See, e.g., *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 616; 566 NW2d 571 (1997) ("A plaintiff should not be required to say "magic words" in order to reap the protections of the [whistleblowers' protection] statute."). Cf. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 669; 593 NW2d 534 (1999) ("[W]e decline to require that the Legislature use any particular talismanic words to indicate its intent.").

We reject defendants' claim that the letters were insufficient because they failed to cite the statute. MCL 129.61 includes no requirement that the demand refer to the statute. Defendants also argue that plaintiffs' letters were insufficient to meet the demand requirement because the letters did not request either an accounting or the recovery of the funds expended. MCL 129.61 provides that a taxpayer may file a lawsuit "for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended . . . ." The statute, however, does not provide that the taxpayer's preliminary demand must specifically be for an accounting or the recovery of funds.

Defendants further argue that plaintiffs' letters were insufficient to meet the demand requirement because they did not contain a sense of urgency, and plaintiffs did not act upon them by filing a lawsuit until almost three years later. But MCL 129.61 does not require that the demand be made with a "sense of urgency." Plaintiffs requested a halt to the expenditure of public funds "at your earliest possible convenience." This phrase is a request that action be taken as soon as possible. It is sufficient especially because there is no requirement in the statute that the demand convey a sense of urgency.

We also disagree with the Court of Appeals suggestion that MCL 129.61 requires a demand for litigation. The statute provides that before a taxpayer may institute a lawsuit, a demand must be made "on the public officer, board or commission whose duty it may be to maintain such suit" for recovery of unlawfully expended funds. The statute does not expressly require that the demand be for a lawsuit. Further, just because the public body has the ultimate duty to bring a lawsuit if it is needed does not mean that the demand must be for a lawsuit. The taxpayer demand, at a minimum,

calls on a conscientious public body to reevaluate whether it is carrying out its duties properly and, in fact, this may result in the public body's acting in compliance with the demand. It may do this by any number of means, only one of which is to enter into litigation. In fact, when the statute uses the phrase "whose duty it *may be* to maintain such suit" (emphasis added), it recognizes this. Moreover, the statute provides that after a demand, before the taxpayer may bring a suit, a precondition is that the public body must neglect or refuse "to take action in relation thereto." This implies that the public body need not necessarily file suit, only that it needs to take some kind of action relating to the matter.[8]

We therefore conclude that the demand made in this matter was sufficient to satisfy MCL 129.61.

IV. CONSTITUTIONAL STANDING

Having determined that plaintiffs' letters satisfied the requirements of MCL 129.61, we are required to decide whether plaintiffs have constitutional standing to pursue their lawsuit. That is, even though we have determined that plaintiffs are authorized by the Legislature to bring this lawsuit, we must determine whether the independent constitutional requirement of standing presents a separate bar to the lawsuit.

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[8] We also reject the Court of Appeals dictum that plaintiffs were required to send the demand to the school district treasurer, as "the officer likely responsible for maintaining such a lawsuit." 265 Mich App at 710. There is no indication in the statute that the demand had to be served specifically on the treasurer, as opposed to other key figures in the school district. MCL 129.61 provides that the demand must be made on the "public officer, board or commission" whose duty it may be to maintain the suit. This language makes it clear that demand on a board, rather than one specific member of the board (such as a treasurer), is sufficient. Here, plaintiffs sent letters to all nine members of the school board as well as the superintendent. This was sufficient to give the school district and the treasurer notice of the demand.

First, as we stated in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001):

> It is important, initially, to recognize that in Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.
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> * * *
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> "[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." [*Id.* at 735-736, quoting *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996) (citations omitted).]

In *Lee* we adopted the test the United States Supreme Court uses to determine whether a federal court has standing to hear a lawsuit[9] and concluded:

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[9] Justice KELLY asserts that we have "ignored" the United States Supreme Court's statement in *Massachusetts v Mellon*, 262 US 447, 486; 43 S Ct 597; 67 L Ed 1078 (1923), that " '[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.' " *Post* at 363. First, this statement is dictum in light of the fact that the Supreme Court determined that it did not have jurisdiction to hear the challenges raised in *Mellon*. Second, Justice KELLY ignores the fact that, just two sentences later, the Supreme Court noted that "there are decisions to the contrary. See, for example, *Miller v Grandy*, 13 Mich 540, 550 [1865]." *Mellon, supra* at 486. In *Miller*, which has never been overruled, this Court held that "a private tax payer, suffering under no special grievance, is not even a proper party to a bill filed to restrain threatened misconduct . . . ." *Miller,*

> "[T]he irreducible constitutional minimum of standing contains three elements. 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 . . . trace[able] to the challenged action of the defendant, and not . . . th[e] 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, supra* at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).][10]

And, as we explained in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 622-623; 684 NW2d 800 (2004):

> If the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch. . . . Unless there is an individual who has personally been injured by the Governor's enforcement or administration of these laws, it is not normally the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable

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supra at 550. Therefore, we "ignore" dicta from *Mellon* because, by its own terms, it is inapplicable in determining the scope of the judicial power in Michigan.

[10] In *Lujan,* the United States Supreme Court held that the plaintiffs lacked constitutional standing to bring suit under a provision of the Endangered Species Act of 1973 that contained a citizen-suit provision that permitted "any person [to] commence a civil suit on his own behalf—(A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this act . . . ." 16 USC 1540(g)(1). The Court in effect held that this provision was unconstitutional as applied to a citizen who lacks constitutional standing.

> fashion. That the Legislature—perhaps even with the acquiescence of the executive—has purported to impose this role upon the judicial branch does not alter this constitutional reality.

In *Cleveland Cliffs* we explained that but for a few enumerated exceptions,[11] the definitions of "judicial power" in the United States and Michigan constitutions are identical—both require an "injury in fact" that is both concrete and particularized, as well as actual or imminent, in order to establish standing. *Id*. at 624-629. The Legislature may not confer jurisdiction upon the court "unmoored from any genuine case or controversy . . . ." *Id.* at 622. If the Legislature were to do so, "this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch." *Id.*[12]

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[11] Const 1963, art 3, § 8 allows either house of the Legislature to request the Supreme Court to issue an advisory opinion on the "constitutionality of legislation"; Const 1963, art 9, § 32 confers upon "[a]ny taxpayer of the state" standing to bring suit to enforce the provisions of the so-called Headlee Amendment; and Const 1963, art 11, § 5 empowers "any citizen of the state" to initiate proceedings for injunctive or mandamus relief to enforce the civil service laws of the state.

[12] See, also, *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), where we discussed the issue of statutorily conferred standing. This Court held that MCL 14.101 and MCL 14.28 did not give the Attorney General standing to intervene to appeal the Court of Appeals judgment, because the Attorney General did not represent an "aggrieved party." In particular, the Court held:

> To the extent one might read MCL 14.101 or MCL 14.28 as allowing the Attorney General to prosecute an appeal from a lower court ruling without the losing party below also appealing, and without the Attorney General himself being or representing an aggrieved party, the statutes would exceed the Legislature's authority because, except where expressly provided, this Court is not constitutionally authorized to hear

We did, however, recognize in *Cleveland Cliffs* that persons bringing qui tam actions[13] were found to have standing by the United States Supreme Court in *Vermont Agency of Natural Resources v United States ex rel Stevens* 529 US 765, 774-777; 120 S Ct 1858; 146 L Ed 2d 836 (2000). We stated:

> Accordingly, the [*Vermont Agency*] Court held that one who brings a relator suit has standing because he is the assignee of a claim and may assert the injury-in-fact suffered by the assignor, which is normally the government. *Id*. at 773. In such cases, the Court concluded, the government's injury-in-fact suffices to confer standing on the individual relators bringing the suit. *Id*. at 774.
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> * * *
>
> [T]he use of citizen suits or actions by private attorneys general does not undermine the application of traditional standing requirements. If anything, the use of such suits supports the application of those requirements, as citizen suits and actions by private attorneys general have always been grounded in a private injury, whether suffered directly or as a result of an assignment by another. [*Cleveland Cliffs, supra* at 646-647 (emphasis omitted).]

In sum, *Cleveland Cliffs* holds that the Legislature may not confer standing on a party that does not otherwise meet the constitutional injury-in-fact test for standing. But, under *Vermont Agency*, the Legislature may create

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nonjusticiable controversies. *Nat'l Wildlife Federation, supra* at 614-615. To give these statutes such a reading would contravene an operative presumption of this Court that we presume constitutional intent on the part of the Legislature. [*Federated, supra* at 294-295.]

[13] "Qui tam" is an abbreviation of a Latin phrase that means " 'who pursues this action on our Lord the King's behalf as well as his own.' " *Vermont Agency of Natural Resources v United States ex rel Stevens*, 529 US 765, 769 n 1; 120 S Ct 1858; 146 L Ed 2d 836 (2000) (citation omitted).

qui tam actions whereby a statute partially assigns the government's injury in fact claim to a private citizen.

Thus, the question is whether MCL 129.61 creates a qui tam action or an action similar enough to a qui tam action to constitutionally confer standing. In arguing that MCL 129.61 does effectively create a qui tam action, the plaintiffs, drawing on *Vermont Agency*, point out the similarities between the federal False Claims Act at issue in *Vermont Agency*, 31 USC 3729 to 3733, and MCL 129.61. These include, first, that both statutes allow a private citizen to bring a civil action on behalf of the government. Second, both statutes require the private citizen to give the government the opportunity to prosecute the claim on its own behalf, and, finally, that both statutes allow the citizen to go forward with the civil action if the government fails to do so. Yet, while the above similarities exist, the crucial difference between the False Claims Act and MCL 129.60 is that the False Claims Act gives a litigant a concrete private interest in the outcome of the suit, and thus constitutional standing, by providing a bounty.[14] There is no similar provision in MCL 129.61, which has not only no bounty provision but no other mechanism that even conceivably could establish such a private interest.

A second significant distinction between a typical qui tam action (like the one in *Vermont Agency*) and MCL 129.61 is that MCL 129.61 does not have a provision allowing the government to intervene and assume control of the suit. The *Vermont Agency* Court held that a qui tam relator under the federal False Claims Act has standing because he or she is properly considered a partial assignee

[14] The concept of a bounty is that the plaintiff recovers some of the money judgment if the lawsuit succeeds. For example, the federal False Claims Act awards a relator between 15 and 30 percent of the government's recovery. 31 USC 3730(d)(1)-(2).

to assert the injury in fact suffered by the government. This implies that the statute's assignment of claims must be partial rather than full to be valid.[15] Because there is no assignment of any sort in MCL 129.61, this key aspect found in the False Claims Act is also missing.

Moreover, the state, again, unlike the federal government in a situation involving the False Claims Act, is not the real party in interest in a suit brought under MCL 129.61. Our statute does not require the plaintiff to follow procedural safeguards found in the False Claims Act as well as other modern qui tam statutes to ensure that the government remains fully apprised of the litigation, has the opportunity to participate, and retains the power to make key decisions over the relator's objections.[16]

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[15] See, e.g., Gilles, *Representational standing: US ex rel Stevens and the future of public law litigation*, 89 Cal L R 315, 346 (2001) (It is likely that full assignment of proprietary claims by the government, under a legislative regime that prohibits the executive from intervening or exercising any control over assigned claims, would violate separation of powers.).

[16] For example, the federal False Claims Act, 31 USC 3730 (b) to (f), protects the interest of the United States in the following ways: (1) the relator must serve the complaint and written disclosure of material evidence on the government before the complaint is served on the defendant; (2) the relator must file the complaint in camera and the complaint must remain under seal while the government conducts an investigation, and the relator must not serve the defendant except by court order; (3) the government must either intervene and take over the conduct of the action before the defendant is served or notify the court that the relator will be conducting the action; (4) if the government proceeds with the action, it has primary responsibility for prosecuting the lawsuit and is not bound by the acts of the relator; (5) the government may dismiss or settle the action over the objection of the relator; (6) the government must give written consent before the case is dismissed; (7) the government is protected from liability for litigation expenses of the qui tam relator; and (8) the government receives at least 70 percent of any recovery.

For these reasons then, we conclude that MCL 129.61 did not establish a qui tam action that would give plaintiffs constitutional standing to pursue their lawsuit.

Plaintiffs argue in the alternative that even if MCL 129.61 does not establish a qui tam action, they nevertheless must have standing under *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993), because there the plaintiffs, who had no more of a claim to standing than plaintiffs in this case have, were found to have standing. We disagree. In *House Speaker*, the issue was whether the private nonprofit, corporate plaintiffs had standing to challenge the Governor's authority to transfer the powers of a legislatively created body to a new, gubernatorially created body. The Court, while acknowledging the general principle that standing requires a litigant to " 'demonstrat[e] that [its] substantial interest will be detrimentally affected in a manner different from the citizenry at large,' " *id.* at 572 (citation omitted), inexplicably neglected to actually apply that principle. What the Court did do, puzzlingly, was to conclude that because the civic groups met the requirements of MCR 2.201(B)(4),[17] a court rule that in essence gives qualifying persons or groups the right to

[17] This court rule provides:

> An action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought:
>
> (a) in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes; or
>
> (b) in the names of at least 5 residents of Michigan who own property assessed for direct taxation by the county where they reside.

The statutory counterpart to this court rule is MCL 600.2041(3).

sue without an injury, they could sue. Yet, as *Lee* and *Cleveland* Cliffs made clear, no court rule or statute can eliminate the injury requirement for constitutional standing. Thus, *House Speaker* is not dispositive and is of limited value because the Court did not address whether the court rule (MCR 2.201) or the corresponding statute (MCL 600.2041) could constitutionally confer standing to an organization that did not have a concrete interest in the suit and did not suffer an injury in fact. To the extent one might read it as having silently done so, we disapprove of it as being inconsistent with *Lee* and *Cleveland Cliffs*.[18]

Plaintiffs admit that their injury is minute and generalized. Thus, it is not a concrete and particularized injury in fact. Indeed, any "remedy" they might obtain will not confer a financial benefit on them.[19] Moreover, any potential benefit plaintiffs might obtain

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[18] Justice WEAVER's partial dissent reiterates her standard response to the recent standing decisions from this Court that were decided by, yes, a majority, as they always have been since 1837. See *Lee, Cleveland Cliffs, Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services,* 475 Mich 363; 716 NW2d 561 (2006), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc,* 479 Mich 556; 737 NW2d 447 (2007), and our responses in these cases.

Justice WEAVER's position on standing, described by her as "prudential standing," is that there are no immutable rules or standards a litigant must meet to have standing to sue; rather, the court decides as it wishes on a case-by-case basis if a party has standing. The proper understanding of such an approach is as a standing regime with no rules and unlimited power for the judiciary. When no one can know the law in advance, and, of course, no conscientious judge could then operate under it in a principled fashion, no other description suffices. The judicial standing rule we have adopted has no such defect. In short, hers is an essentially arbitrary approach that no amount of accusatory verbiage can camouflage.

[19] MCL 129.61 merely calls for an accounting or a return of funds to the state entity.

if they prevailed in this lawsuit would not be any different than that which would be obtained by everyone else in the state. Under such circumstances, they do not have constitutional standing.[20]

V. CONCLUSION

For all the reasons we have set forth, we conclude that although plaintiffs' demand under MCL 129.61 was sufficient, this statute is unconstitutional to the extent that it purports to confer standing on taxpayers who have not satisfied the *Lee*/*Cleveland Cliffs* standing requirements.

We reject that part of the Court of Appeals judgment that determined that plaintiffs' letters did not constitute a demand under MCL 129.61, but, on the basis that plaintiffs lack constitutional standing to sue, we affirm the lower court judgments that held that plaintiffs could not proceed with their lawsuit. We remand the case to the trial court for entry of an order dismissing plaintiffs' lawsuit.

Affirmed and remanded to the trial court.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

KELLY, J. (*concurring*). Plaintiffs brought a suit alleging that defendants violated state law by entering into collective bargaining agreements that define and pro-

[20] See also *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980), stating that a private citizen has no standing to vindicate a public wrong or enforce a public right where that citizen has not been hurt in any manner different from the citizenry at large, and *Menendez v Detroit*, 337 Mich 476, 482; 60 NW2d 319 (1953), stating that a "private taxpayer, suffering no special grievance, is not a proper party plaintiff to a bill of complaint filed to restrain threatened official misconduct."

vide benefits for same-sex domestic partners of school district employees. The circuit court did not reach the substantive issue but dismissed the suit, holding that the plaintiffs did not comply with the requirements of the statute that confers standing to sue, MCL 129.61. The Court of Appeals affirmed that ruling in a published opinion. *Rohde v Ann Arbor Pub Schools,* 265 Mich App 702; 698 NW2d 402 (2005).

A majority of this Court has affirmed the Court of Appeals result on the basis that, although plaintiffs satisfied the statutory demand requirements, they lack constitutional standing to proceed with the suit. I disagree with the majority's standing analysis but agree with the decision to affirm, because I believe that plaintiffs did not satisfy the demand requirements of MCL 129.61.

FACTS

Plaintiffs are 17 individuals who pay state and local taxes used to fund the Ann Arbor Public Schools (AAPS). Defendants are the AAPS, its board of education, the president of the board, and the treasurer of the board. Intervening defendant is the Ann Arbor Education Association (AAEA), the exclusive collective bargaining representative of the teachers and other school personnel of the AAPS.

In 2000, plaintiffs directed letters to the following public officials: (1) the Governor of the state of Michigan, (2) legal counsel for the Executive Office of the state of Michigan, (3) the Attorney General of the state of Michigan, (4) the Superintendent of Public Instruction in the state of Michigan, (5) the Assistant Superintendent of Public Instruction, (6) the Washtenaw County Prosecutor, (7) nine members of the AAPS board of education, and (8) the superintendent of the AAPS. All the letters read as follows:

> I [or We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] ask that you halt this illegal use of public funds at your earliest convenience.

The letters were sent by certified mail on December 15, 2000, and were received soon after. When no action was taken to halt the expenditure of public funds for benefits to the same-sex domestic partners of AAPS employees, plaintiffs brought suit in the Washtenaw Circuit Court under MCL 129.61. The crux of plaintiffs' claim is that defendants improperly defined and recognized a new form of domestic relations and treated this relationship as the equivalent of marriage in violation of the Michigan defense of marriage act, MCL 555.1.[1]

The circuit court did not reach the substantive issue, the validity of the domestic partner policy, but dismissed on the ground that plaintiffs did not have standing to sue under MCL 129.61. The court held that (1) plaintiffs had not sued on behalf of or for the benefit of the treasurer of the district as contemplated by the express language of MCL 129.61, and that (2) plaintiffs did not comply with the mandatory requirements of MCL 129.61 that they make a demand before filing suit.

The Court of Appeals affirmed. It disagreed with the circuit court's conclusion that the suit was not filed on

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[1] MCL 551.1 provides:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

behalf of or for the benefit of the AAPS treasurer as required by MCL 129.61. However, the Court did agree that plaintiffs had failed to satisfy the demand requirements of MCL 129.61. The Court stated:

> Pursuant to MCL 129.61, the party must contact the appropriate party ("the public officer, board, or commission whose duty it may be to maintain such suit") and make a demand that a lawsuit be brought by that party for an accounting or recovery of misappropriated funds. Consulting a dictionary to ascribe the term "demand" its plain and ordinary meaning, we find that it provides the definition "to ask for with proper authority; claim as a right." Moreover, the phrase "maintain such suit" indicates that the purpose of the demand requirement is to inform the appropriate party that legal action is forthcoming. Plaintiffs' letters are merely a request that the alleged misappropriation stop; they are not a demand for legal action. Moreover, plaintiffs did not send a letter to the AAPS treasurer, the officer likely responsible for maintaining such a lawsuit. [*Rohde,* 265 Mich App at 709-710 (citations omitted).]

Plaintiffs applied for leave to appeal in the Supreme Court, and we heard oral argument on what constitutes an effective demand under MCL 129.61. 474 Mich 1120 (2006). We then granted leave to appeal, requesting that the parties additionally brief the issue whether plaintiffs have standing under *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). 477 Mich 924 (2006).

STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006). This case involves a question of statutory interpretation, which is

also reviewed de novo. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005).

PLAINTIFFS FAILED TO SATISFY
THE *DEMAND* REQUIREMENTS Of MCL 129.61

The underlying issue in this case is whether the use of public funds for benefits to same-sex partners of public employees is illegal. But the issue before this Court on appeal is whether a request for an investigation and a halting of the use of funds for such benefits constitutes an effective demand under MCL 129.61. The Court of Appeals decided that it did not and, therefore, held that the circuit court had properly granted summary disposition to defendants. I agree with both lower courts' determination that plaintiffs have not satisfied the demand requirements of MCL 129.61.

MCL 129.61 provides:

> Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

The confusion in this case arises because the statute requires "a demand . . . on the public officer, board or

commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto" but does not clearly define what action a plaintiff must demand.[2] By reading the statute as a whole and giving effect to every word, phrase, and clause, however, this issue is easily resolved. See *Grimes v Dep't of Transportation,* 475 Mich 72, 89; 715 NW2d 275 (2006).

MCL 129.61 authorizes a taxpayer to bring suit "for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended." The statute requires that a demand be made on the party "responsible for maintaining such suit." The dictionary definition of "demand" is "to ask for with proper authority; claim as a right." *Random House Webster's College Dictionary* (2001). It follows that, in order to make an effective demand, a plaintiff must ask the "party responsible for maintaining [the] suit" to undertake the action that the suit would accomplish, which is "an accounting[3] and/or the recovery of funds or moneys misappropriated or unlawfully expended."

In this case, plaintiffs sent letters to the Attorney General, among others, requesting an investigation and a halting of the expenditure of future funds for benefits to same-sex partners of employees. The letters did not request any action with respect to past expenditures; it referred solely to the halting of future expenditures. Even assuming that those who received the letters included the

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[2] The majority opinion finds that "a letter that conveys a call to act is sufficient to constitute a demand" under MCL 129.61. *Ante* at 339. However, it never explains what specific action plaintiffs must request in order to satisfy the demand requirement. Evidently, a call for an investigation and a halting of funds is sufficient, but the majority never explains what language it relies on to reach this conclusion.

[3] "Accounting" is defined as "a detailed report of the financial state or transactions of a person, company, etc." *Random House Webster's College Dictionary* (2001).

proper party to maintain a suit, the demand requirement was still not satisfied. Plaintiffs never asked anyone, as MCL 129.61 requires, for an accounting of past expenditures or the recovery of funds wrongfully spent.

Requiring plaintiffs to request the specific action that the suit would accomplish is consistent with the purpose of a demand requirement. The phrase "before such suit is instituted" indicates that the Legislature intended that the proper party be given notice and the first opportunity to act. See *Chicago ex rel Konstantelos v Duncan Traffic Equip Co*, 95 Ill 2d 344, 353-354; 447 NE2d 789 (1983) (holding that the purpose of a demand requirement in taxpayer lawsuits is to allow the legislative body the first opportunity to decide whether to take the requested action). The letters involved in this case did not request the specific action that would be accomplished by the taxpayer suit. Hence, the proper party was not given the first opportunity to review the matter and decide on its own whether to take this action.

THE STANDING ISSUE

A majority of this Court decides that plaintiffs satisfied the demand requirements of MCL 129.61. But the majority affirms on the basis that plaintiffs do not have standing. Because I would hold that plaintiffs did not satisfy the demand requirements, the standing issue need not be pursued. I am compelled, however, to point out the flaws in the majority's analysis of this issue.

In *Lee v Macomb Co Bd of Commissioners*,[4] this Court expressly adopted the standing test articulated by the United States Supreme Court in *Lujan v Defend-*

[4] 464 Mich 726; 629 NW2d 900 (2001).

ers of Wildlife, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).[5] The test has three elements:

> 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 . . . trace[able] to the challenged action of the defendant, and not . . . th[e] 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.]

In federal court, from which test articulated in *Lee* was derived, the general rule is that taxpayers do not have standing to object to a particular expenditure of funds. *DaimlerChrysler Corp v Cuno*, 547 US 332; 126 S Ct 1854; 164 L Ed 2d 589 (2006). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.' " *Id.,* 547 US at ___; 126 S Ct at 1862.

However, exceptions to this general rule exist. The United States Supreme Court has found that the rule that taxpayers do not have standing to challenge a particular expenditure of funds does not apply to mu-

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[5] As I stated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), I disagree with the majority's holding in the case. Where a statute expressly authorizes an action for a violation of the act without the showing of a particularized injury, the Court should not apply the *Lujan* standard. *Cleveland Cliffs*, 471 Mich at 677 (KELLY, J., concurring in result only). I recognize with regret that this Court's decisions in *Lee* and *Cleveland Cliffs* now constitute binding precedent.

nicipal taxpayers. In *Massachusetts v Mellon,*[6] the Court held that an individual's status as a federal taxpayer is insufficient to confer standing on that individual to challenge the constitutionality of federal action. *Mellon*, 262 US at 487. But, the Court also held, that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Id.* at 486.

Mellon predates by several decades the United States Supreme Court's current three-part test for constitutional standing. Nevertheless, *Mellon* reconciles easily with the current standing inquiry. *Mellon* stands for the proposition that the economic injury of increased taxes suffered by a federal taxpayer is not enough to confer standing. By contrast, the allegedly illegal use of local tax dollars is a sufficiently direct and immediate injury to confer standing on municipal taxpayers.[7] And although the United States Supreme Court has not subsequently specifically addressed the standing issue in connection with a municipal taxpayer, it has reiterated this federal/municipal distinction on several occasions, implicitly ratifying it.[8] E.g., *Cuno*, 547 US at ___; 126 S Ct at 1864-1865; *ASARCO v Kadish*, 490 US 605, 613; 109 S Ct 2037; 104 L Ed 2d 696 (1989); *Coleman v Miller*, 307 US 433, 445; 59 S Ct 972; 83 L Ed 2d 1385 (1939).

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[6] 262 US 447, 487; 43 S Ct 597; 67 L Ed 1078 (1923).

[7] Plaintiffs also could likely show causation and the availability of redress because a favorable decision would result in stopping the flow of the disputed expenditures.

[8] For an extended discussion of federal standing decisions and the different treatment afforded federal, state, and municipal taxpayers see Hickman, *How did we get here anyway*: *Considering the standing question in* DaimlerChrysler v Cuno, 4 Geo J L & Pub Policy 47 (2006).

Here, in deciding that plaintiffs, who pay local taxes, do not have constitutional standing to sue, the majority summarily rejects *Mellon* and its progeny. I believe that this is an error. These decisions are persuasive authority and deserve at least to be given serious consideration, if not followed. I am at a loss to explain why the majority previously advocated adopting the federal standing test, yet in this case the same justices summarily dismiss federal caselaw when applying the test.

Contrary to the majority's claims, I recognize that this Court is not bound by the United States Supreme Court's decision in *Mellon*. However, I point out that the majority ignores federal precedent in this case when it has followed in lockstep federal precedent in other recent standing cases. E.g., *Lee*, 464 Mich at 740; *Cleveland Cliffs*, 471 Mich at 628-629; *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 377; 716 NW2d 561 (2006) (opinion by YOUNG, J.). I can see no reason why the majority would follow federal precedent in those cases but summarily dismiss it here.

The majority's assertion that it is simply following this Court's decision in *Miller v Grandy*,[9] raises other questions. To embrace that argument, the reader must accept that the majority has blindly embraced *Miller* as having been correctly decided, even though *Miller* conflicts with federal precedent. At the same time, the reader must accept that *House Speaker v Governor*,[10] on which plaintiffs rely, should be overruled because the federal precedent from which *Lee* and *Cleveland Cliffs* are derived is preferable to *House Speaker*. The majority should be consistent in its use of federal precedent. Or,

[9] 13 Mich 540, 550 (1865).

[10] 443 Mich 560; 506 NW2d 190 (1993).

if not consistent, it should at least articulate a principled reason for rejecting *Mellon*.[11]

CONCLUSION

The majority affirms the judgment of the Court of Appeals because plaintiffs do not have standing to sue. I agree with the majority's decision to affirm, but I do so on separate grounds.

In order to make an effective demand under MCL 129.61, a plaintiff must ask the party responsible for maintaining the suit for an accounting or the recovery of unlawfully spent funds. Because, in this case, plaintiffs' letters requested only an investigation and the halting of the expenditure of future funds, plaintiffs failed to satisfy the demand requirements of MCL 129.61. Accordingly,

[11] The majority claims that the statement in *Massachusetts v Mellon* distinguishing municipal taxpayers from federal taxpayers is dictum. As I explained above, the United States Supreme Court has stated on numerous occasions that *Mellon* established a federal/municipal distinction with respect to taxpayer standing. E.g., *Cuno*, 547 US at ___; 126 S Ct 1864-1865; *ASARCO*, 490 US at 613; *Coleman*, 307 US at 445. The Court does not treat the distinction as dictum. Given that the United States Supreme Court recognizes the distinction as a holding, it would seem that the majority would not characterize it as dictum. Also, the majority's position on this subject is inconsistent. By quoting *Mellon* for the proposition that a plaintiff must suffer a particularized injury, the members of the majority recognized, in *Cleveland Cliffs*, 471 Mich at 615, 616, that the decision on the standing issue in *Mellon* was a holding. The members of the majority do not explain why they have changed their view here. Also, the fact that the United States Supreme Court recently recognized the distinction in *Cuno* illustrates an important point: federal courts today are of a mind that municipal taxpayers generally have standing to challenge an allegedly illegal expenditure of their tax dollars, whereas state and federal taxpayers do not. Considering that this Court's *Lee*/*Cleveland Cliffs* standing test was derived from federal law, the United States Supreme Court position on standing should be persuasive when this Court applies Michigan's standing test.

the Court of Appeals correctly affirmed the circuit court decision granting summary disposition to defendants.

CAVANAGH, J. (*concurring in the result only*). I concur only with the result reached by the majority because I do not agree with its rationale. Instead, I agree with Justice KELLY that plaintiffs did not meet the statutory demand requirements of MCL 129.61. Accordingly, I believe that the Court of Appeals properly dismissed plaintiffs' case and that there is no need to address the issue of standing.

WEAVER, J. (*concurring in part and dissenting in part*). I dissent from the holding of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) that plaintiffs do not have standing to challenge the domestic-partner benefits offered by defendant Ann Arbor Public Schools to its employees. By basing its decision on faux constitutional principles of standing, the majority of four has further manipulated and eroded Michigan's traditional doctrine of standing. The majority's holding in this case is an example of the majority of four's misuse of the power of interpretation. The majority of four overturns long-established law to create new law, not based in our Michigan Constitution. I would hold that MCL 129.61 grants standing to parties when they meet the requirements set forth in the statute and that, because plaintiffs met the demand requirement of MCL 129.61, plaintiffs have standing to challenge the benefits offered by the Ann Arbor Public Schools. I would therefore reverse the Court of Appeals judgment holding that plaintiffs failed to meet the demand requirement of MCL 129.61. However, I would not remand this case to the trial court to decide the

substantive issues raised by plaintiffs. I would instead hold this case in abeyance for *Nat'l Pride at Work, Inc v Governor*, a case in which this Court granted leave to appeal to determine whether public employers may offer benefits to same-sex partners of public employees.[1]

I. FACTS

Plaintiffs are individual taxpayers who filed suit under MCL 129.61 to compel defendant Ann Arbor Public Schools (AAPS) to halt the expenditure of public funds defendant used to provide benefits for same-sex domestic partners of school district employees.[2] Plaintiffs alleged that the expenditure of public funds to provide for same-sex domestic-partnership benefits violates MCL 551.1[3] by recognizing same-sex relationships as the equivalent of marriage.

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[1] *Nat'l Pride at Work, Inc v Governor*, 478 Mich 862 (2007).

[2] MCL 129.61 provides, in pertinent part:

> Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto.

[3] MCL 551.1 states:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Before filing suit, plaintiffs sent letters by certified mail to various public officials,[4] informing the public officials of the allegedly illegal activity. In the letters, plaintiffs stated:

> I [or We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] ask that you halt this illegal use of public funds at your earliest possible convenience.

When no action was taken by the public officials, plaintiffs filed the instant lawsuit. The trial court dismissed the case on motion for summary disposition, ruling that plaintiffs had failed to meet the requirements to bring a suit outlined in MCL 129.61.[5] On appeal, the Court of Appeals affirmed the trial court, holding that plaintiffs had failed to satisfy the demand requirement of MCL 129.61.[6]

Plaintiffs applied for leave to appeal in this Court, and we heard oral argument on whether to grant leave to

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[4] Plaintiffs sent letters to the Governor of the state of Michigan, legal counsel for the Executive Office of the state of Michigan, the Attorney General of the state of Michigan, the Superintendent of Public Instruction in the state of Michigan, the Assistant Superintendent of Public Instruction, the Washtenaw County Prosecutor, nine members of the AAPS Board of Education, and the Superintendent of the AAPS.

[5] Thus, the substantive issues of this case have not been argued. However, in *Nat'l Pride at Work, Inc v Governor*, 274 Mich App 147; 732 NW2d 139 (2007), the Court of Appeals held that Const 1963, art 1, § 25, a recent amendment of the Michigan Constitution, forbids public employers from offering same-sex domestic-partnership benefits. We have since granted leave to appeal in *Nat'l Pride at Work*. See 478 Mich 862 (2007).

[6] *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702; 698 NW2d 402 (2005).

appeal with respect to the issue of what constitutes an effective demand under MCL 129.61. See 474 Mich 1120 (2006). We then granted leave to appeal. 477 Mich 924 (2006). However, rather than asking the parties to brief only the issues decided in the lower courts, this Court also asked the parties to brief the issue whether MCL 129.61 could grant standing in light of the majority of four's holding in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*. [7] *Id*.

II. THE MAJORITY OF FOUR'S ASSAULT ON STANDING IN MICHIGAN

The majority of four has taken this case, involving the important and controversial issue whether public employers can offer same-sex benefits to public employees, and turned it into a crucial step along its path toward the decimation of the traditional legal doctrine of standing in Michigan.

Beginning with *Lee v Macomb Co Bd of Comm'rs*,[8] a case involving the interpretation of MCL 35.21, the majority overruled Michigan precedent establishing prudential standing as the traditional doctrine of legal standing in Michigan.[9] In place of Michigan's doctrine

[7] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004).

[8] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001).

[9] Before *Lee*, the Michigan standing requirements were based on prudential, rather than constitutional, concerns. See, generally, *House Speaker v State Administrative Bd*, 441 Mich 547, 559 n 20; 495 NW2d 539 (1993), and Justice RILEY's concurrence in *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 643; 537 NW2d 436 (1995). The prudential standing test is a long-established test that was used by this Court to provide a standard for litigants to meet in order to have standing to sue. The prudential test requires "a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker*, *supra* at 554. The prudential test was never grounded in the Michigan Consti-

of prudential standing, the majority created for Michigan a constitutional doctrine of standing based on the federal courts' test for standing, as stated in *Lujan v Defenders of Wildlife*.[10]

In *Nat'l Wildlife*, the majority of four, through lengthy dicta, attacked the Michigan Environmental Protection Act (MEPA) as unconstitutional, stating that MEPA granted too much power to the Court through its provision granting standing to any person.[11]

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tution, because the Michigan Constitution is silent on standing. Thus, standing could, throughout the history of Michigan, be altered by statutes such as MCL 129.61.

[10] *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). The *Lee* majority, quoting *Lujan*, stated:

> "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 . . . trace[able] to the challenged action of the defendant, and not . . . th[e] 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*, *supra* at 739, quoting *Lujan*, *supra* at 560-561.]

The *Lee* majority adopted the *Lujan* test as a constitutionally based test for standing, under a theory that Const 1963, art 6, § 1, which vests the state courts with "judicial power," granted the Michigan judicial branch only the same limited judicial power bestowed on the federal courts under article III of the United States Constitution.

[11] The majority concluded that MEPA was granting the judiciary the "executive power" to enforce laws, expanding the judiciary's power beyond the constitutional "judicial power." While the majority feigned judicial restraint, it was in truth engaging in judicial activism. The majority based its analysis on its self-adopted definition of the term "judicial power," a term contained in Const 1963, art 6, § 1. The Michigan Constitution does not define "judicial power," so the majority turned to federal law for a definition; specifically the majority relied on article III of the United States Constitution. But the majority of four's statement in *Michigan Chiropractic Council v Comm'r of the*

Meanwhile, the majority held that the plaintiffs in *Nat'l Wildlife* had standing because they met the federal constitutional standing doctrine adopted by the majority in *Lee*. Thus, despite the lengthy discourse by the majority on the subject, the issue whether the Legislature could grant standing to any citizen, under the test adopted by *Lee*, remained unresolved.

In my *Nat'l Wildlife* concurrence, I stated that by writing such extensive dicta on the subject of citizen-suit standing in a highly publicized case: "The majority can wait for a future case that has not drawn public attention to openly and directly declare the MEPA citizen-suit standing provision unconstitutional."[12]

Although the underlying substantive issue of same-sex benefits in the instant case has stirred up controversy and publicity, the issue has already been decided by the Court

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Office of Financial & Ins Services, 475 Mich 363, 369; 716 NW2d 561 (2006), reveals the United States Constitution's key variation from the Michigan Constitution. The majority stated: "Our tripartite system of government is constitutionally established in both our state and federal constitutions. US Const, art III, § 1 confers upon the courts only 'judicial power'; US Const, art III, § 2 limits the judicial power to '[c]ases' and '[c]ontroversies.' " *Id*. The problem with the majority's comparison between the Michigan Constitution and the federal constitution is that only US Const, art III, § 2 sets out a case-or-controversy limitation. Similar to that contained in the Michigan Constitution, the general idea of judicial power contained in US Const, art III, § 1 is very broad. It is then specifically limited by US Const, art III, § 2. The Michigan Constitution contains no corresponding limitation. Thus, the majority misinterprets what the general federal judicial power entails, and instead defines the power by its own limitations set out in a subsequent section of the federal constitution. To make matters worse, the majority then defines Michigan's judicial power by the federal limitations, even though the Michigan Constitution lacks a similar limitation. The result is the majority's self-created, inferred case-or-controversy standard governing standing in Michigan.

[12] *Nat'l Wildlife*, *supra* at 653-654 (WEAVER, J., concurring in the result only).

of Appeals in *Nat'l Pride at Work*, an appeal that we will review in the coming term. Thus, for all practical purposes, the majority's procedural opinion in this case changes nothing for either side in the debate over same-sex benefits. By deciding that the Legislature cannot grant standing in this case, however, the majority has managed to slip in a major blow to Michigan's traditional doctrine of standing. The majority can now use this holding to declare that statutes such as MEPA unconstitutionally grant standing to citizens, and to avoid the inevitable firestorm that would follow by directly holding so in a case in which the opinion actually has significance to the parties involved. See *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007), in which the majority indeed applies the holding in this case to declare that MEPA unconstitutionally grants standing to citizens.

Today, the majority not only declares that the Legislature cannot constitutionally grant standing to citizens, it does so by extensively quoting its dicta from *Nat'l Wildlife*. As the majority in *Nat'l Wildlife* admitted, its discussion of the Legislature's ability to grant standing was "simply dicta."[13] The majority's manipulation of dicta to create quotable references designed to affect future holdings is truly indicative of the majority's assault on Michigan's traditional, prudential doctrine of standing. Starting with *Lee*, the majority set the stage to create its standing doctrine, slipping in pieces of dicta along the way in *Nat'l Wildlife*, all so that it could quote itself in future opinions.

The majority has manipulated its own opinions to create its own doctrine of law for standing in Michigan by overruling precedent and by replacing that

[13] *Nat'l Wildlife*, *supra* at 649 n 33.

precedent with a doctrine it characterizes as being based on the Michigan Constitution. By making standing a constitutional concern, the majority has taken the area of legal standing out of the hands of the Legislature and the people and placed it exclusively at this majority's mercy. To make standing a constitutional concern when our Michigan Constitution is completely silent regarding which of the government's branches has power to grant standing represents judicial activism of the most objectionable sort. A power that was once available to all citizens of Michigan, the power to bring a lawsuit, can now only be reclaimed by constitutional amendment. The majority has created its own definition of "judicial power," based on the case-or-controversy *limitations of the judicial power* specifically enumerated by the United States Constitution for the federal courts,[14] and adopted it as some type of inherent quality of the Michigan Constitution.

The majority interjects the term "case-or-controversy" into the Michigan Constitution in order to conclude that MCL 129.61 is unconstitutional. By interjecting the term "case or controversy" into the Michigan Constitution, the majority obscures the plain language of the most important document in Michigan's legal system. Further, the majority holds a statute unconstitutional when, as this Court has long recognized, this Court must presume that the Legislature would not violate the constitution.[15] The majority is adopting a term it infers from the Michigan Constitution and using that inference as a means to defeat the presumption of constitutionality inherent in all Michigan legislation.

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[14] See n 11 of this opinion.

[15] *People v McQuillan,* 392 Mich 511, 536; 221 NW2d 569 (1974).

As the majority points out, *ante* at 353-354, before the decision in *Lee*, this Court did not address standing as a constitutionally based test.[16] The majority correctly states that in *House Speaker v Governor*, this Court concluded "that because the civic groups met the requirements of MCR 2.201(B)(4),[17] a court rule that in essence gives qualifying persons or groups the right to sue without an injury, they could sue." *Ante* at 353-354. While the majority may find it "inexplicabl[e]" or "puzzling[ ]" that this Court in *House Speaker* would

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[16] As I wrote in my concurrence in *Lee*:

> In *House Speaker* we stated that "this Court is not bound to follow federal cases regarding standing," pointing out that "[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts may issue opinions only where there is an actual case or controversy." [*House Speaker*, *supra* at] 559, including n 20. Justice Kennedy, writing for the Court in *ASARCO Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989), acknowledged:
>
> "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." [*Lee*, *supra* at 743 n 2.]

[17] MCR 2.201(B)(4) provides:

> An action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought:
>
> (a) in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes; or
>
> (b) in the names of at least 5 residents of Michigan who own property assessed for direct taxation by the county where they reside.

The statutory counterpart to this court rule is MCL 600.2041(3).

use such an analysis to give citizens standing,[18] it is a puzzle that does not require much thought to solve and explain. This Court applied MCR 2.201(B)(4) in *House Speaker* because, at that time, Michigan followed a prudential standing test, rather than a constitutionally based standing test created by the majority of four. Court rules and statutes could, at that time, be used to grant standing even when the plaintiffs did not suffer a concrete injury to themselves or their representatives.[19] The majority in *Lee* overruled the traditional prudential standing doctrine and instead creatively adopted for Michigan the federal constitutional standing test, despite no relevant change in the Michigan Constitution or applicable Michigan codified law.

In fact, in *Miller v Grandy*,[20] an 1865 case cited by the majority for the proposition that taxpayers in Michigan do not have standing to sue, this Court applied the traditional prudential standing test. Until *Lee*, this Court analyzed standing without resorting to the Michigan Constitution, even though the Michigan Constitution has always included reference to the courts' "judicial power" that the majority now cites as support for its creative conclusion that an implied constitutional power to determine standing belongs only to the judicial branch.[21]

The most important difference between pre-*Lee* and post-*Lee* standing doctrine is that, post-*Lee*, standing is now a constitutional concern. Regardless of what stand-

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[18] *Ante* at 353.

[19] Under *House Speaker*, plaintiffs in this case would have standing to sue because they have complied with MCL 129.61. As discussed in part III of this opinion, plaintiffs can bring a suit or action at law under MCL 129.61 on behalf of a political subdivision for the recovery of misappropriated funds.

[20] *Miller v Grandy*, 13 Mich 540 (1865).

[21] See, e.g., Const 1835, art 6, § 1; Const 1850, art 6, § 1; Const 1908, art 7, § 1.

ing test was used before *Lee* was decided, standing was never grounded in the Michigan Constitution. The Legislature could always confer standing on citizens without concern for violating the separation of powers doctrine.

For the reasons stated, I cannot agree with the majority that MCL 129.61 unconstitutionally grants standing to citizens, because I cannot agree that standing is rooted in the Michigan Constitution. The majority has gone too far in creating its own standing test as a constitutional test. It has taken away a valuable power from the Legislature and the people of Michigan. I believe that, even when a plaintiff does not meet the three-part test adopted by the majority in *Lee*, the Legislature is not barred by the Michigan Constitution from granting standing to that plaintiff.

III. PLAINTIFFS SATISFIED MCL 129.61

While I dissent from the majority's holding that plaintiffs lack constitutional standing, I agree with and concur in the majority's analysis of the plaintiffs' compliance with the requirements outlined in MCL 129.61, contained in part III of the majority opinion, in which the majority holds that plaintiffs satisfied the demand requirement of MCL 129.61.

IV. CONCLUSION

I would hold that MCL 129.61 grants standing to parties when they meet the requirements set forth in the statute and that, because plaintiffs met the demand requirement of MCL 129.61, plaintiffs have standing to challenge the benefits offered by defendant Ann Arbor Public Schools.

I would reverse the Court of Appeals judgment that plaintiffs failed to meet the demand requirement of MCL 129.61. I would not remand this case to the trial court to decide the substantive issues raised by plaintiffs. I would instead hold this case in abeyance for *Nat'l Pride at Work*, a case in which this Court will determine whether public employers may offer benefits to same-sex partners of public employees.

The holding by the majority in this case is a victory for neither side in the contentious debate over the constitutionality of same-sex benefits for public employees. Rather, it is a defeat for all the people of Michigan, who now have to contend with the majority's unrestrained decision that the Legislature cannot grant legal standing to the citizens of this state.

TRENTADUE v
BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY

Docket Nos. 128579, 128623 to 128625. Argued December 12, 2006 (Calendar No. 4). Decided July 25, 2007.

Dayle Trentadue, personal representative of the estate of Margarette F. Eby, deceased, brought an action in 2002 in the Genesee Circuit Court against Buckler Automatic Lawn Sprinkler Company; Shirley and Laurence W. Gorton, the owners of Buckler; Jeffrey Gorton, the son and employee of Shirley and Laurence Gorton; Carl F. Bekofske, personal representative of the estate of Ruth R. Mott, deceased, who died in 1999; MFO Management Company, the provider of administrative services to the Mott family; and Victor Nyberg and Todd M. Bakos, employees of Mott, seeking damages resulting from the rape and murder of Eby by Jeffrey Gorton in 1986. The crimes occurred at a residence Eby leased from Mott and that was located on the grounds of the Mott family estate. Buckler serviced the sprinkler system on the grounds. The complaint alleged that Shirley and Laurence Gorton were negligent in hiring and monitoring Jeffrey Gorton and that the remaining defendants were negligent in allowing access to the area that led to Eby's residence and in not providing adequate security or alarms. Each defendant, except Jeffrey Gorton, moved for summary disposition on the bases that the three-year period of limitations applicable to wrongful death actions, MCL 600.5805(10)—as well as any extension to the period provided to personal representatives by the wrongful death saving statute, MCL 600.5852—had expired and that, under MCL 600.5827, the period of limitations ran from the time the claims accrued to the plaintiff or someone through whom the plaintiff claims. The plaintiff responded by asserting that under the common-law discovery rule the period of limitations was tolled until 2002, when evidence established that Jeffrey Gorton was the perpetrator of the crimes. The court, Robert M. Ransom, J., granted the motions by Bekofske and MFO, ruling that the claims against them were known and could have been brought against them at the time the crimes occurred. The court denied the remaining motions for summary disposition. The Court of Appeals consolidated appeals by leave granted filed by Trentadue, Buckler, Shirley and Lau-

rence Gorton, and MFO, and the Court, OWENS, P.J., and SAWYER and WHITE, JJ., affirmed in part, reversed in part, and remanded the matter to the trial court, holding that the common-law discovery rule tolled the limitations period for all of the plaintiff's claims. 266 Mich App 297 (2005). The Supreme Court granted applications for leave to appeal filed by Buckler, Shirley and Laurence Gorton, and MFO. 475 Mich 906 (2006).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices YOUNG and MARKMAN, the Supreme Court *held*:

The plain language of MCL 600.5827 governs accrual in this matter and precludes the use of a broad common-law discovery rule to toll the accrual date of claims to which the statute applies. The wrong was done when Eby was raped and murdered in 1986 and the plaintiff's claims accrued at that time. The judgment of the Court of Appeals and the circuit court's order denying the defendants-appellants' motions for summary disposition must be reversed and the matter must be remanded to the circuit court for further proceedings.

1. The statutory scheme is exclusive and precludes the common-law practice of tolling accrual based on discovery in cases where no statutory tolling provisions apply.

2. Courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827. The contrary conclusion in *Chase v Sabin*, 445 Mich 190 (1994), that courts may adopt the discovery rule despite an express statute of limitations that does not include a tolling exception must be rejected.

3. Because the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual, no tolling is allowed if the plaintiff fails to discover the elements of a cause of action during the limitations period and the claim fails to qualify for tolling under a specific statutory provision.

4. *Johnson v Caldwell*, 371 Mich 368 (1963), which articulated the rule that when a claimant was unaware of any basis for an action, the harsh result of barring any lawsuit because the period of limitations has expired can be avoided by the operation of a court-created discovery rule (a common-law discovery rule), and *Johnson*'s progeny must be overruled.

5. The statutes of limitations applicable to this case further a legitimate legislative aim, and the enforcement of those statutes does not violate the plaintiff's due process rights.

6. The use of equitable tolling in *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411 (2004), was limited to those circumstances where the courts themselves have created the confusion necessitating the use of equity. Such circumstances do not exist in this case.

Court of Appeals judgment reversed, circuit court orders denying defendants-appellants' motions for summary disposition reversed, and case remanded to the circuit court.

Justice WEAVER, joined by Justice CAVANAGH, dissenting, disagreed with the majority's conclusion that the Legislature sought to abrogate the common-law discovery rule when it enacted the Revised Judicature Act, and agreed with Justice KELLY's conclusion that changing the common-law discovery rule would result in practical real-world dislocations. Justice WEAVER would affirm the Court of Appeals decision applying the common-law discovery rule to toll the period of limitations where the plaintiff could not have reasonably discovered the elements of a wrongful death cause of action within the limitations period, stating that the majority's conclusion to the contrary has deprived the plaintiff, and those similarly situated, from having their day in court.

Justice KELLY, dissenting, stated three reasons why she strongly disagrees with the majority's decision. First, MCL 600.5827, which concerns the accrual of a claim, does not apply in this case because the statute only applies "[e]xcept as otherwise expressly provided." MCL 600.5805(10) governs this wrongful death action and expressly provides its own accrual period. Because § 5827 is inapplicable, it is inappropriate to address in this case whether the common-law discovery rule is applicable when § 5827 applies. Second, even if § 5827 did apply to this case, the majority commits a tragic mistake by abandoning the common-law discovery rule, which has been recognized for decades in Michigan. Application of the factors stated in *Robinson v Detroit*, 462 Mich 439 (2002), for deciding when it is appropriate to overrule a precedent of the Supreme Court indicates that the decisions of the Supreme Court applying the common-law discovery rule should not be overruled. Finally, even if the majority correctly holds that the common-law discovery rule is inapplicable when § 5827 applies, the decision of the Court of Appeals should not be reversed and the plaintiff should be allowed to claim the benefits of the common-law discovery rule. MCL 600.5869 provides that an action shall be governed by the law under which the claim accrued. At the time of the murder, the Supreme Court recognized the rule and the law of the state provided that a cause of action did not accrue until all the elements of the cause of action have occurred and can be alleged in

a proper complaint. Therefore, it was not until the murderer was identified that the period of limitations began to run, and the plaintiff filed suit within three years of the identification. The judgment of the Court of Appeals should be affirmed, and the common-law discovery rule should remain untouched.

LIMITATION OF ACTIONS — TORTS — WRONGFUL DEATH ACTIONS — ACCRUAL OF ACTIONS — TOLLING.

MCL 600.5827, which governs the accrual of wrongful death actions and provides that a claim accrues at the time the wrong upon which the claim is based was done, and MCL 600.5805(10), which provides a three-year period of limitations from the time of death within which to bring a wrongful death action, govern the time period during which a personal representative may file such actions, subject to potential extensions expressly provided by statute; the statutory scheme is exclusive and does not permit tolling of the time of accrual or period of limitations under the common-law discovery rule, which allows tolling when a plaintiff reasonably could not have discovered the elements of a cause of action within the limitations period; *Johnson v Caldwell,* 371 Mich 368 (1963), and cases following *Johnson* permitting an extra-statutory period of tolling based on discovery are overruled.

Cox, Hodgman & Giarmarco, P.C. (by *David A. Binkley, Trisha M. Werder,* and *Elizabeth A. Favaro*), and *Mark Granzotto, P.C.* (by *Mark Granzotto*), for Dayle Trentadue.

Gault Davison, P.C. (by *Edward B. Davison),* for the Buckler Automatic Lawn Sprinkler Company and Shirley and Laurence W. Gorton.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank, Deborah A. Hebert*, and *Geoffrey M. Brown*), for the MFO Management Company.

Amici Curiae:

Charfoos & Christensen, P.C. (by *David R. Parker*), for the State Bar of Michigan Negligence Section.

Sullivan, Ward, Asher & Patton, P.C. (by *Ronald S. Lederman* and *Sharon S. Almonrode*), for the Iron Workers Local No. 25 Pension Fund, the Roofers Local 149 Pension Fund, the Plumbers Local 98 Defined Benefit Pension Fund, the Pipefitters Local 636 Defined Benefit Pension Fund, and the I.A.M. Motor City Pension Funds.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Michael J. Reynolds*), for the Michigan Electric and Gas Association.

Michael B. Serling, Angela J. Nicita, and *Zamler, Mellen & Schiffman, P.C.* (by *Margaret Holman-Jensen*), for Channing Pollock and others.

Goldberg, Persky & White, P.C. (by *James J. Bedortha* and *Lane A. Clack*), for the asbestos claimants.

CORRIGAN, J. This wrongful death case requires us to consider whether the common-law "discovery rule," which allows 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, can operate to toll the period of limitations, or whether MCL 600.5827, which has no such provision, alone governs the time of accrual of the plaintiff's claims. We conclude that MCL 600.5827 alone controls. Because the Court of Appeals held to the contrary, we reverse its judgment and remand the case to the Genesee Circuit Court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

This case arises from the tragic rape and murder of Margarette F. Eby in November 1986 at her home in Flint. According to plaintiff's complaint, in 1981 Eby leased a residence in the gatehouse on the grounds of

the Mott family estate from Ruth R. Mott (Mott) where Eby began to live. Eby was found raped and murdered on November 9, 1986, after last being seen alive on November 7, 1986. The rape and murder remained unsolved until 2002, when deoxyribonucleic acid (DNA) evidence established that Jeffrey Gorton, an employee of his parents' corporation, the Buckler Automatic Lawn Sprinkler Company (Buckler), which serviced the sprinkler system on the grounds, had committed the crime. Gorton pleaded no contest when charged with the murder and was sentenced to life imprisonment for Eby's rape-murder.

On August 2, 2002, plaintiff Dayle Trentadue, Eby's daughter and the personal representative of her estate, filed a complaint against Jeffrey Gorton; his parents Shirley and Lawrence Gorton who, as noted, operated Buckler; Buckler; Carl F. Bekofske, personal representative of the estate of Ruth R. Mott, deceased, who died in 1999; MFO Management Company (MFO), the management company that provided administrative services to the Mott family; and two of Mott's employees, Victor Nyberg and Todd Bakos, asserting several theories of negligence. Regarding the Gortons, the contentions were essentially negligent hiring and monitoring of Jeffrey Gorton. The other defendants were allegedly negligent in allowing access to the area that led to Eby's residence and not providing adequate security or alarms.

Each defendant, except Jeffrey Gorton, moved for summary disposition under MCR 2.116(C)(7), arguing, among other things, that plaintiff's action was barred by the three-year statute of limitations for wrongful death actions.[1] In particular, they argued that under

[1] MCL 600.5805(10).

MCL 600.5827[2] a claim accrues when the plaintiff is harmed,[3] and the action for wrongful death must be commenced within three years after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims. MCL 600.5805(1); MCL 600.5805(10). Further, while MCL 600.5852 permits an extension of up to three years based on when a personal representative is appointed, that statute was inapplicable here because almost 16 years had passed. Thus, defendants asserted that the suit should have been dismissed as untimely and barred under the statute of limitations. Plaintiff in response asserted that the common-law discovery rule applied to toll the period of limitations. That is, even though the provisions of the period of limitations were silent on tolling based on discovery, until she knew the identity of the killer, the period of limitations was tolled.[4]

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[2] MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

[3] *Boyle v Gen Motors Corp,* 468 Mich 226, 231 n 5; 661 NW2d 557 (2003).

[4] Regarding plaintiff's inability to discover the identity of the killer, she characterized the facts largely as do Justice KELLY and Justice WEAVER in dissent. Most significantly, plaintiff claimed that she could not have discovered her premises liability and security claims against Mott and MFO because the police were convinced that Eby had been murdered by an acquaintance whom she allowed into the apartment. This claim distorts the affidavit of David King, the homicide investigator. King described the method of entry as "undetermined" and attested that the police investigated Eby's acquaintances *and* other persons "who appeared to be suspicious because of their lifestyle." It appears unknown why police did not interview Jeffrey Gorton.

The Genesee Circuit Court ruled for plaintiff, adopting her theory that the common-law discovery rule remains viable in Michigan and thus applicable here. The court concluded regarding defendants Buckler and Shirley and Lawrence Gorton that "[a] claim for personal injury accrues when all of the elements are present and can be properly pleaded in a complaint," citing, e.g., *Connelly v Paul Ruddy's Equip Repair & Service Co,* 388 Mich 146; 200 NW2d 70 (1972). *Trentadue v Buckler Automatic Lawn Sprinkler Co,* opinion of the Genesee Circuit Court, issued October 28, 2003 (Docket No. 02.74145-NZ), p 4. The court also "recognize[d], in some instances, [that the] identity of the killer may be necessary to plead a cause of action." *Id.* Accordingly, it decided that most of plaintiff's claims were not time-barred because plaintiff could not determine that the duties were breached, or that the breaches caused the injuries, until she became aware of the killer's identity in 2002. Regarding Bekofske and MFO, the court granted their summary disposition motions on the basis that if Mott and MFO had failed to provide adequate security, this claim was known to plaintiff at the time of the killing, and the cause of action could have been brought at that time.[5]

On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded, concluding that the common-law discovery rule tolled the limitations period for *all* plaintiff's claims, including the improper security claims against Bekofske and MFO. 266 Mich App 297; 701 NW2d 756 (2005). The Court of Appeals concluded that the common-law discovery rule tolled the period of limitations because plaintiff was unaware of a cause of action against Buckler, the Gortons, Nyberg, or Bakos until their relationship with the killer became known. Regarding Bekofske and MFO, the Court of Appeals reversed the part of the trial court's judgment that granted summary

[5] The claim against Jeffrey Gorton is not in dispute.

disposition in their favor. It concluded that the discovery rule applied because until the identity of the killer became known, no causal connection could be discovered between a breach of duty and Eby's death. The Court of Appeals failed to address the absence of the common-law discovery provision in MCL 600.5827. It evidently presumed that the discovery provision could co-exist with the statute and was not abrogated by the statute's enactment.

Buckler, the Gortons, and MFO sought leave to appeal in this Court. We granted leave to appeal to consider whether a common-law discovery rule continues to exist in Michigan or whether MCL 600.5827, which has no common-law discovery provision, is the exclusive means of establishing tolling.[6]

II. STANDARD OF REVIEW

This Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo. *Grimes v Dep't of Transportation,* 475 Mich 72, 76; 715 NW2d 275 (2006). In the absence of disputed facts, we also review de novo whether a cause of action is barred by the applicable statute of limitations. *Joliet v Pitoniak,* 475 Mich 30, 35; 715 NW2d 60 (2006). Finally, we address questions of statutory interpretation de novo. *Grimes, supra* at 76.

III. ANALYSIS

A. THE STATUTE OF LIMITATIONS AND ITS EFFECT ON THE COMMON-LAW DISCOVERY RULE

The applicable statute of limitations in a wrongful death case is MCL 600.5805(10),[7] which states: "The period of limitations is 3 years after the time of the

[6] 475 Mich 906 (2006).

[7] MCL 600.5805(10) has been renumbered several times since it was enacted as part of the Revised Judicature Act of 1961. 1961 PA 236. The

death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." Thus, the period of limitations runs three years from "the death or injury."

Moreover, MCL 600.5827 defines the time of accrual for actions subject to the limitations period in MCL 600.5805(10).[8] It provides:

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subsection was also amended to explicitly apply to cases alleging wrongful death in 1978. 1978 PA 495. We will refer to the subsection as subsection 10 throughout this opinion for ease of reference.

[8] See, e.g., *Joliet, supra* at 40; *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263, 282; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005); *Moll v Abbott Laboratories,* 444 Mich 1, 12; 506 NW2d 816 (1993).

Although this Court has consistently applied the statutes together, Justice KELLY now questions whether MCL 600.5827 applies in cases governed by MCL 600.5805(10). By its terms, § 5827 applies to "cases not covered by" MCL 600.5829 to 600.5838, which are not relevant to this case. Accordingly, this Court has consistently applied § 5827 and § 5805(10) together. *Joliet, supra* at 40; *Garg, supra* at 282; *Moll, supra* at 12. Moreover, the statutes are complementary and easily read together. MCL 600.5827 establishes that periods of limitations run "from the time the claim accrues," which is "the time the wrong upon which the claim was based is done." MCL 600.5805(10) specifies that personal injury and wrongful death actions accrue at the time of "death or injury." Because "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted" under § 5827, the statutes are perfectly consistent. *Boyle v Gen Motors Corp*, 486 Mich 266, 231 n 5; 661 NW2d 577 (2003).

Significantly, Justice KELLY's preferred application of MCL 600.5805(10) by itself would not yield a different result. First, the time of death under § 5805(10) would be marked from the same moment as the time the wrong was done, under MCL 600.5827. Thus, not only are the statutes complementary, they also have precisely the same effect when applied separately. Second, even assuming that § 5805(10) should alone govern, we would be hard-pressed to inject a common-law discovery rule into this statute's plain language, which unambiguously establishes that the "period of limitations is 3 years after the time of the death or injury." Finally, using a discovery rule to avoid the plain language of § 5805(10) presents the same problem as does applying the rule under § 5827; it ignores the remainder of the statutory scheme, which clearly provides for discovery-based tolling when the Legislature deems it appropriate, as further discussed *infra*.

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

This is consistent with MCL 600.5805(10) because it indicates that the claim accrues "at the time the wrong upon which the claim is based was done . . . ." We have, not surprisingly given its clarity, so held in *Boyle v Gen Motors Corp,* 468 Mich 226, 231-232; 661 NW2d 557 (2003), and *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263, 282; 696 NW2d 646 (2005). We have also clearly established that "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted." *Boyle, supra* at 231 n 5.

The Revised Judicature Act, at MCL 600.5838(2), 600.5838a(2), 600.5839(1), and 600.5855, provides for tolling of the period of limitations in certain specified situations. These are actions alleging professional malpractice, MCL 600.5838(2); actions alleging medical malpractice, MCL 600.5838a(2); actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1); and actions alleging that a person who may be liable for the claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim, MCL 600.5855. Significantly, none of these tolling provisions covers this situation—tolling until the identity of the tortfeasor is discovered.

Plaintiff contends, however, that, notwithstanding these statutes, when the claimant was unaware of any basis for an action, the harsh result of barring any lawsuit because the period of limitations has expired can be avoided by the operation of a court-created discovery rule, sometimes described as a common-law

rule, articulated in *Johnson v Caldwell,* 371 Mich 368, 379; 123 NW2d 785 (1963), superseded by statute as stated in *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420, 428 n 2; 329 NW2d 729 (1982). Under a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint. *Moll v Abbott Laboratories,* 444 Mich 1, 16-17; 506 NW2d 816 (1993).[9] Accordingly, here, plaintiff argues that her claims did not accrue until she discovered that Gorton was the killer because, before that time, she could not have known of and alleged each element of the claims.[10] We reject this contention because the statutory scheme is exclusive and thus precludes this common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply.

It is axiomatic that the Legislature has the authority to abrogate the common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Further, if a statutory provision and the common law conflict, the common law must yield. *Pulver v Dundee*

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[9] A personal injury claim must allege that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, (3) the breach was the proximate cause of the plaintiff's injuries, and (4) damage. *Moll, supra* at 16.

[10] Justice WEAVER makes the same argument but also goes one step further. She acknowledges that, under MCL 600.5827, a claim accrues when " 'all of the elements of the cause of action have occurred' " or when " 'all of the elements of an action for personal injury, including the element of damage, are present . . . .' " *Post* at 413, 420, quoting *Connelly, supra* at 150-151 (emphasis omitted). Justice WEAVER then asserts: "At the time of Dr. Eby's death, not all the elements of a wrongful death action had 'occurred.' " *Post* at 414. To the contrary, clearly each element of plaintiff's negligence claims had occurred at the time of Eby's death; indeed, the crux of each claim is that defendants' acts preceded and culminated in Eby's death.

Cement Co, 445 Mich 68, 75 n 8; 515 NW2d 728 (1994).[11] Accordingly, this Court has observed:

> "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." [*Hoerstman Gen Contracting, supra* at 74, quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441].[12]

Here, as we have explained, the relevant sections of the Revised Judicature Act comprehensively establish limitations periods, times of accrual, and tolling for civil cases. MCL 600.5827 explicitly states that a limitations period runs from the time a claim accrues "[e]xcept as otherwise expressly provided." Accordingly, the statutes "designate specific limitations and exceptions" for tolling based on discovery, as exemplified by MCL 600.5838, 600.5838a, 600.5839, and 600.5855. The scheme also explicitly supersedes the common law as

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[11] Similarly, see *Sington* v *Chrysler Corp*, 467 Mich 144, 164; 648 NW2d 624 (2002) ("Codification of common-law rules makes those rules of no consequence if they are inconsistent with the codification.").

[12] Justice WEAVER's effort at distinguishing *Hoerstman* and *Millross* on the basis of their facts is unavailing. She points out that the statutory scheme at issue here does not contain precisely the same language as the statutes at issue in those cases. *Post* at 421-424. *Hoerstman* and *Millross* do not stand for the proposition that the Legislature is bound to use certain language to convey its intent to abrogate the common law in a given area, however. To the contrary, these cases direct us to examine the scheme as a whole and ask if it constitutes " '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.' " *Hoerstman Gen Contracting, supra* at 74, quoting *Millross, supra* at 183. As Justice WEAVER plainly states: "What is important in conveying [the] intent [to abrogate] is that the legislation be comprehensive." *Post* at 423.

can be seen in the area of medical malpractice, for instance, where this Court's prestatutory applications of the common-law discovery rule were superseded by MCL 600.5838a, in which the Legislature codified the discovery rule for medical malpractice cases.

Finally, MCL 600.5855 is a good indication that the Legislature intended the scheme to be comprehensive and exclusive. MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed.[13] If we may simply apply an extrastatutory discovery rule in any case not addressed by the statutory scheme, we will render § 5855 effectively meaningless. For, under a general extrastatutory discovery rule, a plaintiff could toll the limitations period simply by claiming that he reasonably had no knowledge of the tort or the identity of the tortfeasor. He would never need to establish that the claim or tortfeasor had been fraudulently concealed.

Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual

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[13] MCL 600.5855 reads:

> 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.

in avoidance of the plain language of MCL 600.5827 and we reject this Court's contrary conclusion in *Chase v Sabin,* 445 Mich 190, 191-192; 516 NW2d 60 (1994).[14] Because the statutory scheme here is comprehensive, the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit. This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the permissible legislative objective[15] of protecting defendants from stale or fraudulent claims. *Gladych v New Family Homes, Inc,* 468 Mich 594, 600; 664 NW2d 705 (2003). Accordingly, the lower courts erred when they applied

[14] This result is also consistent with our recent holding in *Boyle, supra* at 231-232, in which we declined to employ the discovery rule to the plaintiffs' fraud claim based, in part, on the plain language of MCL 600.5827, which also governed accrual in that case.

We note that Justice WEAVER, in particular, relies on *Chase* to support her dissenting conclusion that "this case presents the unique situation in which this Court has traditionally applied the discovery rule[.]" *Post* at 415, citing *Stephens v Dixon*, 449 Mich 531, 534-536; 536 NW2d 755 (1995), in turn quoting *Chase, supra* at 196-197. First, the plaintiff in *Chase* alleged that a surgeon negligently injured him during surgery. *Id.* at 192. Therefore, the *Chase* Court's broad observations regarding appropriate use of the discovery rule are arguably dicta when applied beyond the medical malpractice context. Most significantly, the *Chase* Court concluded that use of the discovery rule was particularly appropriate because a medical malpractice plaintiff will typically rely on a hospital or physician's records to prove his claim. *Id.* at 199-200. As Justice WEAVER observes, in contexts such as medical malpractice where the rule is typically applied, " 'evidentiary records are rarely diminished by the passage of time' " and, therefore, there is less concern for protecting defendants from fading memories and time-flawed evidence. *Post* at 418, quoting *Stephens, supra* at 537. Thus, although we reject the *Chase* Court's use of a discovery rule when not authorized by statute, we also fail to see how the instant case "presents the unique situation in which this Court has traditionally applied the discovery rule[.]" *Post* at 415.

[15] *Phillips v Mirac,* 470 Mich 415, 436; 685 NW2d 174 (2004).

an extrastatutory discovery rule to allow plaintiff to bring her claims 16 years after the death of her decedent. When the death occurred, the "wrong upon which the claim is based was done." Given this holding, we overrule *Johnson, supra,* and its progeny.

Overruling these cases is the most appropriate course of action because they run directly counter to the legislative scheme. Further, overruling them is not problematic, under *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000), primarily because, by its nature, the discovery rule does not create expectation or reliance interests. In *Robinson*, we explained that, in deciding whether to overrule wrongly decided cases, we must consider whether "practical real-world dislocations" would result, whether "reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id.* at 464-466. We have already explained that the statutory law, and its changes over time, cause us to question the validity of court-imposed applications of the discovery rule. Most significantly, the nature of the discovery rule contravenes any argument that our decision affects plaintiffs' reliance interests. A plaintiff does not decide to postpone asserting a claim because he relies on the availability of extrastatutory discovery-based tolling. To the contrary, discovery-based tolling is a retroactive mechanism for relief to be used only when a plaintiff could not anticipate his claims. To the extent reliance interests figure into the analysis, it is the expectations of defendants—including those who, as here, may have had as little indication that a claim existed as did the plaintiff—that are harmed when a plaintiff brings claims long after an event occurred.

Defendants must, at some point, be able to safely dispose of business records and other seemingly mundane evidence that they would have no reason to expect could exculpate them in litigation.

Finally, our dissenting colleagues' explanations for why we should not overrule cases that employ a common-law discovery rule ignore the central reasoning and result of our decision. Justice KELLY states, for instance, that "[t]he common-law discovery rule has become so embedded in the fabric of Michigan limitations law that the state's jurisprudence will be seriously damaged by destroying it." *Post* at 442. But rather than destroy the discovery rule, we recognize that the Legislature has comprehensively established the circumstances under which the rule should be applied and has, in the process, rendered use of the rule more uniform and predictable for plaintiffs, defendants and courts alike.[16]

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[16] Although Justice KELLY criticizes us for disregarding precedent, *post* at 437, she very recently indicated that she would have been more than willing to overrule precedent she disfavored, e.g. *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004). See *People v Smith,* 478 Mich 292, 322 n 17; 733 NW2d 351 (2007). She also voted to overrule another decision of this Court in *Haynes v Neshewat,* 477 Mich 29, 39; 729 NW2d 488 (2007), overruling *Kassab v Michigan Basic Prop Ins Ass'n,* 441 Mich 433; 491 NW2d 545 (1992). Therefore, one is naturally tempted to re-inquire, see *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 223-228; 731 NW2d 41 (2007) (MARKMAN, J., concurring), whether her ongoing criticism truly concerns our attitude toward precedent or merely her attitude toward specific previous decisions of the Court. Justice KELLY points to her positions in recent cases including *Liss v Lewiston-Richards*, *Inc*, 478 Mich 203; 732 NW2d 514 (2007), *Rohde v Ann Arbor Pub Schools,* 479 Mich 336; 737 NW2d 158 (2007), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007). She states: "[E]ven though I did not agree with the precedent in these cases, I said nothing about overruling it." *Post* at 438 n 5. Yet, in *Liss,* although she did not expressly advocate overruling precedent, she asserted that the holding of *Smith v Globe Life Ins Co,* 460 Mich 446; 597 NW2d 28 (1999), "should be limited strictly to cases

B. ADDITIONAL RESPONSE TO DISSENTS

First, we reject Justice KELLY's contention in dissent that the statutory scheme evinces the Legislature's intent simply to "ratif[y] prior decisions of this Court applying the common-law discovery rule," *post* at 439, and, therefore, to "implicitly acknowledge[] the applicability of the rule in other types of cases." *Post* at 440. She concludes that the Legislature has abrogated our decisions only to "limit[] the discovery rule where it saw fit." *Post* at 440. But we see no logical reason to equate the Legislature's "approval of the rule"—by its codification of some of this Court's uses of the rule—with the Legislature's approval of every application of the rule. Justice WEAVER similarly suggests that, because the Legislature paid particular attention only to these circumstances, "it is apparent that the Legislature recognized the continuing existence and viability of the common-law discovery rule and saw fit to limit it in certain instances (§§ 5838 and 5838a), but not in all instances." *Post* at 426. Thus, our dissenting colleagues conclude that the Legislature intended merely to limit the rule in some circumstances rather than to establish limited circumstances in which the rule applies.

But the scheme does not, as Justice KELLY asserts, merely "expressly provid[e] that the discovery rule does not apply in professional negligence cases," thus "impl[ying] that it was to apply in all other contexts" under the maxim of *expressio unius est exclusio alterius*. *Post* at 440 n 7. In drawing this conclusion, Justice KELLY

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involving the insurance industry." *Liss, supra* at 217 (KELLY, J., dissenting). In *Rohde* and *Nestlé*, although she acknowledged that the cases with which she disagrees are binding precedent, she had no need to advocate for overruling them; she expressly contended that these established cases did not preclude her preferred outcomes in the cases at hand. *Rohde, supra* at 362 n 5 (KELLY, J., concurring); *Nestlé, supra* at 323-324 (KELLY, J., dissenting).

focuses on the first sections of MCL 600.5838 and 600.5838a, which establish general limitations on the use of a discovery rule in professional and medical malpractice cases. MCL 600.5838(1) provides, for example, that a professional malpractice claim

> *accrues* at the time [the professional] discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*. [Emphasis added.]

The second section of this statute, however, explicitly authorizes discovery-based tolling. MCL 600.5838(2) provides that

> an action involving a claim based on malpractice *may be commenced* at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or *within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.* [Emphasis added.]

In other words, the statute simultaneously authorizes *and* limits the circumstances under which tolling is appropriate. The same is true of the other statutes that our dissenting colleagues claim merely limit how the rule applies in certain cases; each statute comprehensively authorizes and limits the use of discovery-based tolling in particular circumstances.[17] Because the

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[17] MCL 600.5838a(1) provides that a medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(2), in turn, authorizes limited use of the rule, stating: "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(2) and (3)

statutes *authorize* use of discovery-based tolling, we cannot agree that "[t]he only possible reason the Legislature would have included this language is to take professional negligence claims outside the scope of the common-law discovery rule." *Post* at 440-441 n 7. Moreover, the general prohibition on use of the discovery rule in malpractice cases is not "reduced to a redundancy" because it "remove[s] professional negligence claims from the scope of a rule that the Legislature never recognized as existing." *Post* at 441 n 7. Rather, in light of this Court's ongoing use of the discovery rule, particularly in the medical malpractice arena, the Legislature pointedly clarified that a malpractice claim *accrues* regardless of when it is discovered, consistent with the mandate in MCL 600.5827, while also prescribing a tolling period for *commencement* of a suit based on discovery.

Most significantly, both dissenting justices' interpretations of the scheme directly contravene the broad mandate in § 5827 that, "[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues." In accord with this mandate, MCL 600.5838, 600.5838a, 600.5839, and 600.5855 pro-

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round out the statute's comprehensive governance of discovery-based tolling in this area. These sections require that actions commenced on the basis of discovery must be brought within six years of the act or omission unless the claim involves permanent loss of or damage to a reproductive organ resulting in the inability to procreate or discovery of the claim was prevented by the fraudulent conduct of the defendant or his agents.

In a similar vein, MCL 600.5839(1) expressly authorizes plaintiffs to bring suit to recover damages arising out of a defective and unsafe condition of an improvement to real property on the basis of when they discover the defect; such a suit must be brought within "1 year after the defect is discovered or should have been discovered." The statute also lists certain criteria that justify use of the rule and limits its application to claims brought within "10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement." *Id*.

vide that certain actions may be commenced after a claim is discovered, although the claim accrued in the past and the limitations period has run. Thus, these statutes are clearly *expressed exceptions* to the general rule in § 5827 that the limitations period begins running when the harm is done. Indeed, *expressio unius est exclusio alterius*.

MCL 600.5855 also belies the contention that the statutory exceptions merely limit, rather than exclusively authorize, discovery-based tolling under certain circumstances. As we have discussed, MCL 600.5855 provides for essentially *unlimited* tolling based on discovery when a claim is fraudulently concealed. If we may apply an extrastatutory discovery rule in any case not covered by the expressed exceptions, we will render § 5855 effectively meaningless because a plaintiff may toll the limitations period simply by claiming he reasonably had no knowledge of the tort or the identity of the tortfeasor. He would never need to allege fraudulent concealment.

Justice WEAVER's argument regarding this issue only serves to strengthen our point. She explains that "the fraudulent concealment provision would not be helpful to this plaintiff, nor to other plaintiffs who, in the absence of fraudulent concealment, are unable to pursue a claim because they did not have the information necessary to establish a claim until after the period of limitation had expired." *Post* at 424-425. Therefore, she concludes: "Given the distinct need for the common-law discovery rule to assist these innocent plaintiffs, it cannot be said that the continued existence of the discovery rule makes § 5855 superfluous. The two provisions can peacefully co-exist because they serve different purposes." *Post* at 425.

To the contrary, the common-law discovery rule fully encompasses the statutory rule allowing tolling based on fraudulent concealment. As described by Justice WEAVER, for instance, the common-law rule applied if the "plaintiff did not have enough information to allege" elements of the claim, through no fault of her own. *Post* at 414. The discovery of previously unknown information would therefore permit a claim to be saved by the discovery rule regardless of whether the information was *intentionally* obscured from the plaintiff. Thus, Justice WEAVER's interpretation renders the fraudulent concealment statute unnecessary—because the statute's purpose is subsumed by the broader common-law rule—and ignores the Legislature's decision to apply the discovery rule to one class of undiscovered claims but not to all undiscovered claims. Although she attempts to protect innocent plaintiffs, she fails to acknowledge that the Legislature has balanced its desire to protect such plaintiffs against its desire to protect defendants from having to defend stale claims; the outcome of the balancing differs on the basis of the defendant's culpability, or lack thereof, for obscuring the claim.

Finally, we also disagree with Justice KELLY's contention that the lower courts could nonetheless employ a discovery rule here because courts commonly did so in 1986 at the time of Eby's death. She cites MCL 600.5869, which states: "[a]ll actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry." *Post* at 447. MCL 600.5827 and the three-year limitations period for wrongful death actions under MCL 600.5805 have existed in their current forms since 1961 and 1978, respectively.[18] Moreover, the related statutes defining and limiting the use of discovery rules

[18] 1961 PA 236; 1978 PA 495.

under particular circumstances have also existed since 1986.[19] Thus, the relevant statutory law has not changed since 1986. Regardless of whether we agree with Justice KELLY that § 5869 encompasses both statutory and common law, she presents no authority or explanation for how a unique, equitable, inherently backward-looking doctrine such as the discretionary common-law discovery rule can be meaningfully applied as "the law under which the right accrued." First, a court could not have invoked the discovery rule in 1986 when the "right accrued" because it was unnecessary; the limitations period had not run. Second, § 5869 does not *require* use of the rule, as Justice KELLY presumes. *Post* at 448 n 13. Rather, the rule is judge-made law that has been applied on a case-by-case basis. In essence, Justice KELLY's theory would render our opinion paradoxically meaningless because our holding would not apply to events occurring any time before the day we decide this case; although a claim that accrues tomorrow will be subject to the relevant statutory period and exceptions, a claim that accrued in 1986 may be brought at any time in the future, indefinitely.

Most significantly, Justice KELLY's focus on MCL 600.5869 obscures the crux and effect of her position; she is asking us to refrain from applying our holding in this case to this case. This position violates the general rule that decisions are retroactive unless "exigent circumstances" justify the "extreme measure" of prospective-only application. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 586; 702 NW2d 539 (2005) (internal quotations omitted). Even when a decision meets

[19] MCL 600.5838 (amended by 1975 PA 142 to address discovery-based tolling); MCL 600.5838a (enacted by 1986 PA 178 with language addressing discovery); MCL 600.5839(1) (amended by 1985 PA 188 to address discovery-based tolling); MCL 600.5855 (enacted by 1961 PA 236).

the threshold criterion for prospective application because it clearly establishes a new principle of law, we must consider: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski v City of Allen Park,* 465 Mich 675, 696; 641 NW2d 219 (2002). Here, prospective-only application is inappropriate. First, the very purpose of our holding is to respect limits the Legislature has placed on plaintiffs' abilities to revive suits relying on events occurring in the distant past; prospective application is therefore directly opposed to our resolve to honor the Legislature's policy choice. Moreover, as we already explained, the very nature of the discovery rule defies any reliance on its operation. Finally, the administration of justice is not significantly affected because the rights and interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence.

For similar reasons, our decision does not "throw[] Michigan into topsy-turvy land, where a person's legal claim dies before it is born." *Post* at 449. A discovery rule is only necessary when a plaintiff's claim has accrued and he cannot bring suit within the limitations period. Nothing in our decision cuts off a plaintiff's right to bring suit before the wrong is done; for, until the wrong is done, a claim does not accrue under MCL 600.5827.

C. DUE PROCESS

Plaintiff also asserts that, in construing MCL 600.5827 as we do, we deprive her of due process[20]

[20] US Const, Am XIV; Const 1963, art 1, § 17.

because she cannot seek damages for her injury. While she does not dispute that in normal circumstances three years, along with the statutorily allowed extension for personal representatives, is reasonable, she asserts that it is unreasonable if she had no way of knowing the identity of the perpetrator of the wrong. That is, she argues that it is unconstitutional for the Legislature to deprive a plaintiff who has an injury—but who, through no fault of his own, has no knowledge of who injured him—of a cause of action.

Plaintiff's reasoning is rooted in the following passage from *Price v Hopkin,* 13 Mich 318, 324 (1865):

> [T]he legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. . . . It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. [Citations omitted.]

Justices KELLY and WEAVER also rely on *Price* for their contention that our holding violates due process. They misconstrue the holding in *Price*, however, which does not apply to this case.

Price does not address the discovery rule. Rather, there, the Court was faced with a new legislative enactment that shortened the limitations period during which a plaintiff could bring a suit for ejectment from land. *Id.* at 322-323. When the act took effect, it applied to all future cases that had not yet been filed. *Id.* at 323. Accordingly, the ability to bring suit was extinguished for a limited class of plaintiffs who, before the act was passed, had relied on the former limitations period and

expected to be able to bring suit in the future. *Id.* at 323, 324-328. The *Price* Court concluded that, under the circumstances, due process was violated because a legislature may not "take away an existing right of action, by a statute of limitations which allows no time in which to bring suit after the statute has come into operation." *Id.* at 324.

Accordingly, the specific holding in *Price* has no bearing on this case, in which the limitations period has remained consistent since the time plaintiff's causes of action accrued.[21] A plaintiff's right to due process is not violated because a desired remedy is no longer available; every statute of limitations deprives plaintiffs of a remedy at the moment the period of limitations expires. Indeed, in *Price*, the newly shortened limitations period was not problematic, in and of itself, as a matter of law. *Price, supra* at 323-324. Rather, it was only unconstitutional as applied to the plaintiff. *Id.* at 328. The general rule expressed in *Price* remains:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative

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[21] Justice WEAVER argues that, in *Chase, supra* at 196, this Court cited *Price* as general support for continued use of the discovery rule. *Post* at 428-429. The reference to *Price* in *Chase* directly precedes a discussion of the general proposition—rooted in MCL 600.5827 and explained in *Connelly, supra*—that a negligence claim accrues *not* when a defendant breaches a duty, but when a plaintiff is injured. Any other conclusion "could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury." *Chase, supra* at 196. We agree that this potential effect could " 'declare the bread stale before it is baked,' " *id.* at 197 (citation omitted), and raise the due process concerns described in *Price*. We reject the *Chase* Court's interpretation of *Price* only to the extent *Chase* may be read, as Justice WEAVER suggests, to assert that a plaintiff's due process rights are violated under *Price* if an otherwise reasonable limitations period expires before a plaintiff is *aware* of the claim. Such an interpretation of *Price* would eschew the *Price* Court's assertion that it is fully within the power of the Legislature to enact reasonable periods of limitations.

> judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. [*Price, supra* at 324.]

Given the Legislature's unquestioned power, the only question we must ask—as with any due process analysis of a statute that involves neither a suspect classification such as race, alienage, ethnicity or national origin, nor a deprivation of a fundamental right—is whether it " 'bears a reasonable relation to a permissible legislative objective.' " *Phillips v Mirac, Inc,* 470 Mich 415, 436; 685 NW2d 174 (2004) (citation omitted). Statutes of limitations "serve the permissible legislative objective of relieving defendants of the burden of defending claims brought after the time so established." *O'Brien v Hazelet & Erdal,* 410 Mich 1, 14; 299 NW2d 336 (1980).[22] This Court has also explained that "[i]f the

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[22] See, also, *Stephens v Dixon*, 449 Mich 531, 536; 536 NW2d 755 (1995) (brackets in original):

> "While providing equitable relief to plaintiffs otherwise barred by a strict application of the statute of limitations, the discovery rule also threatens legitimate interests of the defendant which the statute protects. While it may be harsh to bar the action of a plaintiff who, through no fault of his own, did not discover his injury until after the running of the statute, it is also unfair . . . to compel a defendant to answer a charge arising out of events in the distant past. The discovery rule tends to undermine the sense of security that the statute of limitations was designed to provide, namely, that at some point a person is entitled to put the past behind him and leave it there." [Olsen, *The discovery rule in New Jersey: Unlimited limitation on the statute of limitations,* 42 Rutgers L R 205, 211-212 (1989).]

In her dissent, Justice KELLY asserts: "The purpose of a limitations statute is to 'penalize plaintiffs who have not been industrious in pursuing their claims,' not to eliminate a valid cause of action when the plaintiff is without fault." *Post* at 445-446, quoting *Lemmerman v Fealk,* 449 Mich 56, 65-66; 534 NW2d 695 (1995). She ignores that limitations periods are *also* aimed at relieving defendants from the burden of defending stale claims.

Legislature can entirely abrogate a common-law right, surely it may provide that a particular cause of action can no longer arise unless it accrues within a specified period of time." *Id.* at 15.

In light of the permissible legislative objectives of statutes of limitations, *O'Brien, supra,* the statutes applicable to this case unquestionably further a legitimate legislative aim. The Legislature obviously weighed carefully the competing interests of plaintiffs and defendants when it limited a plaintiff's ability to bring suit under MCL 600.5827 and MCL 600.5805, but protected plaintiffs by affording a limited extension for personal representatives, MCL 600.5852, as well as a discovery-based tolling provision when a defendant fraudulently conceals claims, MCL 600.5855. Given the three-year limitations period and its potential extensions, we cannot say that the Legislature failed to "afford a reasonable time within which suit may be brought." *Price, supra* at 325. Accordingly, our holding does not violate plaintiff's due process rights.

D. EQUITABLE TOLLING UNDER *BRYANT v OAKPOINTE VILLA NURSING CENTRE, INC*

Finally, we decline plaintiff's request to employ a "pinpoint application of equity" to her claims so as to render them timely, on the unique facts of this case. In making this request, plaintiff relies largely on *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004). In *Bryant,* we addressed the difference between actions sounding in ordinary negligence and those sounding in medical malpractice. We con-

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Justice WEAVER acknowledges the dual purposes of limitations periods. When she asserts that the equities favor plaintiff in this case, however, Justice WEAVER merely distinguishes *Stephens, supra,* in which the discovery rule was clearly inapplicable because the plaintiff knew of her injury and its cause before the limitations period expired. *Post* at 413, 418-419.

cluded that some of the plaintiff's claims sounded in malpractice, and would have been barred by the malpractice limitations period. *Id.* at 432. Nonetheless, we allowed the particular plaintiff's malpractice claims to proceed with the negligence claims because

> [t]he distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan . . . [and the p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. [*Id.* at 432.]

As we clarified in *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 590 n 65; 702 NW2d 539 (2005), however, our use of equity in *Bryant* is limited to those circumstances when the courts themselves have created confusion. In *Bryant,* the use of equity was appropriate because of "the preexisting jumble of convoluted caselaw through which the plaintiff was forced to navigate." *Devillers, supra* at 590 n 65. Here, in contrast, plaintiff has not detrimentally relied on confusing, pre-existing case law. By its very nature, the discovery rule does not lend itself to detrimental reliance; plaintiffs seeking to invoke it do not wait to bring suit because they expect to rely on the rule, but because they claim that external factors prevented them from discovering their claims.

Perhaps most significantly, in *Bryant,* no controlling statute negated the application of equity; rather, this Court's caselaw determined whether a claim sounded in medical malpractice or ordinary negligence. *Devillers, supra* at 590 n 65. To the contrary, in the instant case, the statutory scheme controls limitations periods, accrual, and tolling, just as the no-fault act, specifically MCL 500.3145(1), controlled the outcome in *Devillers. Id.* As we opined in *Devillers, supra* at 591, if 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.[23] Statutes lose their meaning if "an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity." *Id.* Significantly, such unrestrained use of equity also undermines consistency and predictability for plaintiffs and defendants alike.

IV. CONCLUSION

We hold that the plain language of MCL 600.5827 precludes the use of a broad common-law discovery rule to toll the accrual date of claims to which this statute applies. Here, the wrong was done when Eby was raped and murdered in 1986. MCL 600.5827 was in effect at that time. Accordingly, plaintiff's claims accrued at the time of Eby's death. The Legislature has evinced its intent that, despite this tragedy, the defendant-appellants may not face the threat of litigation 16 years later, merely because plaintiff alleges she could not reasonably discover the facts underlying their potential negligence until 2002.

We reverse the judgment of the Court of Appeals as well as the circuit court's order denying the defendant-appellants' motions for summary disposition under MCR 2.116(C)(7). We remand to the circuit court for further proceedings consistent with this opinion.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*dissenting*). I dissent from the majority's conclusion that MCL 600.5827 exclusively governs the

[23] Const 1963, art 3, § 2.

time of accrual of plaintiff's claims. I would affirm the Court of Appeals decision applying the common-law "discovery rule,"[1] which operates to toll the statutory period of limitations when a plaintiff could not have reasonably discovered the elements of a cause of action within the limitations period.

Further, I concur with Justice KELLY that under the test set forth in *Robinson v Detroit*,[2] the discovery rule "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."[3]

FACTS

In 1981, Dr. Margarette Eby moved to Flint, Michigan, and began leasing a two-story gatehouse located near the entrance to the Ruth R. Mott estate (Mott Estate). Evidently Mrs. Mott lived a hermitic lifestyle on the Mott Estate grounds known as "Applewood." Virtually all her personal dealings were handled by the Mott Family Office (MFO).[4]

The gatehouse was remotely located some distance from Mrs. Mott's home, and the gatehouse basement contained the valves and piping that supported the sprinkler system for the entire Mott Estate grounds. In January 1985, Dr. Eby complained to Mrs. Mott about break-ins she experienced at the gatehouse, including an incident on January 23, 1985, during which Dr. Eby's compact disc player and purse were stolen. Paul Yager,

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[1] *Johnson v Caldwell,* 371 Mich 368, 379; 123 NW2d 785 (1963). See also *Moll v Abbott Laboratories,* 444 Mich 1, 16-17; 506 NW2d 816 (1993).

[2] 462 Mich 439; 613 NW2d 307 (2000).

[3] *Id.* at 466.

[4] MFO was formed in 1969 to attend to the financial and personal needs of Ruth Mott, her children, and her nieces and nephews.

then the chief executive officer of MFO, responded to Dr. Eby's complaint on behalf of Mrs. Mott. In response to Dr. Eby's complaint and her request for installation of a security alarm system, Mrs. Mott had new deadbolt locks installed. No alarm system was installed.

Nearly two years later, late in the evening on November 7, 1986, Dr. Eby returned to the gatehouse after a dinner party. Two friends accompanied her to the gatehouse door and waited until she was safely inside before departing. Two days later, Dr. Eby was found dead in the gatehouse. She had been attacked, raped, and knifed to death. The police investigation of Dr. Eby's death focused primarily on persons who might have been known to Dr. Eby because there appeared to be no sign of forced entry. Police interviewed a number of suspicious persons, but there was never any evidence developed that implicated those persons in Dr. Eby's death. The evidence collected included deoxyribonucleic acid (DNA) evidence (semen) from Dr. Eby's body, as well as a partial fingerprint from a faucet inside the gatehouse.

In 1991, Nancy Ludwig, an airline attendant, was attacked, raped, and knifed to death in a hotel near the Detroit Metropolitan Airport. The circumstances surrounding her death were strikingly similar to Dr. Eby's, and at the request of Dr. Eby's son, the police reopened the investigation into Dr. Eby's death. After additional DNA testing on evidence collected from both victims, and after comparing fingerprints left at both crime scenes, investigators were able to determine that Jeffrey Gorton committed both murders.[5]

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[5] Gorton was apprehended in Florida and sentenced to life in prison on February 13, 2003, after pleading no contest to first-degree murder, MCL 750.316, and first-degree criminal sexual conduct, MCL 750.520b.

Before Dr. Eby's death in 1986, Jeffrey Gorton was an employee of Buckler Automatic Lawn Sprinkler Company (Buckler), which serviced the Mott Estate's sprinkler system. Buckler was owned by Jeffrey Gorton's parents, Laurence and Shirley Gorton. Jeffrey Gorton was provided access to the sprinkler system controls housed in the gatehouse basement through Mott Estate staff members Victor Nyberg and Todd Bakos, both allegedly employed by MFO.

On August 2, 2002, six months after discovering the identity of Dr. Eby's murderer through the arrest of Gorton, plaintiff Dayle Trentadue, daughter of Dr. Eby and personal representative for the estate of Margarette F. Eby (estate of Eby), filed a wrongful death complaint against multiple defendants. The defendants included Buckler, its owners Laurence and Shirley Gorton, Jeffrey Gorton, Ruth Mott, MFO, and MFO employees Nyberg and Bakos. The complaint alleged, among other things, negligent hiring and negligent supervision of Dr. Eby's killer, Jeffrey Gorton.[6]

With regard to her claims against the Mott Estate, MFO, and Nyberg and Bakos for negligent hiring and negligent supervision, plaintiff alleged that on November 5, 1986, MFO employees Nyberg and Bakos provided Gorton with unsupervised access to the gatehouse

[6] With regard to her claims against Buckler and the Gortons for negligent hiring and negligent supervision, plaintiff alleged that in 1985, a year before Gorton killed Dr. Eby, Gorton's parents were aware that Gorton had just been released from a Florida prison after serving time for assault crimes. Evidently Jeffrey Gorton had a history of violence against women, and his felony convictions in Florida involved physical assaults on women.

His paternal grandparents even appeared for his sentencing in Florida and begged the judge to permit Gorton to get psychiatric help for his violent outbursts against women. Yet, despite this knowledge, the Gortons employed their son in the family business and sent him to service the sprinklers at the Mott Estate.

basement to winterize the sprinklers and that it was by this means that Gorton was subsequently able to come back on November 7 to attack and kill Dr. Eby.[7] Moreover, despite Dr. Eby's earlier and repeated requests to defendants Ruth Mott and MFO to improve the security of the gatehouse, plaintiff alleged that defendants were negligent in failing to provide adequate security, thereby permitting Jeffrey Gorton's access to the gatehouse.

All defendants filed motions for summary disposition, but the circuit court granted summary disposition only to defendants Mott and MFO, and only on one count (count VIII, which alleged that the premises were unsafe). The parties appealed, and the Court of Appeals reversed the summary disposition for MFO on count VIII, affirmed in all other respects, and remanded the matter to the circuit court for further proceedings.[8] In so ruling, the Court of Appeals concluded that the discovery rule tolled the period of limitations because plaintiff had no basis to assert claims against any defendant until the murderer's culpability was discovered.

Defendants appealed, and we granted leave, directing the parties to include among the issues to be briefed:

> [W]hether the Court of Appeals application of a common-law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would

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[7] Plaintiff suggests that when Nyberg and Bakos gave Gorton access on November 5, they failed to resecure the gatehouse basement access so that Gorton was then later able to enter the gatehouse on November 7 through the unlocked basement door.

[8] *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 266 Mich App 297; 701 NW2d 756 (2005). The decision was initially unpublished, but the Court later granted plaintiff's publication request.

otherwise control, should be overruled. [*Trentadue v Buckler Automatic Lawn Sprinkler Co,* 475 Mich 906 (2006).]

ANALYSIS

MCL 600.5805(10) provides that in wrongful death actions, "[t]he period of limitations is 3 years after the time of the death or injury . . . to recover damages for the death of a person . . . ." Further, MCL 600.5827 states:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Both of these provisions appear in the Revised Judicature Act, MCL 600.5801 *et seq*., in chapter 58, the chapter entitled "Limitation of Actions." The policy considerations behind the enactment of statutes of limitations were noted by this Court in *Lothian v Detroit*:[9]

> They encourage the prompt recovery of damages, *Buzzn v Muncey Cartage Co*, 248 Mich 64, 67; 226 NW 836 (1929); they penalize plaintiffs who have not been industrious in pursuing their claims, *First National Bank of Ovid v Steel*, 146 Mich 308; 109 NW 423 (1906); they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision", *Jenny v Perkins*, 17 Mich 28, 33 (1868); they relieve defendants of the prolonged fear of litigation, *Bigelow* [*v Walraven*], *supra*, [392 Mich at] 576 [;221 NW2d 328 (1974)]; they prevent fraudulent claims from being asserted, *Bailey v Glover*, 88 US (21 Wall) 342; 22 L Ed 636 (1875); and they " 'remedy . . . the general inconvenience resulting from

[9] 414 Mich 160, 166-167; 324 NW2d 9 (1982).

> delay in the assertion of a legal right which it is practicable to assert' ". *Lenawee County v Nutten,* 234 Mich 391, 396; 208 NW 613 (1926).

In *Lemmerman v Fealk,*[10] we further noted that " 'the primary purposes behind statutes of limitations are: 1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale and fraudulent claims.' " And certainly, had plaintiff herein failed to diligently pursue her claim, or attempted to file a fraudulent claim, this Court would not hesitate to summarily apply these statutes of limitations to bar plaintiff's suit.

However, neither of these policy considerations will be furthered by application of these provisions given that plaintiff was deprived of the evidence necessary to even establish that a claim existed until long after the period of limitations had expired. It is precisely in situations such as the one plaintiff faces here that this Court has applied the discovery rule to prevent a statute of limitations from foreclosing a plaintiff's right to bring suit. And, in fact, the law in this state in 1986, the year of Dr. Eby's murder, was that a cause of action did not accrue until the elements forming the basis of the complaint could be pleaded:

> In the case of an action for damages arising out of tortious injury to a person, the cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint.
>
> Those elements are four in number.
>
> (1) The existence of a legal duty by defendant toward plaintiff.
>
> (2) The breach of such duty.

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[10] 449 Mich 56, 65; 534 NW2d 695 (1995) (citation omitted).

(3) A proximate causal relationship between the breach of such duty and an injury to the plaintiff.

(4) The plaintiff must have suffered damages.[11]

At the time of Dr. Eby's death, not all the elements of a wrongful death action had "occurred." The majority disagrees with this contention, *ante* at 389 n 10, arguing that each element of plaintiff's claim *had* "occurred" at the time Dr. Eby was murdered; however, while I concede that the *events* had "occurred," the fact is that plaintiff did not have enough information to allege that Dr. Eby's death was the result of the negligent acts of Ruth Mott, MFO and its employees, and Buckler Automatic Lawn Sprinkler Company and its employees and owners. In other words, the information available to plaintiff at the time of Dr. Eby's death did not put plaintiff on notice that a claim could be made against the various defendants. Plaintiff was not alerted to the availability of a claim to be made against defendants until plaintiff learned the identity of the killer and the killer's connection to defendants. Plaintiff was not aware of the killer's identity, nor was plaintiff aware of the connection the killer had to any of the potential defendants. Consequently, there was no basis for pleading that any duty was owed to the plaintiff by any potential defendant. The evidence collected tended to show that Dr. Eby was killed by an acquaintance, given that there was no sign of forced entry into the gatehouse. Because the police evidently theorized that Dr. Eby knew the killer, their investigation focused on Dr. Eby's known acquaintances. Consequently, the police never questioned killer Jeffrey Gorton, the Buckler employee, nor was there ever any investigation into the relationship between Buckler, MFO, and Ruth Mott. Dr.

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[11] *Connelly v Paul Ruddy's Equip Repair & Service Co,* 388 Mich 146, 150; 200 NW2d 70 (1972).

Eby's murder remained unsolved until years after the period of limitations had expired; thus, plaintiff lacked the essential piece of evidence—the fact that Buckler employee Jeffrey Gorton attacked, raped, and killed Dr. Eby. It was only upon discovering this critical information that plaintiff was able to establish, after reopening the investigation, that the elements necessary to bring a wrongful death claim were in fact all present and could be alleged in a complaint.

And while defendants have asserted that despite the absence of the critical information pertaining to how Dr. Eby in fact died, plaintiff could still have adequately alleged a general negligence claim within the statutory period, had she done so, her claim likely would have been deemed legally deficient given that the criminal evidence collected at the time of Dr. Eby's death tended to indicate that Dr. Eby herself allowed the killer into her own home.

As we stated in *Stephens v Dixon,*[12] this case presents the unique situation in which this Court has traditionally applied the discovery rule:

> In Michigan, the limitation period for ordinary negligence actions such as the case at bar is three years. MCL 600.5805(8); MSA 27A.5805(8). The most complicated problem associated with statutes of limitation, and the problem presented in this case, is that of determining when they begin to run. MCL 600.5805(8); MSA 27A.5805(8) provides that "[t]he claim accrues at the time . . . the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; MSA 27A.5827. We have held that the term "wrong," as used in the accrual provision, refers to the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388

[12] 449 Mich 531, 534-536; 536 NW2d 755 (1995).

Mich 146; 200 NW2d 70 (1972). Otherwise, a plaintiff's cause of action could be barred before the injury took place.

Another accrual problem associated with statutes of limitation occurs when a plaintiff is injured but is unaware of the injury. If the statute of limitation begins to run at the time of injury, it is possible that plaintiffs with perfectly valid claims could be prevented, through no fault of their own, from bringing their actions within the specified period of limitation. In situations such as these, the common law has developed equitable rules to mitigate the harsh effects of the statute of limitation. One such exception is the discovery rule. The discovery rule, based on principles of fundamental fairness, "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action." *Hammer v Hammer*, 142 Wis 2d 257, 264; 418 NW2d 23 (1987).

We explained the discovery rule in *Chase v Sabin*, 445 Mich 190, 196-197; 516 NW2d 60 (1994). In *Chase*, a 1963 eye operation failed because of an event that occurred during the operation. The plaintiff was not told of the occurrence. In 1988, while pursuing an unrelated worker's compensation claim, the plaintiff's attorney obtained a hospital record of the surgery and learned of the event. We stated:

"Similarly, because statutes of limitation do not evidence a legislative intent to extinguish a cause of action before the plaintiff is aware of the possible cause of action, we have adopted the discovery rule in the appropriate instances. Last term . . . we held that the discovery rule controls the date a pharmaceutical products liability action accrues. 'If the three-year period of limitation began to run at the time of the defendant's breach, most, if not all, claims would be barred before the plaintiff had reason to know of the injury and the cause of the injury. Such an interpretation seeks "to declare the bread stale before it is baked." ' (Citation omitted.)"

We note that while the discovery rule serves as an important limit on a mechanical and unjust termination of

a legitimate cause of action, there can be equitable problems with the imposition of the discovery rule as well. As one commentator has stated:

"While providing equitable relief to plaintiffs otherwise barred by a strict application of the statute of limitations, the discovery rule also threatens legitimate interests of the defendant which the statute protects. While it may be harsh to bar the action of a plaintiff who, through no fault of his own, did not discover his injury until after the running of the statute, it is also unfair . . . to compel a defendant to answer a charge arising out of events in the distant past. The discovery rule tends to undermine the sense of security that the statute of limitations was designed to provide, namely, that at some point a person is entitled to put the past behind him and leave it there. [Olsen, *The discovery rule in New Jersey: Unlimited limitation on the statute of limitations*, 42 Rutgers L R 205, 211-212 (1989).]"

Given the competing interests of balancing the plaintiff's right to bring a claim once a plaintiff learns of the injuries with the defendant's right not to have to defend a stale claim, the *Stephens* Court went on to discuss when to apply the discovery rule:

In the present case, the plaintiff proposes that we take a step beyond the rule of *Chase* [*v Sabin, supra*]. There, we held that "the discovery rule governs the accrual date for negligence claims, pursued against hospitals and their agents, which are similar to malpractice claims." *Id.* at 201. By contrast, the present case involves allegations of ordinary negligence.

In *Moll v Abbott Laboratories*, 444 Mich 1, 12-13; 506 NW2d 816 (1993), we noted this Court's adoption of the discovery rule for medical malpractice cases in *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963), in negligent misrepresentation cases in *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), and in products liability actions for asbestos-related diseases in *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986). In *Moll*, we

> extended the application of the discovery rule to products liability actions for pharmaceutical products liability actions. Defendant correctly points out that in these contexts, evidentiary records are rarely diminished by the passage of time. Hence, as we stated in *Larson*, *supra* at 312, quoting *Eagle-Pitcher Industries, Inc v Cox*, 481 So 2d 517, 523 (Fla App, 1985), "the concern for protecting defendants from 'time-flawed evidence, fading memories, lost documents, etc.' is less significant in these cases." That is not the case in automobile tort liability cases, where the evidence for liability defense is often dependent on fading memories of individual witnesses.
>
> We hold that the discovery rule is not available in a case of ordinary negligence where a plaintiff merely misjudges the severity of a known injury. [*Id*. at 537.]

Ultimately, the *Stephens* Court declined to extend the discovery rule in that case because, unlike plaintiff herein, the plaintiff in *Stephens* not only *knew she was injured, but knew the cause of her injury* before the period of limitations expired. The plaintiff in *Stephens* had argued that even though she knew she was injured, she did not know the true extent of her injuries until after the period of limitations had expired. Citing *Connelly, supra,* the Court declined to apply the discovery rule and restated the rule that "a cause of action for tortious injury accrues 'when all of the elements of the cause of action have occurred and can be alleged in a proper complaint.' "[13]

In contrast to the plaintiff in *Stephens,* plaintiff Trentadue, as personal representative of the estate of Eby, did not have the information available to bring a wrongful death claim until she knew *who* the killer was and *how* the killer managed to get access to Dr. Eby's private residence. Essentially, the "injury," that is, the

[13] *Stephens, supra* at 539, quoting *Connelly, supra* at 150.

wrongful death, was not apparent until 16 years after Dr. Eby's death. Nor was the "cause" of that injury apparent until after the period of limitations had expired.

In determining when the wrongful death claim accrued, we turn to MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections 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.]

The statute does not define "wrong" or "damage," but this Court has already examined these terms and provided the following analysis:

> Defendants argue that the statutory provision "* * * the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results" means, in the context of this case, that claims against them are barred, since breach of duty claimed against them must have occurred prior to March 15, 1965, more than 3 years before action was commenced.
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> Defendants contend that the word *wrong* refers to an act of carelessness or negligence in repairing or handling the press. By their view, the word *damage* refers to the personal injury suffered by the plaintiff on May 12, 1965, the day that the press malfunctioned.
>
> Defendants claim that interpreting the word *wrong* to mean *actionable wrong, tort, harm or injury* is to broaden the meaning of that word, and render the word *damage* entirely meaningless.
>
> It is argued by the plaintiff that under such a view, her claim is barred before she was hurt. She would never have been able to commence an action at all.

By that interpretation, plaintiff says, the statute is not one of limitation but one of abolition, completely destroying her cause of action before it arises.

Defendants counter by pointing out that the statute of limitations is a statute of repose, designed to protect defendants from stale claims; that this is an industrial state and it is therefore reasonable to conclude that the Legislature intended to protect industrial and commercial interests by fixing a certain limit upon exposure to liability for faulty products and workmanship.

We cannot accept the defendants' view. However desirable the stated objectives might be, it is doubted that such was the legislative purpose. The statute in question is the Revised Judicature Act. It was drawn, as defendants point out, 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.

The word damage *is not rendered meaningless in a fair reading of the statute, even where the word* wrong *is understood to mean actionable wrong*.

It is quite common in personal injury actions to allege and prove future loss of earning capacity, future medical expenses, future pain and suffering. Indeed all of these elements must be alleged and proved in a single cause of action. *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. [*Connelly*, *supra* at 150-151 (emphasis added).]

Thus, for purposes of a wrongful death action in which a plaintiff seeks damages for tortious injuries and death suffered by the decedent, the time that the claim first accrues is the point in time when "all of the elements of an action for personal injury, including the

element of damage, are present . . . ." *Id*. at 151. Because plaintiff, through no fault of her own, lacked the information necessary to establish the elements of wrongful death until 16 years after Dr. Eby's death, the claim did not accrue until plaintiff became aware of that information.

Today, the majority overrules *Johnson* and its progeny, effectively depriving plaintiff, and future potential injured parties, from seeking compensation when their injuries are not known to them before the statutory period of limitations expires. As a result, statutes of limitations will be imposed not on those who would sit on their rights, but on the innocent, who, through no fault of their own, have been deprived of the information necessary to bring an otherwise valid claim.

The majority's justification for the abolition of the discovery rule is that, with the enactment of MCL 600.5801 *et seq.*, the Legislature created a comprehensive statutory scheme meant to supersede any existing common law dealing with the subject matter. *Ante* at 390-391. Yet the authority cited in support of the majority's argument is unpersuasive. The majority points to *Hoerstman Gen Contracting, Inc v Hahn*[14] as the basis for its conclusion that MCL 600.5801 *et seq*. were enacted to abrogate the common-law discovery rule. However, in *Hoerstman*, the statute at issue was article 3 of the Uniform Commercial Code, MCL 440.3101 *et seq*. The question we faced was whether after the enactment of MCL 440.3311, the common-law defense of accord and satisfaction was eliminated. In finding that the Legislature did so intend, we stated:

> As already noted, *Article 3 of the UCC is comprehensive. It is intended to apply to nearly every situation involving*

[14] 474 Mich 66, 74; 711 NW2d 340 (2006), quoting *Millross v Plum Hollow Golf Club,* 429 Mich 178, 183; 413 NW2d 17 (1987), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441.

negotiable instruments. See MCL 440.3102. The language contained in MCL 440.3311 completely covers the details of accord and satisfactions.

MCL 440.3311(3) and (4) contain exceptions or conditions. Their enumeration eliminates the possibility of their being other exceptions under the legal maxim *expressio unius est exclusio alterius*. The maxim is a rule of construction that is a product of logic and common sense. This Court long ago stated that no maxim is more uniformly used to properly construe statutes.

Therefore, the language of the statute shows that the Legislature covered the entire area of accord and satisfactions involving negotiable instruments. It clearly intended that the statute would abrogate the common law on this subject. [*Id.* at 74-75 (citations omitted; emphasis added).]

The rationale from *Hoerstman* is not applicable to the statutory scheme at issue here because MCL 600.5801 *et seq*. lack the comprehensive enactment language found in the negotiable instruments statute. Importantly, MCL 440.3102 defines the scope of the statute and its reach, whereas the same cannot be said of MCL 600.5805. In particular, MCL 440.3102(1) provides: "*This article applies to negotiable instruments*. It does not apply to money, to payment orders governed by article 4a, or to securities governed by article 8." (Emphasis added.) Chapter 58 of the Revised Judicature Act does not contain a comparable provision defining the scope of the chapter.

The majority claims that *Hoerstman* and *Millross* are not distinguishable on this basis, *ante* at 390 n 12, because these cases do not establish that the Legislature must use certain language to abrogate the common law. However, as the *Hoerstman* Court correctly noted, "[t]he Legislature has the authority to abrogate the

common law."[15] And "[w]hen it does so, it should speak in no uncertain terms."[16] Thus, language defining the scope of a chapter is just one example of the kind of language that the Legislature has used to convey its intent to abrogate the common law. What is important in conveying such intent is that the legislation be comprehensive.

For example, the *Hoerstman* Court cited *Millross, supra,* for the proposition that comprehensive legislation abrogates the common law.[17] *Millross* provides even stronger evidence that the statutory scheme herein is distinct from the statutory schemes at issue in both *Hoerstman* and *Millross*. Specifically, in *Millross*, this Court noted that abrogation was appropriate because it was clear that "the Legislature intended the dramshop act to be a *complete and self-contained solution to a problem not adequately addressed at common law and the exclusive remedy* for any action arising under 'dramshop-related facts.' "[18] "Indeed," the Court went on to note that

> the Legislature has amended the act to expressly codify this intent in 1986 PA 176, which provides in pertinent part, "*This section provides the exclusive remedy* for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor." MCL 436.22(11); MSA 18.993(11). [*Millross, supra* at 186 (emphasis added).]

In contrast, nowhere in chapter 58, Limitations of Actions, is there a provision establishing that that chapter is exclusive. Nor is there any language evidencing an intent by the Legislature to abolish the common-law discovery rule in order to provide "complete and

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[15] *Hoerstman*, *supra* at 74.

[16] *Id*.

[17] *Id*.

[18] *Millross, supra* at 185-186.

self-contained" legislation limiting the time in which actions could be brought and thereby replace the discovery rule.

The majority asserts, *ante* at 391, that because the Legislature included MCL 600.5855,[19] the application of the common-law discovery rule will render § 5855 meaningless. I disagree, given that in order for a plaintiff to avail himself or herself of § 5855, there must still be evidence of *fraudulent* concealment. Here, where there does not appear to be evidence of fraudulent concealment on the part of any of the named defendants, plaintiff would not be able to use this provision.[20] Thus, the

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[19] MCL 600.5855 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.

[20] This Court discussed fraudulent concealment in *Int'l Union United Auto Workers v Wood,* 337 Mich 8, 13-14; 59 NW2d 60 (1953):

> Fraudulent concealment was defined in *De Haan* v. *Winter*, 258 Mich 293, 296[; 241 NW 923 (1932), superseded by statute on other grounds *Morgan v Taylor*, 434 Mich 180 (1990)], as meaning the "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent."
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> * * *
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> Fraudulent concealment is more than mere silence. *McNaughton* v. *Rockford State Bank*, 261 Mich 265, 268[; 246 NW 84 (1933)].
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> * * *

fraudulent concealment provision would not be helpful to this plaintiff, nor to other plaintiffs who, in the absence of fraudulent concealment, are unable to pursue a claim because they did not have the information necessary to establish a claim until after the period of limitations had expired.

Further, I disagree with the majority's assertion that a narrowly drawn statute purports to change an entire body of common law in the absence of the Legislature explicitly stating that it so intends. The majority's assertion incorrectly assumes that a narrowly tailored statute, which is silent with regard to the broad scope of the discovery rule, somehow changes the entire application of the discovery rule.[21]

Given the distinct need for the common-law discovery rule to assist these innocent plaintiffs, it cannot be said that the continued existence of the discovery rule makes § 5855 superfluous. The two provisions can peacefully coexist because they serve different purposes.

Indeed, it is evident that when the Legislature wanted to supersede the common-law discovery rule, it did so specifically with regard to certain claims. For example, MCL 600.5838 establishes the time in which a malpractice claim accrues:

> . . . Concealment by one other than the one sought to be charged is not within the prohibition of the statute. See *Stevenson* v. *Robinson*, 39 Mich 160 [1878].

[21] While the majority asserts incorrectly that the fraudulent concealment statute is "subsumed," *ante* at 399, by the discovery rule because the discovery rule encompasses both fraudulent concealment claims and nonfraudulent concealment claims, the fact that the discovery rule has a broader application than the fraudulent concealment statute does not mean that the Legislature sought to allow the use of the discovery rule only with respect to fraudulent concealment claims. Nor does the continued existence of the discovery rule vitiate the fraudulent concealment statute, which merely represents the Legislature's decision to specify how the common-law discovery rule applies to fraudulent concealment claims.

(1) Except as other provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*.

(2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later*. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. *A malpractice action which is not commenced within the time prescribed by this subsection is barred*. [Emphasis added.][22]

In contrast to the malpractice limitation provisions, which indicate with specificity how the discovery rule should be applied, the wrongful death limitation provisions at issue here do not bar the use of the common-law discovery rule, nor do they limit the application of the discovery rule in certain instances. Given the coexistence of these various limitation provisions, it is apparent that the Legislature recognized the continuing existence and viability of the common-law discovery rule and saw fit to limit it in certain instances (§§ 5838 and 5838a), but not in all instances. Specifically, MCL 600.5805 does not contain any provisions limiting the application of the discovery rule, but instead provides:

[22] MCL 600.5838a contains a comparable accrual provision abolishing the availability of the discovery rule for medical malpractice claims filed under that statute.

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, *after the claim first accrued* to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Ultimately, if plaintiff is denied her day in court on the basis of the majority's interpretation of MCL 600.5827, plaintiff will be denied due process. This Court has held that while the Legislature has the power to enact statutes of limitations, those provisions will be deemed unconstitutional if they unreasonably deprive a plaintiff from bringing an otherwise valid claim:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. A statute which forbids any suit for the recovery of lands is not a statute of limitations, but a statute to pass to adverse possessors the title of all other claimants; and its validity cannot depend upon the name bestowed upon it. It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would

> be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. [*Price v Hopkin,* 13 Mich 318, 324-325 (1865) (citations omitted).]

More recently, this Court cited *Price* to support this Court's long history of applying the discovery rule when a statute of limitations would wrongfully deprive a plaintiff of a reasonable time in which to bring a claim:[23]

> A statute of limitation should provide plaintiffs with a reasonable opportunity to commence suit. For over one hundred years, this Court has sought to fulfill this purpose, construing statutes accordingly.
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> * * *
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> Our adherence to this principle resulted in our holding that the term "wrong," as stated in the accrual statute, designated the date on which the plaintiff was harmed by the defendant's negligent act, as opposed to the date the defendant acted negligently. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146; 200 NW2d 70 (1972). Necessity dictated such a conclusion because an opposite interpretation could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury.
>
> Similarly, because statutes of limitation do not evidence a legislative intent to extinguish a cause of action before the plaintiff is aware of the possible cause of action, we have adopted the discovery rule in the appropriate instances. Last term, in *Moll*, *supra* at 13, we held that the discovery rule controls the date a pharmaceutical products liability action accrues. "If the three-year period of limitation began to run at the time of the defendant's breach, most, if not all, claims would be barred before the plaintiff had reason to know of the injury and the cause of the injury. Such an interpretation seeks 'to declare the bread stale before it is baked.' " (Citation omitted.) The same reasoning compelled our application of the discovery rule to

[23] *Chase v Sabin,* 445 Mich 190, 195-197; 516 NW2d 60 (1994).

products liability actions premised on asbestos related injuries, *Larson*, *supra*. In *Southgate School Dist v West Side Construction Co*, 399 Mich 72, 82; 247 NW2d 884 (1976), we held that the discovery rule governs the date a breach of warranty claim accrues, providing plaintiffs with an adequate opportunity to bring suit. See also *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974) (the discovery rule governs the accrual of negligent misrepresentation cases), and *Dyke v Richard*, 390 Mich 739; 213 NW2d 185 (1973) (the discovery rule governs the accrual of medical malpractice cases).

The majority opinion disputes the applicability of *Price,* yet this Court adopted the rationale from *Price* in both *Moll* and *Chase* on the basis that in each case, *where the plaintiff was not aware of the injury or its cause*, the discovery rule was appropriately invoked to permit the plaintiff to go forward on an otherwise time-barred claim. A statute of limitations that effectively deprives a plaintiff of the substantive right to bring an action is unreasonable.[24]

CONCLUSION

As a result of the majority's conclusion that MCL 600.5827 exclusively governs the time of accrual of

[24] *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.' *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 [1978], citing *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 [1971].").

While the *Taxpayers* Court upheld the one-year statute of limitations at issue, what is notable about that decision is the fact that the Court acknowledged that when a limitations period effectively deprives a plaintiff of judicial access, it will not be upheld. That is the very situation we face here if this Court deprives plaintiff of the right to apply the common-law discovery rule.

plaintiff's claims and that the discovery rule is therefore no longer available to a plaintiff who could not reasonably have discovered the elements of a cause of action, the majority has succeeded in depriving plaintiff, and those similarly situated, from having their day in court.

Because I disagree with the majority's conclusion that with the enactment of the Revised Judicature Act, the Legislature sought to abrogate the discovery rule, I would affirm the Court of Appeals decision applying the common-law discovery rule and tolling the period of limitations where plaintiff could not have reasonably discovered the elements of a wrongful death cause of action within the limitations period.

CAVANAGH, J., concurred with WEAVER, J.

KELLY, J. (*dissenting*). In this wrongful death action, the majority frames the issue as whether the common-law discovery rule tolls the statutory period of limitations or whether MCL 600.5827 alone governs when plaintiff's claims accrued. It concludes that MCL 600.5827 alone controls.

I strongly disagree with this decision for three reasons. First, MCL 600.5827 does not apply to this case. Second, even if it does apply, the majority commits a tragic mistake by abandoning Michigan's decades-old common-law discovery rule. Third, even accepting the majority's decision to abolish the discovery rule from now on, this particular plaintiff should be allowed to claim the benefits of the rule. Accordingly, I respectfully dissent.

FACTS

This case arises from the murder of Mrs. Margarette Eby. From 1981 to 1986, she rented the gatehouse on the Mott Estate (Applewood) where she was found dead on November 9, 1986.

During that five-year period, Mrs. Eby experienced occasional break-ins at the gatehouse and complained about them to Ruth Mott. Ruth Mott was Mrs. Eby's landlord. She also lived at Applewood. Mrs. Mott's affairs were handled by the MFO (Mott Family Office) Management Company, which acted on her behalf in virtually every aspect of her business and personal life, including Applewood. The responses that Mrs. Eby received from letters written to Mrs. Mott in 1986 regarding break-ins at the gatehouse was typified by the following:

> While Mrs. Mott regrets the occurrence of last Wednesday night, it seems apparent that no system would have prevented your loss when the keys to make the system effective were left in your unlocked car in front of the house. Further, when you leave the gate open frequently and fail to provide visual security through drags, curtains or blinds, unnecessary temptation to unwelcome intruders is evident.

On November 7, 1986, Mrs. Eby attended a dinner party with three friends. Two of them accompanied her home, arriving at Applewood sometime after 11:00 p.m. Mrs. Eby's companions observed her attempt to unlock the front door. When she was unable to do so, she asked her friends to walk her to the side door. She was able to open the side door and her companions saw her lock the door before they left.

Two days later, the gatehouse door was found open. What was discovered inside has been described by the Flint Police Department officers who arrived at the scene as perhaps the most gruesome murder scene they had ever encountered. Mrs. Eby's body was found in her upstairs bedroom. She had been attacked, raped, and knifed to death.

The physical evidence provided little of value. Besides a partial fingerprint on a bathroom faucet, the police uncovered virtually nothing to link the crime to a particular individual. As a result, it appears that the Flint Police Department pursued the only theory that seemed to suit the murder scene, that Mrs. Eby voluntarily allowed the killer into her home. However, because Mrs. Eby had not been killed by an acquaintance, this theory proved fruitless. It is unclear why the police never considered that a complete stranger might have been Mrs. Eby's killer.

What no one knew at the time was that the MFO had given the killer, Jeffrey Gorton, access to the common area beneath Mrs. Eby's home. Gorton was a lawn service employee of Buckler Automatic Lawn Sprinkler Company (Buckler). Two days before Mrs. Eby was raped and murdered, Gorton arrived at Applewood to perform sprinkler winterization. The MFO supervised the process and gave Gorton unsupervised access to the gatehouse basement. It is believed that, while in the house, Gorton unlocked an entry point that allowed him to reenter the building on the night of the murder.

Gorton was first identified as a suspect when, about 16 years later, Mrs. Eby's son recognized the similarities between his mother's murder and the murder of Northwest Airlines flight attendant Nancy Ludwig. Alerted to the similarities, the police eventually conducted deoxyribonucleic acid (DNA) testing on evidence collected from both victims. It showed that the same man killed both women. The fingerprint found on the faucet was also reexamined, and more sophisticated fingerprint techniques revealed that it belonged to Jeffrey Gorton, who was then living in Florida. A police

surveillance operation resulted in gathering a DNA sample from Gorton that matched the samples retrieved from both victims.

On February 8, 2002, Jeffrey Gorton was arrested and charged with murder. On January 6, 2003, he pleaded no contest to a charge of murdering Mrs. Eby more than 16 years earlier. He is currently serving a life sentence for the crime.

On August 2, 2002, Mrs. Eby's estate filed a wrongful death complaint against Mrs. Mott's estate (Mrs. Mott died in 1999), the MFO, MFO employees Todd Bakos and Victor Nyberg, Buckler, Jeffrey Gorton, and Gorton's parents, Shirley and Laurence Gorton, who owned and operated Buckler. In the complaint, plaintiff alleged that (1) Jeffrey Gorton killed plaintiff's decedent, (2) Mrs. Mott, the MFO, Bakos, and Nyberg gave Jeffrey Gorton unsupervised access to the decedent's home, (3) Mott and the MFO were responsible on a respondeat superior theory for the negligence of Bakos and Nyberg, (4) Mrs. Mott and the MFO had a duty but failed to provide adequate security for the residence despite the decedent's repeated requests for it and notice of prior criminal activity at the site, (5) Buckler and Shirley and Laurence Gorton breached their duty to conduct adequate employment investigations to determine if prospective employees presented any danger, (6) Shirley and Laurence Gorton failed to supervise Jeffrey when they knew or should have known he was a threat, (7) and Shirley and Laurence Gorton had respondeat superior liability because they put Jeffrey in a position to rape and kill the decedent.

Each defendant, except Jeffrey Gorton, filed a motion for summary disposition, arguing that the claims were barred by the statute of limitations. Genesee Circuit Judge Robert M. Ranson ruled on the motions on

October 28, 2003. With the exception of the claim against the MFO and Mrs. Mott's estate that were premised on a generalized duty to keep Mrs. Eby safe, the motions were denied. The trial court ruled that, because plaintiff did not know who killed Mrs. Eby before 2002, plaintiff did not know that someone had breached a duty. Hence, plaintiff lacked knowledge of the causation component of the claims until 2002.

The Court of Appeals granted defendants' applications for leave to appeal. In a unanimous, published opinion, the Court affirmed the part of the trial court's decision that denied defendants' motions for summary disposition. But it reversed the part that granted summary disposition to the MFO and Mrs. Mott's estate on the claim alleging failure to provide adequate security. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 299; 701 NW2d 756 (2005). The panel found that the common-law discovery rule tolled the statute of limitations with respect to all the claims. It ruled that plaintiff could not have been aware of a possible cause of action against defendants until Jeffrey Gorton was identified as the killer. *Id.* at 303-305.

This Court granted defendants' applications for leave to appeal, directing the parties "to include among the issues to be briefed whether the Court of Appeals application of a common-law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled." 475 Mich 906 (2006).

STANDARD OF REVIEW

In the absence of disputed facts, whether a cause of action is barred by a statute of limitations is a question

of law that we review de novo. *Boyle v Gen Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003). We also review de novo a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006).

MCL 600.5827 DOES NOT APPLY TO PLAINTIFF'S CLAIMS

This Court asked the parties to answer whether the common-law discovery rule conflicts with MCL 600.5827 and, if so, whether decisions of this Court recognizing the rule should be overruled. MCL 600.5827 is Michigan's accrual statute. It states:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

In deciding that the common-law discovery rule conflicts with § 5827, a majority of this Court errs by deciding that § 5827 applies to plaintiff's claims. Because I find that § 5827 is not implicated by this case, I conclude that this Court overreaches and unnecessarily decides that the common-law discovery rule is inapplicable when § 5827 applies.

All tort causes of action are governed by a statute of limitations. MCL 600.5805 is the statute that governs personal injury actions. The specific subsection that applies to plaintiff's claims is MCL 600.5805(10). It provides:

> The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Subsection 10 differs from the other subsections of § 5805. The other subsections provide a specific period

during which a case must be filed. But they do not provide an accrual period.[1] When these subsections apply, § 5827 determines when the limitations period begins to run. Unlike these subsections, subsection 10 provides not only a specific period for filing (within 3 years), it provides when the action accrues (the time of death or injury).

Given that § 5805(10) contains its own accrual provision, whenever § 5805(10) is applicable, one need not consider § 5827. Indeed, § 5827 states that its accrual provision is to be applied "[e]xcept as otherwise expressly provided." When § 5805(10) controls, the accrual of the limitations period is "otherwise expressly provided." Hence, because § 5827 does not apply, it is unnecessary for this Court to address whether the discovery rule is applicable when § 5827 applies, and this Court overreaches by answering that question.[2]

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[1] Examples of these other subsections illustrate this point: § 5805(2) specifies only that "[t]he period of limitations is 2 years for an action charging assault, battery, or false imprisonment." Similarly, § 5805(5) provides that "the period of limitations is 2 years for an action charging malicious prosecution."

[2] The majority recognizes that MCL 600.5805(10) provides both the specific statutory period of limitations and the date when that period begins to run. It follows that the majority also implicitly recognizes that MCL 600.5827 has no application to this case. Yet it proceeds to decide the case as if MCL 600.5827 applies. Of course, this makes it possible to use this case to decide whether the common-law discovery rule conflicts with MCL 600.5827. Reaching out to decide an issue that need not be decided is generally considered a form of judicial activism.

Apparently, the majority deems it appropriate to decide whether the discovery rule can save a claim when MCL 600.5827 otherwise applies because the result would be the same under MCL 600.5827 and MCL 600.5805(10). Regardless of whether this is true, it is well established that a court should only decide issues that are necessary to resolve the case at hand. Because MCL 600.5827 does not apply, the case should not be decided as if it did, regardless of whether the same result would apply under either MCL 600.5827 or MCL 600.5805(10). The more prudent

THIS COURT SHOULD NOT OVERRULE ITS OWN PRIOR DECISIONS RECOGNIZING THE COMMON-LAW DISCOVERY RULE

As demonstrated earlier in this opinion, MCL 600.5827 does not apply to plaintiff's claims. But, if it did, the issue would be whether the common-law discovery rule saves plaintiff's claims from the running of the statutory period of limitations or whether § 5827 alone determines when plaintiff's claims accrued. The majority has decided that plaintiff's claims cannot be saved by the common-law discovery rule and has overruled the prior decisions of this Court that recognized the rule. In so doing, it has wiped out caselaw with a foundation stretching back well over 100 years.[3] Yet each of the factors articulated in *Robinson v Detroit*[4] for deciding when it is appropriate to overrule the precedent of this Court counsel in favor of retaining those decisions.[5]

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course would be to decide this case under MCL 600.5805(10). The Court should wait for a case implicating MCL 600.5827 to decide whether the discovery rule can save a plaintiff's claims from the running of the period of limitations when § 5827 would otherwise apply.

[3] See the discussion of this Court's recognition of the fundamental right of access to the courts on pages 442-443 of this dissent.

[4] 462 Mich 439; 613 NW2d 307 (2002).

[5] The four justices who are in the majority in this case were also in the majority in *Robinson*. Looking back, one must question the majority's statement in *Robinson* that stare decisis is generally " 'the preferred course.' " *Id.* at 463 (citation omitted). This majority has never relied on the doctrine to uphold a prior decision of this Court.

The majority attempts to turn the argument around and questions "whether [my] ongoing criticism truly concerns [their] attitudes toward precedent or merely [my] attitude toward specific previous decisions of the Court." *Ante* at 394 n 16. In support of this allegation, the majority cites my opinion in *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007), and my opinion in *Haynes v Neshewat*, 477 Mich 29; 729 NW2d 488 (2007). My opinions in these cases are easily distinguishable from a decision like the majority's that eradicates a rule with a foundation stretching back well over 100 years. In *Smith*, the majority overruled *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984). I preferred to

THE *ROBINSON* FACTORS

The *Robinson* factors are used to determine when it is appropriate to overrule the precedent of this Court. The first is whether the earlier decision was wrongly

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retain *Robideau*. My position in *Smith* does not support a claim that I do not respect precedent. And in *Haynes*, I wrote the unanimous majority opinion. The opinion carefully considered the *Robinson* factors and concluded that no factor counseled against overruling our decision in *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992). *Kassab* interpreted the Civil Rights Act to allow discriminatory behavior. We decided that it would be inappropriate to retain an erroneous interpretation of an act meant to protect against discrimination solely because some individuals may rely on the decision to discriminate. Every member of the Court agreed.

Rather than look to *Smith* and *Haynes*, the majority would do better to look to my recent opinions in *Liss v Lewiston-Richards*, Inc, 478 Mich 203; 732 NW2d 514 (2007), *Rohde v Ann Arbor Pub Schools,* 479 Mich 336; 737 NW2d 158 (2007), and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007).

In *Liss* I stated, "[G]iven the language and purpose of the [Michigan Consumer Protection Act, MCL 445.901 *et seq*.], I believe that this Court interpreted the exemption correctly in [*Attorney General v*] *Diamond Mortgage* [414 Mich 603; 327 NW2d 805 (1982)] and incorrectly in *Smith* [*v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999)]. Even so, because I do not think the compelling interests necessary to overrule a prior decision of this Court are present, I do not advocate overruling *Smith*." *Liss*, 478 Mich at 226 (KELLY, J., dissenting). In *Rohde*, I stated, "I recognize with regret that this Court's decisions 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)] now constitute binding precedent." *Rohde*, 479 Mich at 362 n 5 (KELLY, J., dissenting). And in *Nestlé*, I wrote "Justice WEAVER reaches the opposite conclusion. In so doing, she rejects the standing test adopted by the majority . . . . While I agree with Justice WEAVER's conclusion and her analysis of these decisions, I also recognize that *Lee* and *Cleveland Cliffs* now constitute binding precedent of this Court." *Nestlé*, 479 Mich at 324-326 (KELLY, J. dissenting). Hence, even though I did not agree with the precedent in these cases, I said nothing about overruling it. The majority cannot point to a single case where, having expressed its disagreement with precedent, it has not overruled it or signaled its intent to overrule it.

decided. *Robinson*, 462 Mich at 464. Finding that an earlier decision was wrongly decided is not the end of the inquiry, however. *Id.* at 465. The Court must also weigh the effects of overruling the decision. *Id.* at 466. This consideration involves a review of whether the decision "defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id.* at 464.

The first question, therefore, is whether this Court's prior decisions recognizing the common-law discovery rule were wrongly decided. The majority claims that the language of MCL 600.5827 indicates that the Legislature did not intend to allow plaintiffs to claim the benefit of the common-law discovery rule when § 5827 applies. I disagree. The majority erroneously ignores deliberate actions of the Legislature that have recognized and ratified prior decisions of this Court applying the common-law discovery rule. These actions signify the Legislature's approval of the rule.

The common-law discovery rule has been a part of Michigan limitations law for many years and has been applied in a variety of contexts.[6] And after this Court recognized the discovery rule, the Michigan Legislature twice passed statutes that expressly limit the operation of the rule.

MCL 600.5838 and MCL 600.5838a describe how the limitations period operates in professional negligence cases. The Legislature added language to both of these

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[6] See, e.g., *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963) (rule applied in medical malpractice cases); *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974) (rule applied in negligent misrepresentation cases); *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986) (rule applied in products liability cases); *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993) (rule applied in pharmaceutical products liability cases).

statutes specifying that the period of limitations applies "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." This demonstrates that the Legislature recognizes the discovery rule and is aware of what it needs to do to prevent the rule from applying in particular cases. Therefore, MCL 600.5838 and MCL 600.5838a are important because they demonstrate that the Legislature has limited the discovery rule where it saw fit.

More importantly § 5838 and § 5838a represent legislative acceptance of the discovery rule. By specifically limiting the discovery rule in professional negligence cases, the Legislature has implicitly acknowledged the applicability of the rule in other types of cases. As a result, in professional negligence cases, a plaintiff may no longer claim the benefit of the common-law discovery rule. But the Legislature has not prohibited application of the rule outside the areas addressed in § 5838 and § 5838a.[7]

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[7] The majority claims that there is no "reason to equate the Legislature's 'approval of the rule'—by its codification of some of this Court's uses of the rule—with the Legislature's approval of every application of the rule." *Ante* at 395. Yet the well-established maxim of *expressio unius est exclusio alterius*, which this majority has often invoked in deciding cases, states that the Legislature's mention of one thing implies the exclusion of all others. E.g., *Miller v Chapman Contracting,* 477 Mich 102; 730 NW2d 462 (2007); *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003). By expressly providing that the discovery rule does not apply in professional negligence cases, the Legislature implied that it was to apply in all other contexts.

The majority implies that MCL 600.5838 and MCL 600.5838a support its position. In both of these statutes, the Legislature specifically limited the operation of the common-law discovery rule by providing that the period of limitations described in these sections applies "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." The only possible reason the Legislature would have included this language is to take professional negligence claims outside the scope of the common-

Given that the actions of the Legislature strongly suggest its approval of most of this Court's prior decisions recognizing the common-law discovery rule, the rule should not be discarded. However, even if one believes that earlier cases applying the rule were wrongly decided, it does not follow that these cases must be overruled. *Robinson*, 462 Mich at 465. Rather, stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 463 (citation omitted).

Before jettisoning precedent, this Court must determine "whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 757; 641 NW2d 567 (2002). In assessing these reliance interests, "the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments,

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law discovery rule. But, as a result of the majority's decision, this language is reduced to a redundancy. When a "plaintiff discovers or otherwise has knowledge of the claim" is completely irrelevant if there is no common-law discovery rule. The majority has decided that the Legislature wrote this language in order to remove professional negligence claims from the scope of a rule that the Legislature never recognized as existing.

The majority claims that MCL 600.5838(2) undercuts my position because that section provides a statutory discovery period. The Legislature's decision to provide a statutory discovery period does nothing to weaken my position. Through MCL 600.5838(1), the Legislature took professional negligence claims outside the scope of the common-law discovery rule. It was entirely consistent for the Legislature to provide a statutory discovery period. In so doing, it took some of the sting out of removing professional negligence claims from the scope of the common-law rule.

but practical real-world dislocations." *Robinson*, 462 Mich at 466. The common-law discovery rule has become so embedded in the fabric of Michigan limitations law that the state's jurisprudence will be seriously damaged by destroying it.

This Court has recognized a fundamental right of access to courts for a great many years. As it stated in 1877, "[e]very man is entitled to his day in court before his rights can be finally disposed of, and even the Legislature could not deprive him of the right." *Ehlers v Stoeckle*, 37 Mich 260, 262-263 (1877). The genesis of Michigan's common-law discovery rule goes back even further and can be traced to Justice COOLEY over 140 years ago:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy; all remedy whatsoever may be taken away. . . . It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought. [*Price v Hopkin*, 13 Mich 318, 324 (1865).]

The discovery rule, based on principles of fundamental fairness, " 'was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action.' " *Stephens v Dixon*, 449 Mich 531, 535; 536 NW2d 755 (1995) (citation omitted).

Elimination of the common-law discovery rule will have a drastic, adverse effect on plaintiffs' rights in Michigan. Cutting off plaintiffs' actions before plaintiffs

even know they have a cause of action is the very definition of a "practical real-world dislocation." And people will lose confidence in the courts when they learn that the courts deny them compensation for their injuries simply because it took too long to discover their causes of action.

Aside from the real-world dislocation created by abolishing the common-law discovery rule, there are other factors to consider in determining whether to overrule the prior decisions of this Court. They include whether the decisions defy practical workability and whether changes in the law or the facts no longer justify the questioned precedents. *Robinson*, 462 Mich at 464. It has not been shown that the discovery rule is unworkable. To the contrary, the near universal acceptance of this rule around the country is a strong indication of its workability.[8] And no facts or law have

[8] In addition to Michigan, 35 states plus the District of Columbia have embraced the discovery rule. See, e.g., Alaska: *Hanebuth v Bell Helicopter Int'l*, 694 P2d 143 (Alas, 1984). Arkansas: *State v Diamond Lakes Oil Co*, 347 Ark 618; 66 SW3d 613 (2002). California: *Norgart v Upjohn Co*, 21 Cal 4th 383; 981 P2d 79; 87 Cal Rptr 2d 453 (1999). Colorado: *Rauschenberger v Radetsky*, 745 P2d 640 (Colo, 1987). Connecticut: *Champagne v Raybestos-Manhattan, Inc*, 212 Conn 509; 562 A2d 1100 (1989). Delaware: *In re Asbestos Litigation West Trial Group*, 622 A2d 1090 (Del Super Ct, 1992). Florida: *Johnson v Szymanski*, 368 So 2d 370 (Fla, 1979). Georgia: *King v Seitzingers, Inc*, 160 Ga App 318; 287 SE2d 252 (1981). Hawaii: *Yoshizaki v Hilo Hosp*, 50 Hawaii 150; 433 P2d 220 (1967). Indiana: *Wehling v Citizens Nat'l Bank*, 586 NE2d 840 (Ind, 1992). Iowa: *Roycroft v Hammons*, 203 F Supp 2d 1053 (SD Iowa, 2002). Louisiana: *Harvey v Dixie Graphics, Inc*, 593 So 2d 351 (La, 1992). Maine: *Johnston v Dow & Coulombe, Inc*, 686 A2d 1064 (Me, 1996). Maryland: *Georgia-Pacific Corp v Benjamin*, 394 Md 59; 904 A2d 511 (2006). Minnesota: *Johnson v Winthrop Laboratories Div of Sterling Drug, Inc*, 291 Minn 145; 190 NW2d 77 (1971). Mississippi: *Sweeney v Preston*, 642 So 2d 332 (Miss, 1994). Nebraska: *Condon v AH Robins Co*, 217 Neb 60; 349 NW2d 622 (1984). Nevada: *Siragusa v Brown*, 114 Nev 1384; 971 P2d 801 (1998). New Hampshire: *Big League Entertainment, Inc v Brox Industries*, 149 NH 480; 821 A2d 1054 (2003). New Jersey: *Mancuso v Mancuso*, 209 NJ Super 51; 506 A2d 1253 (1986). New Mexico: *McNeil v*

changed to call into question those cases recognizing the discovery rule. Indeed, the Legislature's decision to abolish the rule solely in the context of professional negligence cases indicates its approval of this Court's decisions that have applied the rule in other contexts.

It is the majority's decision to abolish the common-law discovery rule that threatens to defy practical workability by leading to absurd results and constitutional violations. This Court has held that "[s]tatutes should be construed so as to prevent absurd results, injustice or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). See also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006). Without the discovery rule, plaintiffs will lose the right to pursue certain causes of action before they have or could have had knowledge of them. The plaintiff in this case falls within that group.

Moreover, given this Court's decision in *Henry v Dow Chemical Co*,[9] the very real possibility exists that there

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Rice Engineering & Operating Inc, 139 NM 48; 128 P3d 476 (NM App, 2005). North Dakota: *Wells v First American Bank West*, 598 NW2d 834 (ND, 1999). Ohio: *Collins v Sotka,* 81 Ohio St 3d 506, 692 NE2d 581 (1998). Oklahoma: *Resolution Trust Corp v Grant*, 901 P2d 807 (Okla, 1995). Rhode Island: *Wilkinson v Harrington*, 104 RI 224; 243 A2d 745 (1968). South Carolina: *Gattis v Chavez*, 413 F Supp 33 (D SC, 1976). Tennessee: *Hathaway v Middle Tennessee Anesthesiology, PC*, 724 SW2d 355 (Tenn App, 1986). Texas: *McDade v Texas Commerce Bank, Nat'l Ass'n*, 822 SW2d 713 (Tex App, 1991). Utah: *Klinger v Kightly*, 791 P2d 868 (Utah, 1990). Vermont: *Leo v Hillman*, 164 Vt 94; 665 A2d 572 (1995). Virginia: *Locke v Johns-Manville Corp*, 221 Va 951; 275 SE 2d 900 (1981). Washington: *White v Johns-Manville Corp*, 103 Wash 2d 344; 693 P2d 687 (1985). West Virginia: *Gaither v City Hosp*, 199 W Va 706; 487 SE2d 901 (1997). Wisconsin: *Hansen v A H Robins Co, Inc*, 113 Wis 2d 550; 335 NW2d 578 (1983). Wyoming: *Olson v A H Robins Co, Inc*, 696 P2d 1294 (Wyo, 1985). District of Columbia: *Burke v Washington Hosp Ctr*, 293 F Supp 1328 (D DC, 1968).

[9] 473 Mich 63; 701 NW2d 684 (2005).

will be cases in which a plaintiff will never be able to file suit. In *Henry*, this Court held that a plaintiff can pursue a tort claim only if he or she has suffered a present injury. *Henry*, 473 Mich at 74. Because there will be cases in which a person's injury will not be manifested for a prolonged time, there will be cases in which no cause of action can ever be pursued. These are cases in which a person's injury does not manifest itself until the established limitations period has expired. The absurdity of a system that deprives someone of his or her cause of action before it can be instituted is manifest. As Judge Jerome Frank stated:

> Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff. For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed—beyond the time fixed by the statute—commencing his suit which, but for the delay, he would have won. [*Dincher v Marlin Firearms Co*, 198 F2d 821, 823 (CA 2, 1952) (Frank, J., dissenting).]

Today's decision to abolish the discovery rule also raises constitutional questions regarding the extent of the Legislature's authority to enact statutes of limitations. The Legislature can, if it chooses, completely eliminate common-law causes of action.[10] But the enactment of a statute of limitations implicates other considerations. The purpose of a limitations statute is

[10] *Bean v McFarland*, 280 Mich 19, 21; 273 NW 332 (1937).

to "penalize plaintiffs who have not been industrious in pursing their claims,"[11] not to eliminate a valid cause of action when the plaintiff is without fault. *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995). For this reason, this Court has repeatedly held that a limitations period that does not provide a reasonable period in which to file suit is constitutionally suspect. See, e.g., *Krone v Krone*, 37 Mich 308 (1877); *Dyke v Richard*, 390 Mich 739; 213 NW2d 185 (1973).

In *Dyke*, this Court prohibited a statute of limitations from extinguishing a right to bring suit before reasonable discovery of the cause of action was possible. The Court explained:

> Since "[i]t is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . .", *Price, supra*, a statute which extinguishes the right to bring suit cannot be enforced as a law of limitation. As to a person who does not know, or in the exercise of reasonable diligence could not ascertain within the two year period that he has a cause of action, this statute has the effect of abolishing his right to bring suit.
>
> Such a statute, if sustainable at all could be enforced only as one intended to abolish a common law cause of action. But this statute does not purport to do this, is not asserted to do so, and we cannot ascribe any legislative intention to accomplish that end. We read it as a statute of limitation which applies in every case except where the plaintiff does not know of his cause of action. [*Dyke,* 390 Mich at 746-747.]

And this Court has also held that a limitations provision that does not afford a reasonable time to file suit cannot be constitutionally upheld, because it prevents access to the courts. *Forest v Parmalee*[12] held that "statutes of limitations are to be upheld by courts

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[11] *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

[12] 402 Mich 348, 359; 262 NW2d 653 (1978).

unless it can be demonstrated that they 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."

In certain circumstances, the common-law discovery rule is necessary to ensure that plaintiffs have had a reasonable time to gain knowledge of their causes of action. By abrogating this rule, the majority decision raises serious constitutional questions. These constitutional concerns counsel in favor of retaining the discovery rule.

This Court, like most, has long recognized the value of stare decisis. Its decisions applying the common-law discovery rule should be upheld under that doctrine because (1) the decisions recognizing the rule were correctly decided, (2) a change in the discovery rule would have a drastic effect on plaintiffs' rights, (3) the discovery rule is workable, and (4) abolishing the rule will lead to constitutional violations as well as absurd and unjust results.

MCL 600.5869 REQUIRES APPLICATION OF THE COMMON-LAW DISCOVERY RULE TO PLAINTIFF'S CLAIMS

A majority of this Court decides that the common-law discovery rule is inapplicable when MCL 600.5827 applies. I strongly disagree with this decision. But, even accepting it, the Court need not reverse the Court of Appeals decision in this case.

MCL 600.5869 provides:

> All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry.

The majority finds that "plaintiff's claims accrued at the time of Eby's death." *Ante* at 407. Mrs. Eby was

murdered in 1986. At that time, this Court recognized the common-law discovery rule. Thus, as of 1986, the law in this state was that the cause of action did not accrue until "all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equip Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1970). It follows that, although some future plaintiffs may not be able to claim the benefit of the common-law discovery rule, this plaintiff can. For this reason, the majority need not reverse the decision of the Court of Appeals.[13]

APPLICATION OF THE COMMON-LAW DISCOVERY RULE TO THE FACTS OF THE CASE

Under the common-law discovery rule, a claim accrues when, on the basis of objective facts, a plaintiff

[13] The majority claims that § 5869 cannot save plaintiff's claim because the statutory law has not changed since 1986. This fact is irrelevant. Section 5869 states that "[a]ll actions and rights shall be governed and determined according to the law under which the right accrued . . . ." This section is not confined to statutory provisions. Rather, § 5869 includes all law. It is well established that the law includes the common law. E.g., *People v Blume*, 443 Mich 476, 480 n 7; 505 NW2d 843 (1993); *Myers v Genesee Co Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965); Const 1963, art 3, § 7. Because it is clear that this Court recognized a common-law discovery rule in 1986, § 5869 requires that the discovery rule be applied to plaintiff's case. And because § 5869 *requires* application of the discovery rule, the majority's discussion about retroactive versus prospective application of decisions by this Court is misplaced.

The majority also claims that I present no authority or explanation for why the discovery rule is applicable. *Ante* at 400. In fact, I have made such a presentation. I will recap it here: MCL 600.5869 states that all actions shall be governed by the law as it existed when the claim accrued. The majority asserts that the claim in this case accrued in 1986. In 1986, this Court recognized the common-law discovery rule. Therefore, the discovery rule was the law of the land at the time the claim accrued. Accordingly, § 5869 requires us to apply the common-law discovery rule to plaintiff's claim. As I think is obvious, the authority I cite as requiring application of the discovery rule is § 5869.

can allege each element of the asserted claim. *Moll v Abbott Laboratories*, 444 Mich 1, 15-16; 506 NW2d 816 (1993). A claim for personal injury must allege that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, (3) the defendant's breach was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Chase v Sabin*, 445 Mich 190, 201 n 15; 516 NW2d 60 (1994).

Here, it was not until after Jeffrey Gorton was arrested that plaintiff found out that Mrs. Eby's killer was a stranger. Plaintiff could not have alleged a breach of duty against any of the defendants before knowing that a stranger, Gorton, had killed Mrs. Eby. Therefore, it was not until Gorton was identified as the killer that the period of limitations began to run. Because plaintiff filed suit within three years of the identification of Gorton as the killer, plaintiff's claims are timely.[14]

CONCLUSION

With today's decision, the majority throws Michigan into topsy-turvy land, where a person's legal claim dies before it is born. The majority finds that plaintiff's tort cause of action disappeared before plaintiff could discover the tortfeasor. As a result, the judgment of the Court of Appeals has been reversed.

I disagree with this decision on numerous grounds. MCL 600.5827 does not apply here. Moreover, it is a grievous error to overrule the precedent of this Court that recognizes the common-law discovery rule. The Legislature has signaled its approval of this precedent and indicated that the rule should apply in all cases except those alleging professional negligence. The judg-

[14] MCL 600.5805(10) provides the applicable period of limitations for plaintiff's claim. That period is three years.

ment of the Court of Appeals should be affirmed and the discovery rule should remain untouched. But, even if the discovery rule has no application in the future, this particular plaintiff should be allowed to claim the benefits of the rule. For these reasons, I dissent.

BATES v GILBERT

Docket Nos. 129564 to 129567, 129569 to 129572. Decided July 25, 2007.

Joeann Bates brought an action in the Wayne Circuit Court against Sidney Gilbert and D & R Optical Corporation, alleging malpractice by Gilbert, an optometrist and agent of D & R, in failing to perform glaucoma testing during an examination of the plaintiff. The plaintiff filed an affidavit of merit signed by an ophthalmologist. The court, Robert L. Ziolkowski, J., denied the defendants' motion for summary disposition, in which motion the defendants asserted that the plaintiff's expert was not qualified to sign the affidavit of merit, and entered a default judgment against the defendants with regard to liability, holding that the affidavit of meritorious defense signed by Gilbert and D & R's reliance on that affidavit were not valid. The Court of Appeals, MURPHY and BORRELLO, JJ. (DONOFRIO, P.J., dissenting), affirmed the judgment with regard to the sufficiency of the plaintiff's affidavit, reversed the judgment with regard to whether Gilbert's affidavit was valid, and reversed the judgment with regard to the default judgment entered against D & R. Unpublished opinion per curiam, issued August 16, 2005 (Docket Nos. 252022, 252047, 252792, and 252793). The Court of Appeals based its decision, in part, on its determination that the plaintiff's counsel had a reasonable belief that an ophthalmologist could sign an affidavit of merit against an optometrist defendant. The Supreme Court ordered and heard oral argument on whether to grant the defendants' applications for leave to appeal and the plaintiff's applications for leave to cross-appeal. 477 Mich 894 (2006).

In an opinion per curiam, signed by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The plaintiff's counsel could not have reasonably believed under MCL 600.2912d(1) that the plaintiff's proposed expert witness was qualified to sign the affidavit of merit under MCL 600.2169 offered against the defendants. The plaintiff's counsel could not have reasonably believed that ophthalmology is the same health profession as optometry. Optometry and ophthalmology are

two differently regulated and licensed health professions that address different health problems. The defendants were entitled to a judgment as a matter of law.

Moreover, the majority expressed no opinion with respect to the legal questions and the reasoning of *Sturgis Bank & Trust v Hillsdale Community Health Ctr*, 268 Mich App 484 (2005).

Reversed and remanded to the trial court for the entry of a dismissal without prejudice.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, agreed with the majority that the plaintiff could not have had a reasonable belief that an ophthalmologist could make a statement in an affidavit of merit regarding the standard of care applicable to the defendant optometrist, but dissented with regard to the majority's failure to explain how the plaintiff can successfully meet the requirements set forth in MCL 600.2912d(1). It must be concluded from the majority's opinion and from the denial of leave to appeal the Court of Appeals opinion in *Sturgis* entered on the same date that the Supreme Court would permit the plaintiff to submit an affidavit of merit, executed by an optometrist, in which the optometrist provides a statement regarding causation similar to the nurse affiant's statement regarding causation in *Sturgis*. The majority had the opportunity to correct the statement in *Sturgis* that "the issue whether plaintiff's affiants can substantively attest or address matters of causation is not a concern for the purpose of the 'first stage' of the litigation in which an affidavit of merit must be filed under [MCL 600.2912d(1)]; rather, the issue can be pursued in later proceedings such as at trial," and its failure to do so, or to address the issue in this case, must mean that whatever statement regarding causation the optometrist can provide would satisfy the requirements of MCL 600.2912(1)(d); otherwise, the plaintiff could be unfairly deprived of her claim despite her diligence.

ACTIONS — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — OPTOMETRISTS — OPHTHALMOLOGISTS.

In an action alleging medical malpractice by an optometrist, the plaintiff or the plaintiff's counsel cannot reasonably believe that an expert witness who is an opthalmologist is qualified to sign the affidavit of merit in support of the claim; optometry and ophthalmology are two distinct health professions that address different health problems, and an ophthalmologist is not qualified to sign an affidavit of merit in support of a malpractice action against an optometrist. (MCL 600.2169, 600.2912d [2]).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Worsham, Victor & Ahmad, P.C.* (by *Richard B. Worsham*), for Joeann Bates.

Plunkett & Cooney, P.C. (by *Robert G. Kamenec* and *Kristen M. Tolan*), for Sidney Gilbert.

Sullivan, Ward, Bone, Tyler & Asher, P.C. (by *Ronald S. Lederman*), for D & R Optical Corporation.

PER CURIAM. At issue is whether, under MCL 600.2912d(1), plaintiff's counsel could have reasonably believed that plaintiff's proposed expert witness, an ophthalmologist, was qualified to sign an affidavit of merit under MCL 600.2169 offered against defendant, an optometrist. Because we conclude that plaintiff's counsel could not have reasonably believed that an ophthalmologist is qualified to testify against an optometrist, we reverse the judgment of the Court of Appeals and remand this case to the trial court for the entry of a dismissal without prejudice.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff brought this medical malpractice action against defendants, alleging that defendant Sidney Gilbert, an optometrist and agent of defendant D & R Optical Corporation, failed to perform glaucoma testing, as he should have, when he examined her. Plaintiff filed an affidavit of merit signed by an ophthalmologist. Defendant Gilbert filed an affidavit of meritorious defense signed by himself, claiming that he did perform glaucoma screening on plaintiff when he examined her, and defendant D & R filed a document stating that it was also relying on Gilbert's affidavit.

The trial court concluded that plaintiff could have reasonably believed that an ophthalmologist could sign

the affidavit of merit and denied defendants' motion for summary disposition. While the trial court recognized that an ophthalmologist "is not an optometrist," it reasoned that had an optometrist signed the affidavit of merit, the optometrist would not have been able to attest to causation and that plaintiff's counsel therefore had a reasonable belief that the ophthalmologist was qualified to sign the affidavit of merit. The trial court also entered a default judgment against both defendants with regard to liability, ruling that Gilbert could not file a self-executed affidavit and that D & R could not file a valid affidavit by merely relying on an affidavit filed by another defendant.

On appeal, the Court of Appeals affirmed the judgment with respect to the sufficiency of plaintiff's affidavit, reversed the judgment with respect to the ruling that Gilbert could not submit a self-executed affidavit, and reversed the default judgment with regard to D & R because, although D & R had not filed an affidavit, the trial court erred in assuming that a default was required. *Bates v Gilbert*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 2005 (Docket Nos. 252022, 252047, 252792, and 252793). The Court of Appeals majority concluded that plaintiff's counsel was faced with a "dearth of case law addressing the applicability of MCL 600.2169(1) to non-physician defendants in general and to optometrists specifically" and that plaintiff's counsel had a reasonable belief that an ophthalmologist could sign the affidavit of merit. *Id.* at 6. Presiding Judge DONOFRIO, in dissent, asserted that plaintiff's counsel could not have reasonably believed that plaintiff's affidavit was signed by a qualified expert because "[o]ptometry and ophthalmology are two entirely separate health professions," and thus there was no question that plaintiff's expert had not devoted a majority of his professional time to the

practice of the same health profession as that of defendant Gilbert. *Id*. at 2 (DONOFRIO, P.J., dissenting).

Defendants sought leave to appeal, and plaintiff sought leave to cross-appeal. This Court directed the clerk to schedule oral argument on whether to grant the applications or take other peremptory action.[1] 477 Mich 894 (2006).

II. STANDARD OF REVIEW

This case involves the interpretation of MCL 600.2912d and MCL 600.2169. Statutory interpretation is an issue of law that is reviewed de novo. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The grant or denial of a motion for summary disposition is also reviewed de novo. *McClements v Ford Motor Co*, 473 Mich 373; 702 NW2d 166 (2005).

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[1] We directed the parties to address

> whether the requirements of MCL 600.2912d(1)(a)-(d) are satisfied if: (1) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under MCL 600.2169 to address the standard of care, but who is not also qualified to address causation; or (2) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under § 2169 to address causation, but who is not also qualified to address the standard of care. The parties shall also address whether § 2912d(1) permits or requires a plaintiff to file multiple affidavits, signed by different health professionals, when a single health professional is not qualified under § 2169 to testify about both the standard of care and causation.

Because we conclude that plaintiff's counsel could not have reasonably believed that an ophthalmologist is qualified to prepare an affidavit of merit regarding the standard of practice or care applicable to an optometrist, and thus failed to meet the first and most elementary statutory requirement, we need not address the remaining questions.

III. ANALYSIS

A medical malpractice claim can be brought against any "licensed health care professional," defined to include "an individual licensed or registered under article 15 of the public health code . . . ." MCL 600.5838a(1)(b); MCL 600.2912(1);[2] *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19; 651 NW2d 356 (2002). It is well established that a medical malpractice action may be commenced not only against physicians, but also against nonphysicians who come within the definition of "licensed health care professional," such as nurses, medical technologists, physical therapists, and optometrists. *Cox*, *supra* at 19-20; *Adkins v Annapolis Hosp*, 420 Mich 87, 94-95; 360 NW2d 150 (1984); *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 490 n 3; 711 NW2d 795 (2006); *Tobin v Providence Hosp*, 244 Mich App 626, 670-671; 624 NW2d 548 (2001).

MCL 600.2912d(1) provides, in pertinent part:

> [T]he 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 signed by *a* health professional who the plaintiff's attorney *reasonably believes meets the requirements for an expert witness under section 2169*. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

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[2] MCL 600.2912(1) provides:

> A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis added.]

MCL 600.2169(1) provides:

In an action alleging medical malpractice, a person *shall not give expert testimony on the appropriate standard of practice or care unless* the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the

> party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed. [Emphasis added.]

Thus, under § 2912d(1) and § 2169(1)(b)(*i*) and (*ii*), the plaintiff's counsel must reasonably believe that the expert selected by the plaintiff to address the applicable standard of practice or care in the affidavit of merit devoted a majority of his or her professional time during the year before the alleged malpractice to practicing or teaching the same health profession as the defendant health professional.

Although we recognize that, at the affidavit-of-merit stage, the plaintiff's counsel may have limited information available to ensure a proper "matching" between the plaintiff's expert and the defendant, and must therefore be allowed considerable leeway in identifying an expert affiant, *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004), such leeway cannot be unbounded. The plaintiff's counsel must invariably have a *reasonable belief* that the expert satisfies the requirements of MCL 600.2169. *Grossman, supra* at 599.

In determining the reasonableness of a counsel's belief that the expert signing the affidavit of merit satisfies the requirements of MCL 600.2169, we examine the information available to the plaintiff's counsel when he or she was preparing the affidavit of merit. *Grossman, supra* at 599-600. In the instant case, it is undisputed that plaintiff's counsel was aware that plaintiff's expert, an ophthalmologist, had not practiced or taught optometry in the year preceding the alleged malpractice. Thus, the issue becomes whether plaintiff's counsel reasonably believed that ophthalmology is the "same health profession" as optometry. "Health profession" is defined in article 15 of the Public Health Code as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." MCL 333.16105(2). Optometry and ophthalmology are two differently regulated and licensed health professions that address different problems. Optometry is defined and regulated by statute. MCL 333.17401 to 333.17437. MCL 333.17401(1)(b) provides:

> "Practice of optometry" means 1 or more of the following, but does not include the performance of invasive procedures:
>
> (*i*) The examination of the human eye to ascertain the presence of defects or abnormal conditions that may be corrected, remedied, or relieved, or the effects of which may be corrected, remedied, or relieved by the use of lenses, prisms, or other mechanical devices.
>
> (*ii*) The employment of objective or subjective physical means to determine the accommodative or refractive conditions or the range of powers of vision or muscular equilibrium of the human eye.
>
> (*iii*) The adaptation or the adjustment of the lenses or prisms or the use of therapeutic pharmaceutical agents to correct, remedy, or relieve a defect or abnormal condition

> or to correct, remedy, or relieve the effect of a defect or abnormal condition of the human eye.
>
> (*iv*) The examination of the human eye for contact lenses and the fitting or insertion of contact lenses to the human eye.
>
> (*v*) The employment of objective or subjective means, including diagnostic pharmaceutical agents by an optometrist who meets the requirements of section 17412, for the examination of the human eye for the purpose of ascertaining a departure from the normal, measuring of powers of vision, and adapting lenses for the aid of those powers.

"Ophthalmology," on the other hand, although not specifically defined by statute, has been defined by *Random House Webster's College Dictionary* (1997) as "the branch of medicine dealing with the anatomy, functions, and diseases of the eye."[3] The practice of medicine is defined and regulated by MCL 333.17001 to 333.17084. "Practice of medicine" means "the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts." MCL 333.17001(1)(e). MCL 333.17001(1)(d) defines "physician" as "an individual licensed under this article to engage in the practice of medicine."

Thus, while ophthalmologists are physicians who treat diseases of the eye, optometrists are not physicians and do not generally treat eye diseases or perform invasive procedures, but merely examine the

[3] "Ophthalmologist" is defined as "a physician specializing in ophthalmology." *Random House Webster's College Dictionary* (1997).

human eye to ascertain defects or abnormal conditions that can be corrected or relieved by the use of lenses.[4] We therefore conclude that ophthalmology is not the "same health profession" as optometry and that plaintiff's counsel could not have reasonably believed that optometry and ophthalmology are identical health professions.

In view of the clear language of the relevant statutes, the caselaw existent at the time plaintiff's attorney filed the affidavit of merit,[5] and the evident distinction between ophthalmology and optometry, we conclude that plaintiff's counsel could not have reasonably believed that an ophthalmologist was qualified under MCL 600.2169 to address the standard of practice or care applicable to an optometrist. Thus, plaintiff's affidavit of merit did not comply with the requirements of MCL 600.2912d(1).

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[4] In *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483, 486; 75 S Ct 461; 99 L Ed 563 (1955), the United States Supreme Court held that "[a]n ophthalmologist is a duly licensed physician who specializes in the care of the eyes [while] [a]n optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses."

[5] See, for example, *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 220; 642 NW2d 346 (2002) (holding that an expert must match the board certification of the defendant regarding the area of practice at issue); *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2001) (holding that the plaintiffs' belief that their expert, an endodontist, was qualified under MCL 600.2169 to offer expert testimony on the standard of care applicable to the defendant, a general practice dentist, was unreasonable because the expert's qualifications did not match the qualifications of the defendant); *Greathouse v Rhodes*, 242 Mich App 221, 231; 618 NW2d 106 (2000), rev'd in part on other grounds 465 Mich 885 (2001) (holding that "among other things, [MCL 600.2169] requires that the expert's practice, teaching, and certification qualifications be precisely 'matched' with those of the defendant. Absent a proper 'match' the expert may not be presented in support of a litigant's case or defense.").

IV. CONCLUSION

We hold that under the clear language of MCL 600.2912d(1) and MCL 600.2169(1)(b)(*i*) and (*ii*), plaintiff's counsel must have reasonably believed that the expert selected by plaintiff to address the applicable standard of practice or care in the affidavit of merit devoted a majority of his or her professional time during the year before the alleged malpractice to practicing or teaching the same health profession as defendant Gilbert. Given the law at the time plaintiff filed her affidavit of merit, together with the fact that optometry is a health profession distinct from ophthalmology, plaintiff's counsel could not have reasonably believed that plaintiff's expert, an ophthalmologist, was qualified under MCL 600.2169 to address the standard of practice or care applicable to defendant, an optometrist. Because plaintiff's affidavit of merit did not comply with the requirements of MCL 600.2912d(1), defendants were entitled to a judgment as a matter of law.[6]

[6] We are perplexed by the dissent's criticism that this opinion is "deficient in that it leaves plaintiff unaware with respect to how to successfully continue to prosecute this medical malpractice action." *Post* at 463. All that is necessary on plaintiff's part, as with a party in any other case, is to abide by controlling statutes and controlling caselaw from this Court and the Court of Appeals. We are further perplexed by the dissent's suggestion that "by ignoring the question in the present case and denying leave in *Sturgis* [*Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484; 708 NW2d 453 (2005)]," this Court implicitly accepts the reasoning in *Sturgis*. *Post* at 465-466. "The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed." *Malooly v York Heating & Ventilating Corp*, 270 Mich 240, 247; 258 NW 622 (1935). Thus, the only implication of this Court's decision to deny leave to appeal in *Sturgis* is that a majority of this Court, including the two dissenting justices in this case, were "not persuaded that the questions presented should [then have been] reviewed by this Court." *Sturgis Bank & Trust Co v Hillsdale Community Health*

Accordingly, we reverse the judgment of Court of Appeals and remand this case to the trial court for the entry of a dismissal without prejudice.[7]

TAYLOR, C.J., and WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

CAVANAGH, J. (*concurring in part and dissenting in part*). While I agree with the majority that plaintiff could not have had a reasonable belief that an ophthalmologist could make a statement in an affidavit of merit regarding the standard of care applicable to the defendant optometrist, I write to comment on the absurdity of not explaining to plaintiff how she *can* meet the requirements set forth in MCL 600.2912d(1). Thus, I dissent on the ground that the majority opinion is deficient in that it leaves plaintiff unaware with respect to how to successfully continue to prosecute this medical malpractice action.

When a plaintiff claims medical malpractice, the plaintiff must file an affidavit of merit that is signed by a health professional who the plaintiff believes meets the requirements set forth in MCL 600.2169(1) and that meets the following additional criteria:

> The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney

Ctr, 479 Mich 854; 735 NW2d 206 (2007). That is, the Court "expresse[d] no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals." *Frishett v State Farm Mut Automobile Ins Co*, 378 Mich 733, 734 (1966).

[7] In light of our holding in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), that a medical malpractice complaint that is filed with an affidavit of merit that is later determined to be defective nonetheless tolls the period of limitations, the proper remedy is dismissal without prejudice. Plaintiff may use the remainder of the statutory limitations period to file a new complaint, accompanied by an affidavit of merit that conforms to the requirements of MCL 600.2912d(1).

> concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

For the reasons the majority states, the proffered ophthalmologist cannot make a statement in an affidavit of merit with respect to the standard of practice or care applicable to the defendant optometrist. Presumably, plaintiff will need to procure an optometrist for this purpose. But the question remains whether an optometrist would be qualified to make a statement regarding proximate cause in an affidavit of merit. If not, the affidavit would fail to satisfy another subsection of the statute, MCL 600.2912d(1)(d).

When this Court entered an order granting oral argument on the applications for leave to appeal, we specifically directed the parties to address the following issues:

> [W]hether the requirements of MCL 600.2912d(1)(a)-(d) are satisfied if: (1) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under MCL 600.2169 to address the standard of care, but who is not also qualified to address causation; or (2) a plaintiff files a single affidavit of merit that is signed by a health professional who plaintiff's counsel reasonably believes is qualified under § 2169 to address causation, but who is not also

> qualified to address the standard of care. The parties shall also address whether § 2912d(1) permits or requires a plaintiff to file multiple affidavits, signed by different health professionals, when a single health professional is not qualified under § 2169 to testify about both the standard of care and causation. [477 Mich 894, 894-895 (2007).]

Through these questions, this Court signaled its awareness of the conundrum that arises in situations such as that presented by this case and that presented in *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484; 708 NW2d 453 (2005), oral argument on application for leave to appeal granted 477 Mich 874 (2006). In *Sturgis*, both the alleged negligent employees of the defendant and the affiant were nurses, and it was argued that a nurse cannot testify regarding causation. Today, this Court denies the application for leave to appeal in *Sturgis*, 479 Mich 854 (2007), while at the same time releasing an incomplete decision in this case that fails to address the question that this Court asked and that the parties devoted their time and energy to answering.

I have no choice but to conclude that by ignoring the question in the present case and denying leave to appeal in *Sturgis*, this Court will permit plaintiff to submit an affidavit of merit, executed by an optometrist, in which the optometrist provides a statement regarding causation similar to the nurse's statement regarding causation in *Sturgis*. Examining the sufficiency of the nurse's statement regarding causation, the Court of Appeals stated, "[T]he issue whether plaintiff's affiants can substantively attest or address matters of causation is not a concern for the purposes of the 'first stage' of the litigation in which an affidavit of merit must be filed under § 2912d(1); rather, the issue can be pursued in later proceedings such as at trial." *Sturgis*, *supra* at

494-495. If this Court does not agree with that reasoning, it had the opportunity to correct it in *Sturgis*, and, more importantly, it had the opportunity to address it in this case, in which the issue was briefed and argued and an opinion issued.

It is normally the case, as the majority points out, that denying an application for leave to appeal is not an affirmation of the reasoning of the lower court. See *ante* at 462-463 n 6. But under these unique circumstances, in which the question was squarely presented in two cases and this Court denied leave in one case while declining to answer the question in its opinion in the other case, it must be that whatever statement regarding causation the optometrist can provide would satisfy the requirements of MCL 600.2912d(1)(d). Anything else would be grossly unfair, considering that the statutory period of limitations will again begin to run, and if plaintiff files another affidavit that complies with *Sturgis* but is later determined to be insufficient by this Court, she could be deprived of her claim altogether despite her diligence in seeking the assistance of the appellate courts with respect to how to proceed.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v MICHAEL KELLER
PEOPLE v MELINDA KELLER

Docket Nos. 131223, 131224. Decided July 25, 2007.

Michael and Melinda Keller were charged in the Genesee Circuit Court with maintaining a drug house and possession of marijuana after a search of their home revealed firearms, marijuana-smoking paraphernalia, and nearly six ounces of marijuana. The Kellers filed motions in limine to suppress this evidence, which was obtained pursuant to a search warrant that was based on an anonymous tip from a crime-stoppers organization and on the results of a subsequent search of the defendants' trash, which revealed a partially burnt marijuana cigarette, a green leafy substance on the side of a pizza box, and correspondence tying the defendants to the residence. The court, Geoffrey L. Neithercut, J., ruled that although the affidavit supporting the warrant did not conform to the requirements of MCL 780.653, suppression of the evidence was not an available remedy for that violation. The prosecution filed interlocutory appeals to determine the proper remedy for a violation of MCL 780.653. The Court of Appeals consolidated the appeals and, in a split decision, DAVIS, P.J., and CAVANAGH, J. (TALBOT, J., dissenting), held that the evidence should be suppressed under the exclusionary rule because the search warrant and the underlying affidavit could not support a finding of probable cause and that the good-faith exception to the exclusionary rule did not apply. 270 Mich App 446 (2006). The Supreme Court ordered and heard oral argument on whether to grant the prosecution's applications for leave to appeal or take other peremptory action. 477 Mich 968 (2006).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The affidavit in support of the search warrant established probable cause and did not violate MCL 780.653.

1. The Court of Appeals erred by reviewing de novo the magistrate's probable cause determination, which is properly entitled to great deference by reviewing courts.

2. It was unnecessary to delve into the veracity of the tip's source because direct evidence of illegal activity was discovered in the defendants' trash, which established probable cause to search the home for additional contraband. Because the magistrate properly found probable cause for the search, the evidence is not subject to the exclusionary rule.

3. The affidavit in question was based on the evidence gleaned from the defendants' trash, not on the anonymous tip; therefore, the statutory requirement that an anonymous tip bear indicia of reliability does not come into play.

Reversed and remanded to the trial court for further proceedings.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would hold that the search warrant in this case was unconstitutionally invalid and would affirm the judgment of the Court of Appeals. The affidavit submitted to the magistrate contained no indication that the anonymous source spoke with personal knowledge of the defendants' alleged marijuana manufacturing and distribution scheme and failed to establish the source's credibility and the accuracy of the information, as required by MCL 780.653. The information in the affidavit did not provide a substantial basis for the magistrate to conclude that a search of the defendants' residence would uncover evidence of drug trafficking. The severance doctrine, under which invalid portions of a warrant may be severed from valid portions, should not be applied to the warrant in this case. The warrant in this case was disproportionately invalid, and the purportedly valid portion cannot realistically be distinguished from the invalid portions. Finally, the good-faith exception to the warrant requirement does not apply because (1) the police officers did not act in objectively reasonable reliance on the warrant, given that the affidavit did not contain the information required by MCL 780.653 and thus did not comply with that statute, and (2) the affiant misled the magistrate by implying that the affiant had spoken directly to the anonymous source and omitting key facts bearing on the source's credibility. The evidence seized during the search should be suppressed.

SEARCHES AND SEIZURES — WARRANTS — PROBABLE CAUSE — STANDARD OF REVIEW.

Questions of law relevant to a motion to suppress evidence are reviewed de novo; however, that standard is not appropriate for review of a magistrate's probable cause determination, which is entitled to great deference by reviewing courts.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Donald A. Kuebler*, Chief of Research, Training, and Appeals, for the people.

Neil C. Szabo and *James Zimmer* for the defendants.

Amicus Curiae:

David Gorcyca, president of the Prosecuting Attorneys Association of Michigan, *Kym L. Worthy*, Wayne County Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the Prosecuting Attorneys Association of Michigan.

YOUNG, J. We ordered oral argument on the prosecution's applications for leave to appeal to consider the sufficiency of an affidavit in support of a search warrant under the Fourth Amendment and MCL 780.653, as well as the proper remedy for violations of MCL 780.653. Because we find no constitutional or statutory violation, these consolidated appeals do not present the opportunity to discuss remedies for such violations. Therefore, we reverse the judgments of the lower courts, which held that violations of the statute and the constitution had occurred, and remand the cases to the Genesee Circuit Court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Crime Stoppers[1] received an anonymous tip that defendants were operating a marijuana growing and

[1] The prosecutor describes Crime Stoppers as "a public service announcement on television asking for information about particular crimes. The individuals giving information are sometimes monetarily rewarded." See MCL 600.2157b(4)(b) (" 'Crime stoppers organization' means a private, nonprofit organization that distributes rewards to persons who report to the

distribution operation out of their home in Flint. Crime Stoppers passed the tip on to the Flint police, who conducted surveillance at defendants' home on three separate days, but did not observe any evidence of a marijuana growing and distribution operation. The police then conducted a "trash pull" at defendants' home and discovered a partially burnt marijuana cigarette, a green leafy substance on the side of a pizza box, and correspondence tying defendants to the residence. Based on this information, the police applied for a search warrant for defendants' home.

The affidavit in support of the warrant application is particularly important to this appeal. Paragraph 7 stated:

> That during the past several weeks, your affiant received an anonymous tip stating that large quantities of marijuana was being sold and manufactured out of 3828 Maryland, City of Flint, Genesee County Michigan. The tipster also indicated that there is a hidden room used for manufacturing Marijuana inside said residence.

In paragraph 8, the affidavit stated:

> That on November 30, 2004, your affiant removed two (2) trash bags, white in color with red ties that were located on the south side of Maryland, east of the driveway, near the curb of 3828 Maryland. After removing the trash bags your affiant transported the bags directly to the office of the City of Flint Police Department. Your affiant and fellow officer Marcus Mahan examined the contents of the trash bags. Found inside the trash bags were one (1) suspected marijuana roach, and a green leafy substance on the side of a pizza box, and several pieces of correspondence addressed to Michael/Melinda Keller of 3828 Maryland.

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organization information concerning criminal activity and that forwards the information to the appropriate law enforcement agency.").

Paragraph 9 stated that "[y]our affiant field test[ed] . . . the suspected marijuana which tested positive for the presence of marijuana." Based on the affidavit, the magistrate issued a search warrant.

When the police executed the search warrant, they uncovered nearly six ounces of marijuana, as well as firearms and marijuana smoking paraphernalia. Both defendants were charged with maintaining a drug house[2] and possession of marijuana.[3] The district court bound both defendants over to the circuit court for trial on those charges.

In the circuit court, defendants filed motions in limine to suppress any evidence obtained during the execution of the search warrant, arguing that "the reliability and credibility standards set forth in MCLA 780.653 are totally absent from this case relative to the time of the issuance of the search warrant." Specifically, defendants argued that the police misled the district judge issuing the warrant, and that there was no support for the anonymous tip. The circuit court found a violation of MCL 780.653, but the court held that it could not order suppression based on that violation, citing *People v Hawkins*.[4] To remedy the violation, the court held that defendants could "argue to the jury that the police department intentionally violated the law of the State of Michigan; that the police department deliberately conducted or mislead [sic] a magistrate when seeking the search warrant."[5]

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[2] MCL 333.7405(1)(d) and MCL 333.7406.

[3] Mr. Keller was charged with possession with intent to deliver, MCL 333.7401, while Mrs. Keller was charged with simple possession, MCL 333.7403.

[4] 468 Mich 488; 668 NW2d 602 (2003).

[5] The circuit court also heard motions regarding the *corpus delicti* rule, whether to quash the bindovers on the charges of maintaining a drug

The prosecutor filed interlocutory appeals, raising only the issue of the proper remedy for a violation of MCL 780.653. The Court of Appeals granted the prosecutor's applications for leave to appeal, but instead of addressing the issue raised by the prosecutor, the Court held that the search warrant and the underlying affidavit could not support a finding of probable cause. "Therefore, any evidence obtained pursuant to the warrant was illegally obtained and should be suppressed by the operation of the exclusionary rule unless an exception applies."[6] The Court then opined that "the good-faith exception is inapplicable in this case."[7] The Court cited two facts to support that conclusion. First, "[t]he affiant indicated that she had directly received the anonymous tip and then conveyed it to police."[8] Second, "the affidavit indicates that only a roach and some possible marijuana residue were found during a trash pull—hardly evidence that would lead a reasonable person to believe that drug trafficking was occurring at the house."[9] Additionally, the Court held that "[b]ecause the affidavit was insufficient, we would also conclude that the magistrate wholly abandoned his judicial role when he issued the warrant."[10]

Judge TALBOT dissented. He argued that the suppression ruling was not properly before the Court because defendants never appealed that ruling. With respect to the issue properly before the Court, Judge TALBOT disagreed with the circuit court ruling that defendants

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house, and whether separate trials were warranted. However, none of those motions is presently before this Court.

[6] *People v Keller*, 270 Mich App 446, 450; 716 NW2d 311 (2006).

[7] *Id*. at 451.

[8] *Id*.

[9] *Id*.

[10] *Id*.

could argue to the jury that the police misled the magistrate and violated MCL 780.653. He concluded that "if the Legislature intended to allow a defendant to argue to the jury that the police illegally obtained a search warrant as a remedy for a violation of MCL 780.653, it would have specifically listed such a remedy and would not have provided the specific remedies in MCL 780.657 and MCL 780.658."[11]

This Court scheduled oral argument on the prosecutor's application for leave to appeal.[12] The order directed the parties to address four issues:

> (1) whether the presence in the defendants' trash of a small amount of marijuana constituted probable cause justifying the search; (2) assuming there was a Fourth Amendment violation, whether the police acted in objectively reasonable good-faith reliance on the warrant; (3) whether the search violated MCL 780.653; and (4) assuming that the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that the police misled the magistrate and violated Michigan law in their efforts to obtain a search warrant.[13]

STANDARD OF REVIEW

"Questions of law relevant to a motion to suppress evidence are reviewed de novo."[14] Similarly, constitu-

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[11] *Id*. at 456 (TALBOT, J., dissenting). MCL 780.657 provides for a fine of not more than $1,000 or up to one year of imprisonment for "[a]ny person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity . . . ." MCL 780.658 provides for the same penalties for "[a]ny person who maliciously and without probable cause procures a search warrant to be issued and executed . . . ."

[12] 477 Mich 968 (2006).

[13] *Id.*

[14] *Hawkins*, *supra* at 496-497, citing *People v Hamilton*, 465 Mich 526, 529; 638 NW2d 92 (2002); see also *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

tional and statutory construction involves questions of law that are also reviewed de novo.[15] However, " 'after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." ' "[16]

ANALYSIS

There are two separate but related issues presented by this appeal. The first concerns the constitutional validity of the affidavit in support of the search warrant. If the affidavit was constitutionally infirm, then the Court of Appeals correctly held that, absent an exception, the evidence seized pursuant to the warrant must be excluded.[17] However, if the affidavit passes constitutional muster, then the Court must determine whether the affidavit conformed to MCL 780.653.[18]

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[15] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

[16] *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983), quoting *Spinelli v United States*, 393 US 410, 419; 89 S Ct 584; 21 L Ed 2d 637 (1969).

[17] *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004). However, the Court was incorrect to conclude that "the good-faith exception is inapplicable in this case" and that "[b]ecause the affidavit was insufficient, . . . the magistrate wholly abandoned his judicial role when he issued the warrant." *Keller*, *supra* at 451. The affiant did not "mislead" the district judge, *id*., and the affidavit was not "lacking in indicia of probable cause . . . ." *Goldston*, *supra* at 531 (quotation marks omitted). Moreover, an appellate court's determination that an affidavit was insufficient does not, in and of itself, provide adequate support for the conclusion that a magistrate "wholly abandoned his judicial role." Abandoning the judicial role requires more than reaching a different legal conclusion from that of an appellate court. See, e.g., *Lo-Ji Sales, Inc v New York*, 442 US 319, 328; 99 S Ct 2319; 60 L Ed 2d 920 (1979).

[18] MCL 780.653 provides:

THE CONSTITUTIONALITY OF THE SEARCH WARRANT

The Fourth Amendment requires a warrant to "particularly describ[e] the place to be searched, and the person or things to be seized." The probable cause requirement is relevant to whether "contraband or evidence of a crime will be found in a particular place."[19] With respect to appellate review of probable cause for the issuance of a warrant,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.[20]

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

[19] *Gates*, *supra* at 238; see also *United States v Grubbs*, 547 US 90, 95; 126 S Ct 1494; 164 L Ed 2d 195 (2006) ("In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed.").

[20] *Gates*, *supra* at 238-239, quoting *Jones v United States*, 362 US 257, 271; 80 S Ct 725; 4 L Ed 2d 697 (1960) (changes in *Gates*). This Court

In this case, the Court of Appeals cited two statements in the affidavit that the magistrate may have relied on to find probable cause: (1) the reference to the anonymous tip and (2) the reference to the roach and marijuana residue from the trash pull. The Court dismissed the tip as unreliable because the police could not prove that the source spoke with personal knowledge or was reliable. Additionally, the Court found that the tip "is at significant odds" with both the evidence from the trash pull and the evidence discovered during the execution of the warrant.[21] The Court also dismissed the evidence of marijuana discussed in the affidavit as "only a roach and some possible marijuana residue . . . [,] hardly evidence that would lead a reasonable person to believe that drug trafficking was occurring at the house."[22] Ultimately, the Court of Appeals held that

> [c]onsidering the search warrant and the underlying affidavit, as read in a commonsense and realistic manner, we conclude that a reasonably cautious person could not have concluded that there was a "substantial basis" for the finding of probable cause, i.e., for inferring a "fair probability" that evidence of drug trafficking would be found at defendants' house.[23]

The Court of Appeals analysis is erroneous for a number of reasons. First, the Court reviewed the magistrate's decision de novo.[24] Review de novo is proper for "questions of law relevant to a motion to suppress."[25] However, that standard is not appropriate for review of the

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unanimously adopted this standard in *People v Landt*, 439 Mich 870; 475 NW2d 825 (1991), as noted in *Russo*, *supra* at 603.

[21] *Keller*, *supra* at 450.

[22] *Id*. at 451.

[23] *Id*. at 450, citing *Russo*, *supra* at 603-604.

[24] *Keller, supra* at 448, citing *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

[25] *Hickman*, *supra* at 605.

magistrate's probable cause determination. That determination is entitled to " 'great deference by reviewing courts.' "[26]

Second, the Court improperly framed this case as a test of the source's reliability instead of examining all the circumstances set forth in the affidavit to determine whether there was a substantial basis for the magistrate to conclude that "there [was] a fair probability that contraband or evidence of a crime [would] be found" at defendants' home.[27] Focusing on the tip was inappropriate because, regardless of the veracity of the source, the officer participated in a trash pull that revealed evidence of marijuana and correspondence tying the trash to the defendants. The presence of marijuana in defendants' trash shows "a fair probability that contraband or evidence of a crime will be found in a particular place."[28] Because this officer uncovered direct evidence of illegal activity, the marijuana, it was unnecessary to delve into the veracity of the source.

The unnecessary focus on the tip stems from the Court inappropriately dismissing the marijuana from the "trash pull" as "only a roach." The Court correctly stated that the tip suggested a drug trafficking operation; however, the police conducted further investigation, leading to the discovery of marijuana tied to defendants' home. The marijuana established probable cause to search the home for additional contraband.[29]

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[26] *Gates*, *supra* at 236 (citation omitted).

[27] *Id*. at 238.

[28] *Id*.

[29] The dissent rejects a finding of probable cause under these circumstances because "[a]ll the trash pull established was that, on one occasion, someone with access to defendants' trash discarded a marijuana cigarette in one of their trash bags." *Post* at 488 n 3. However, as Justice CAVANAGH has acknowledged, to establish probable cause to issue a search warrant it is only necessary to show a " ' "substantial basis" for inferring

The dissent focuses on the scope of the warrant, arguing that "[a] warrant issued for drug possession would only authorize a search for marijuana and possibly paraphernalia used in the consumption of marijuana, not the array of evidence of distribution authorized by the warrant in this case." *Post* at 487-488. The dissent's argument is irrelevant, however, because even supposing for the sake of argument that probable cause did not exist to search for "evidence of distribution,"

> "[t]he infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during . . . execution [of the valid portions])." [*United States v Sells*, 463 F3d 1148, 1150 (CA 10, 2006), quoting *United States v Brown*, 984 F2d 1074, 1077 (CA 10, 1993).]

This rule has been adopted by every federal circuit,[30] as well as our Court of Appeals.[31]

As articulated in *Sells*, there is a "multiple-step analysis to determine whether severability is appli-

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a "fair probability" that contraband or evidence of a crime will be found in a particular place.' " *Goldston*, *supra* at 564 (CAVANAGH, J., dissenting), quoting *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Because marijuana was found in defendants' trash outside of defendants' home, a "fair probability" existed that marijuana would also be found *inside* defendants' home. See *United States v Briscoe*, 317 F3d 906, 908 (CA 8, 2003) (holding that drugs found in trash "were sufficient *stand-alone* evidence to establish probable cause" to issue search warrant for possession and distribution) (emphasis in original); *United States v Lawrence*, 308 F3d 623, 627 (CA 6, 2002) (holding that probable cause existed to issue search warrant after discovery of cocaine residue in defendant's trash, "even if [an informant's] statements were excised from the search warrant affidavit").

[30] See *Sells*, *supra* at 1150 n 1 (listing federal cases).

[31] See, e.g., *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001), and *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146 (2007),

cable."[32] First the court must divide the warrant into categories. Then, the court must evaluate the constitutionality of each category. If only some categories are constitutional, the court must determine if the valid categories are distinguishable from the invalid ones and whether the valid categories "make up the great part of the warrant."[33] Here, the warrant authorizes the seizure of three categories of evidence: marijuana; distribution evidence, such as currency and packaging paraphernalia; and possession evidence, such as proof of residency. Of these three categories, the only one that is arguably invalid is the distribution evidence. If it were invalid, that category would be severable from the others.

While all three categories are related to marijuana crimes, the distribution evidence relates to a distinct crime. Furthermore, when determining whether a valid portion constitutes the greater part of a warrant, "merely counting parts, without any evaluation of the practical effect of those parts, is an improperly 'hypertechnical' interpretation of the search authorized by the warrant."[34] Instead, a court should "evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant."[35] In this case, the authorized search for marijuana permitted police officers to search the entire house and to investigate containers in which marijuana might be found. Hence, the scope of the search authorized by the valid portion of the search was extremely broad and allowed police officers to search in almost every place that the authorization to search for

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both discussing the effect of the invalidity of a portion of the affidavit for a warrant, and *People v Kolniak*, 175 Mich App 16, 18-23; 437 NW2d 280 (1989).

[32] *Sells*, *supra* at 1151.

[33] *Id*.

[34] *Id*. at 1160.

[35] *Id*.

distribution evidence permitted. For this reason, the valid portion of the warrant, in our judgment, formed the greater part of the search warrant. Therefore, even if the dissent is correct that the warrant is overbroad, the distribution category is severable.

In this case, the police did not seize any of the "evidence of distribution" for which the warrant authorized a search—"plastic packages, paper packets, and scales for weighing . . . and records of drug transactions . . . ." Thus, even if that portion of the warrant is invalid, there is no need to suppress any evidence when no "evidence of distribution" was seized, because " 'the infirmity of part of a warrant' " only requires that " 'evidence seized pursuant to that part of the warrant' " be suppressed.[36]

Therefore, even accepting the Court of Appeals determination that the source was unreliable, the marijuana from the trash provides a " 'substantial basis for

[36] *Sells, supra* at 1150, quoting *Brown, supra* at 1077. The dissent considers the firearms seized to be "evidence of marijuana distribution." *Post* at 496-497. However, it is "well settled that objects such as weapons or contraband found in [plain view] may be seized by the police without a warrant." *People v Johnson*, 431 Mich 683, 691 n 5; 431 NW2d 825 (1988). Moreover, " 'a warrant that authorizes an officer to search a home for illegal [drugs] also provides authority to open closets, chests, drawers, and containers in which the [drugs] might be found.' " *People v Coleman*, 436 Mich 124, 131; 461 NW2d 615 (1990), quoting *United States v Ross*, 456 US 798, 821; 102 S Ct 2157; 72 L Ed 2d 572 (1982). In this case, it is unclear from the record which firearms the prosecutor sought to introduce and where these firearms were found. However, regardless of where the firearms were found, the firearms evidence should not be suppressed. The valid search warrant for contraband in defendants' home allowed police officers to " 'open closets, chests, drawers, and containers . . . .' " Hence, even if the firearms seized were in a container, the police officers were validly authorized to open such containers to search for contraband. If the police officers found the firearms after opening a container, those weapons would then be in plain view and could be validly seized. Thus, the evidence of firearms found in defendants' home is not properly suppressed.

conclud[ing]' that probable cause existed."[37] Because the magistrate properly found probable cause for the search, the evidence found during that search is not subject to the exclusionary rule. We reverse the Court of Appeals holding to the contrary.

STATUTORY CHALLENGE

The circuit court found a violation of MCL 780.653 because the hearsay information in the affidavit was not reliable and because the officer "misled" the magistrate. The Court of Appeals agreed, citing the fact that "[t]he affiant indicated that she had directly received the anonymous tip when, in fact, Crime Stoppers received the tip and then conveyed it to the police."[38] This conclusion was based on the affidavit, which stated:

> That during the past several weeks your affiant received an anonymous tip stating that large quantities of marijuana was being sold and manufactured out of 3828 Maryland, City of Flint, Genesee County, Michigan. The tipster also indicated that there is a hidden room used for manufacturing marijuana inside said residence.

We find the Court of Appeals reasoning inadequate. First, the affiant does not indicate "that she had directly received" the tip. Because the affiant is the subject of the sentence, it is wholly unclear who relayed the tip to her. Clearly, one could infer that the anonymous source spoke directly to the affiant, but that is not the only inference possible. Nonetheless, under MCL 780.653, the key fact for purposes of probable cause is that the source was anonymous. The officer made no attempt to conceal that fact. The fact that the anony-

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[37] *Id*. at 238-239, quoting *Jones, supra* at 271.

[38] *Keller, supra* at 451.

mous source called Crime Stoppers instead of the police is immaterial under the statute.

The statute requires that "[t]he magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her."[39] Further, "[t]he affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains" indications that the named person has personal knowledge, that the unnamed person spoke with personal knowledge and is credible, or that the unnamed person spoke with personal knowledge and the information is reliable.[40]

The issue then is whether the affidavit is "based upon" information supplied by an unnamed person. "Base," when used as a verb, means "to place or establish on a base or basis; ground, found (usu[ally] fol[lowed] by *on* or *upon*): *Our plan is based on an upturn in the economy*."[41] In this case, the affidavit is "based upon" the affiant's[42] personal efforts to search the trash and discover the marijuana because that evidence is the foundation for probable cause. The affidavit states that "based upon the items found [in the trash pull] and [the] affiant's experience in the investigation of marijuana . . . [the] affiant has probable cause to believe that evidence of illegal drug activity" would be found at defendants' address. Hence, the affidavit

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[39] MCL 780.653.

[40] *Id*.

[41] *Random House Webster's College Dictionary* (1997).

[42] In context, "complainant" seems to be a synonym for "affiant." Black's Law Dictionary (5th ed) defines "complainant" as "[o]ne who applies to the courts for legal redress by filing a complaint (i.e. plaintiff). Also, one who instigates prosecution or who prefers accusation against suspected person." The affiant, who is also asking for a search warrant, is someone who is applying to the court for redress or preferring an accusation.

was explicitly "based upon" the trash pull. While the anonymous tip prompted the investigation, the affidavit is not "based upon" that information because the marijuana found is by itself sufficient for probable cause. Thus, the statutory requirement that an anonymous tip bear indicia of reliability does not come into play.[43] Because there is no statutory violation, we reverse the judgment of the circuit court.[44] Further, without a statutory violation, there is no need to discuss the propriety of the circuit court's remedy for the alleged violation.

CONCLUSION

We disagree with the lower courts' holdings that the affidavit in support of the search warrant failed to establish probable cause and that there was a violation

[43] Even if that requirement came into play, the trash pull partially corroborating the tip provided "affirmative allegations from which the magistrate may conclude . . . that the [anonymous source] is credible." MCL 780.653. See *United States v Hammond*, 351 F3d 765, 772 (CA 6, 2003) (a "tip can take on an increased level of significance . . . if corroborated by the police through subsequent investigation"); *United States v Le*, 173 F3d 1258, 1266 (CA 10, 1999) (holding that tips from two informants that a defendant was selling methamphetamine were corroborated when an officer "search[ed] Le's refuse and discover[ed] traces of methamphetamine").

[44] The dissent would essentially hold that whenever an affidavit makes the slightest reference to information supplied by an informant, the requirements of MCL 780.653 must be complied with. To reach this conclusion, the dissent relies on the first sentence of MCL 780.653, which states that "[t]he magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her." Contrary to what the dissent concludes, the phrase "based upon" has the same meaning in both the first and second sentences. The difference between the sentences is that the first requires the magistrate to found his or her probable cause determination on all the information in the affidavit, while the second sentence only applies if the affidavit itself is founded on information from a source other than the affiant.

of MCL 780.653. Therefore, we reverse the Court of Appeals order to suppress the evidence obtained from the search and the circuit court's order allowing defendants to argue a statutory violation to the jury. We remand the cases to the circuit court for further proceedings in accordance with this opinion.

TAYLOR, C.J., and WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*dissenting*). Because I believe that the search warrant issued in this case was constitutionally invalid, I respectfully dissent. I would affirm the judgment of the Court of Appeals.

I. THE CONSTITUTIONALITY OF THE SEARCH WARRANT

I disagree with the majority's conclusion that the search warrant was constitutionally valid. The United States Constitution requires search warrants to be based "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.[1] Those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). To determine whether probable cause exists, a magistrate must evaluate "whether, given all the circumstances . . . , including the 'veracity' and 'basis of knowledge' of persons sup-

[1] Similarly, the Michigan Constitution provides that "[n]o 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.

plying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

In Michigan, these constitutional mandates are implemented in part by MCL 780.651(1) and MCL 780.653, which require that probable cause be shown through an affidavit presented to a magistrate who will decide, on the basis of the facts related within the affidavit, whether to issue a warrant. If an affidavit contains hearsay information, MCL 780.653 calls for assurances that the information is credible and based on personal knowledge. An affidavit based on information from an unnamed source must include "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b).

The search warrant issued in this case failed to meet the constitutional standards enunciated in *Gates* and implemented by MCL 780.653(b). Our role in reviewing the constitutional validity of a search warrant is to assess the magistrate's determination to ensure that there was a " 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, *supra* at 238-239, quoting *Jones v United States*, 362 US 257, 271; 80 S Ct 725; 4 L Ed 2d 697 (1960). The search warrant was supported by an affidavit that contained information from an anonymous source[2] and evidence from a "trash

[2] The affidavit stated that "your affiant received an anonymous tip stating that large quantities of marijuana was [sic] being sold and manufactured out of [defendants' residence]. The tipster also indicated that there is a hidden room used for manufacturing Marijuana inside said residence."

pull" conducted at defendants' residence. The information in the affidavit did not provide a substantial basis for concluding that a search of defendants' residence would uncover evidence of drug trafficking.

Under *Gates* and MCL 780.653, the magistrate must consider the basis of the source's knowledge. The affidavit contained no indication that the anonymous source spoke with personal knowledge of defendants' alleged manufacturing and distribution scheme. The mere assertion that marijuana was being manufactured in a hidden room of a residence does not amount to an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand," that would build confidence in the source's information. *Gates*, *supra* at 234.

In addition, the affidavit failed to establish the credibility of the anonymous source. For example, the affiant did not indicate that the source had provided reliable information in the past. Nor did the evidence discovered in the trash pull demonstrate that the source was credible or the information reliable by corroborating the allegation of drug trafficking. The trash pull uncovered remnants of a single burnt marijuana cigarette, while the source had accused defendants of manufacturing and selling large quantities of marijuana in their home. The information contained in the affidavit entirely failed to establish the source's credibility and the accuracy of the information.

Of course, no single factor—the source's basis of knowledge, the reliability of the information, or the veracity of the source—is dispositive. Under the totality-of-the-circumstances analysis of *Gates*, the magistrate weighs the "various indicia of reliability" to make a "balanced assessment" of an informant's tip. *Id.* But here no factor weighed heavily enough to justify

crediting the anonymous tip. And without the anonymous tip, the affidavit contained only evidence of a single burnt marijuana cigarette retrieved through a trash pull—not enough evidence to conclude that defendants' residence was being used to sell and manufacture large quantities of marijuana. Accordingly, the magistrate did not have a substantial basis for believing that a search of defendants' residence would uncover evidence of marijuana manufacturing and sale.

The majority contends that even if the anonymous source was unreliable, the warrant was nonetheless valid because the marijuana discovered in the trash pull supplied "probable cause to search the home for additional contraband." *Ante* at 477. But this assertion completely disregards the scope of the warrant. The Fourth Amendment expressly requires that a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." A search that exceeds the scope of its authorizing warrant is constitutionally invalid. "[A]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." 2 LaFave, Search & Seizure (4th ed), § 4.6(a), p 607. The evidence recovered from the trash pull alone cannot validate a search under the warrant issued in this case. The warrant authorized a search for evidence of narcotics distribution when *at most* the trash pull would have only established probable cause for possession of marijuana.[3] A warrant

[3] The warrant authorized a search for

> marijuana and other controlled substances, U.S. Currency, paraphernalia used in the blending, packaging and sale of the above stated controlled substance, including, but not limited to, plastic packages, paper packets, and scales for weighing, and the like, firearms and ammunition, papers and effects showing occupancy,

issued for drug possession would only authorize a search for marijuana and possibly paraphernalia used in the consumption of marijuana, not the array of evidence of distribution authorized by the warrant in this case. The majority entirely overlooks the discrepancy between the trash-pull evidence and the scope of the issued warrant.

II. PARTIAL SUPPRESSION

To justify the search under this warrant, the majority adopts a doctrine known as "partial suppression" or

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ownership, dominion, or control of said premises, including but not limited to rent and property receipts, keys, bills, and cancelled mail envelopes, and records of drug transactions . . . .

Further, it is highly questionable whether the contraband found in the trash, without more, could provide probable cause to believe that marijuana would be found in defendants' home. The majority is too quick to conclude that simply because a burnt marijuana cigarette was found in defendants' trash on *one occasion*, there was a "substantial basis" for inferring a "fair probability" that more marijuana would be found in defendants' home the next day. All the trash pull established was that, on one occasion, someone with access to defendants' trash discarded a marijuana cigarette in one of their trash bags. One could infer that the cigarette belonged to defendants, but it certainly could have come from another source, whether it was a neighbor or passerby disposing of his own garbage in defendants' trash or a guest in defendants' home. After all, the very reason trash searches without warrants are constitutional is because a person loses his privacy interest by putting it out for collection, thereby relinquishing control over it. Even supposing that the marijuana belonged to defendants, a single instance of marijuana use does not necessarily permit the assumption that marijuana would likely be present in defendants' home when the warrant is executed. See, e.g., *United States v Cunningham*, 145 F Supp 2d 964, 967 (ED Wis, 2001) (A trace amount of cocaine discovered in a garbage search "by itself is insufficient to establish probable cause that contraband would be found at defendant's residence. The presence of cocaine traces in garbage does not necessarily give rise to an inference that additional drugs are located on the premises. Cocaine traces may be attributable to one time personal use of drugs by either a resident or a third party.").

"severance." According to this doctrine, invalid portions of a warrant may be severed from valid portions of a warrant; the evidence obtained pursuant to the invalid portion is suppressed, while the evidence obtained through the valid portion is admissible. *United States v Sells*, 463 F3d 1148, 1150 (CA 10, 2006). Whether Michigan should adopt this rule is a question distinct from whether it should be applied in this case. Unfortunately, in its eagerness to adopt this rule, the majority neglects crucial safeguards that federal circuit courts consider before applying the doctrine.[4] As one circuit court explained:

> That severance may be appropriate in theory does not mean it is appropriate in a particular case. The doctrine is not available where no part of the warrant is sufficiently particularized, where no portion of the warrant may be meaningfully severed, or where the sufficiently particularized portions make up only an insignificant or tangential part of the warrant. [*United States v George*, 975 F2d 72, 79-80 (CA 2, 1992) (citations omitted).]

More pertinent to the case at hand, severance may be improper "if probable cause existed as to only a few of

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[4] See *United States v Diaz*, 841 F2d 1, 4 (CA 1, 1988) (severance is appropriate "where the bulk of the warrant and records seized are fully supported by probable cause"); *United States v Christine,* 687 F2d 749, 754-760 (CA 3, 1982) (severance is inappropriate when valid portions are not "meaningfully severable" from the warrant, if it would be an abuse of the warrant procedure, or for a general warrant); *United States v Freeman*, 685 F2d 942, 952 (CA 5, 1982) (severance limited to circumstances where "legitimate fourth amendment interests will not be jeopardized," not where, for example, "the warrant is generally invalid but as to some tangential item meets the requirements of probable cause" or where the valid items were included as a pretext to support an unlawful search); *United States v Fitzgerald*, 724 F2d 633, 636-637 (CA 8, 1983) (permitting severance absent a showing of pretext or bad faith); *United States v Spilotro*, 800 F2d 959, 967 (CA 9, 1986) (invalid portion must be "sufficiently separable from the rest of the warrant to allow severance"); see also *Sells*, *supra* at 1158-1159.

several items listed . . . .” 2 LaFave, *supra*, § 3.7(d), p 436 n 214. The majority errs in adopting and applying the severance doctrine without adequately considering the circumstances of this particular case.

I would not apply the severance doctrine to the warrant involved here. A number of jurisdictions limit the use of the doctrine to cases in which a significant portion of the warrant is valid. For example, the Tenth Circuit Court of Appeals applies the doctrine “only if ‘the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant.’ ” *Sells*, *supra* at 1151, quoting *United States v Naugle*, 997 F2d 819, 822 (CA 10, 1993). This warrant was disproportionally invalid. This is not a case in which the allegedly valid evidence formed the greater part of the warrant. In fact, evidence of marijuana possession was just one portion of a warrant that also sought other controlled substances, currency, distribution paraphernalia (various forms of which were enumerated at length), papers establishing ownership, and records of drug transactions. It is evident from considering the warrant as a whole that the purpose of this search was to uncover evidence of a drug distribution scheme.[5] That defendants may have also engaged in personal possession and consumption of marijuana was incidental to the greater part of the warrant. The majority

[5] While disclaiming a “hypertechnical” approach, the majority engages in just that when it groups the evidence sought under the warrant into three categories and declares that probable cause existed for two out of three of them. In fact, several categories of evidence sought by the warrant are unrelated to marijuana possession: possession of other controlled substances, currency, paraphernalia used in the blending, packaging, and sale of controlled substances, and records of drug transactions. The only categories of evidence sought under the warrant that would be necessary to establish the elements of simple marijuana possession would be marijuana and evidence of control over the premises.

conflates *Sells'*s directive that a court should "evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant" with the plain view doctrine. *Sells*, *supra* at 1160. This approach would foster abuse of the warrant process, as the police would be encouraged to include small, numerous items in a warrant simply to ensure that an otherwise invalid warrant can be salvaged under the severance doctrine. Further, a warrant's "scope" and "invasiveness" is not defined merely in terms of the locations that may be searched. Rather, those terms also encompass the *types* of evidence sought. And clearly the *types* of evidence justified in a search for marijuana possession make up a lesser portion of the entire types of evidence sought under this warrant.

Further, the purportedly valid portion of the warrant is not sufficiently distinguishable from the invalid portions to support severance. In the affidavit, the trash pull and the anonymous tip were used to support a search for the same evidence—evidence of marijuana manufacturing and sale. The warrant did not distinguish between marijuana that was merely in defendants' possession and marijuana that was part of the suspected marijuana distribution operation. Consequently, the purportedly valid portion of the warrant cannot realistically be distinguished from the invalid portions. Thus, this warrant is not suitable for severance.

Additionally, as will be addressed further in part III, there is evidence that the affiant acted in bad faith. Most jurisdictions consider the presence of bad faith on the part of the police to preclude the application of the severance doctrine, and I would do the same.

III. THE GOOD-FAITH EXCEPTION

The good-faith exception to the warrant requirement does not salvage the constitutionality of the search of

defendants' home. The good-faith exception provides that when police act in reasonable and good-faith reliance on a search warrant, the items seized need not be suppressed if the warrant is later declared invalid. *United States v Leon*, 468 US 897, 920-921; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004). However, the exception does not apply if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon, supra* at 923, citing *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). In addition, the exception does not apply when the magistrate "wholly abandoned his judicial role," when the warrant is facially deficient, or when the affidavit is " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Leon, supra* at 923, quoting *Brown v Illinois*, 422 US 590, 611; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

The good-faith exception fails to apply here on at least two grounds: the police officers did not act in objectively reasonable reliance on the warrant because the affidavit plainly did not comply with MCL 780.653, and the affiant misled the magistrate. To invoke the good-faith exception, the officers must have reasonably relied on the warrant. Reasonable reliance is gauged by an objective standard that "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, *supra* at 919 n 20, citing *United States v Peltier*, 422 US 531, 542; 95 S Ct 2313; 45 L Ed 2d 374 (1975). MCL 780.653 requires that affidavits based on information from an anonymous source include allegations that could lead the magistrate to conclude that the source spoke with personal knowledge and either that the

source is credible or that the information is reliable.[6] The warrant in this case clearly violated MCL 780.653 because the supporting affidavit was based on an anonymous tip, yet it contained none of the information required by statute. It provided no allegations that could support a finding that the source spoke with personal knowledge of the drug operation. There was no indication that the source was credible or the information reliable. So the police executing the search did not act in objectively reasonable reliance on the warrant because its supporting affidavit plainly did not comply with the statutory requirements of MCL 780.653. Accordingly, the good-faith exception does not pardon the officers' execution of an unconstitutional warrant.

In addition, there is evidence that the affiant intentionally or recklessly indicated that the anonymous tip had been received directly, rather than through Crime Stoppers. An appellate court reviews for clear error the finding that an affidavit in support of a search warrant was misleading because it contained false statements made knowingly and intentionally or with reckless disregard for their truth. *United States v Henson*, 848 F2d 1374, 1381 (CA 6, 1988). Clear error exists if the reviewing court is left with the "definite and firm

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[6] MCL 780.653 provides in relevant part:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> * * *
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

conviction that the trial court made a mistake . . . ." *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983). Thus, we must give deference to the decision of the circuit court, which ruled "that your police department mislead [sic] the magistrate . . . ." The preliminary examination produced sufficient evidence of misleading and incomplete statements to conclude that the circuit court did not make a mistake. The affidavit must include certain indicia of reliability relating to the anonymous source. But not only did the affidavit fail to aver any of these factors, it failed to disclose that the anonymous tip originated with Crime Stoppers, a reward-based system, which bears on the source's credibility.[7] Instead, the affidavit implied that the affiant took the anonymous tip directly.[8] The affidavit also omitted reference to the three occasions on which the police conducted surveillance of defendants' residence, while at the preliminary hearing the affiant acknowledged that "those surveillances turned up nothing[.]" In sum, the affidavit misleadingly implied that the affiant had spoken to the anonymous source directly, which bolstered the source's credibility, while two key facts *omitted* from the affidavit would have *diminished* the source's credibility. The circuit court's ruling that the affiant misled the magistrate should remain intact. As such, the good-faith exception to the warrant requirement would not apply.

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[7] The Crime Stoppers Alliance operates a toll-free hotline and offers a cash reward of up to $1,000 to any person providing a tip resulting in a felony arrest.

[8] Because we review the circuit court's finding for clear error, this interpretation need not be the "only inference" that could be drawn from the affidavit, as the majority suggests. *Ante* at 481. The inference that guides us should be the one drawn by the circuit court. The circuit court heard the testimony of the affiant, considered the language of the affidavit, and concluded that the officer had misled the magistrate.

Because the search was conducted under a constitutionally invalid warrant and the good-faith exception does not apply, the proper remedy is to exclude the evidence discovered in the search. I would uphold the decision of the Court of Appeals.

IV. THE STATUTORY VIOLATION

Having concluded that the search warrant was constitutionally invalid and that the evidence seized during the search must be suppressed, there is no need to address the violation of MCL 780.653 and its proper remedy. Accordingly, I will not reiterate my discussion of the statutory violation from the preceding section. However, the majority's claim that this warrant did not trigger the statutory requirement that the anonymous source bear indicia of reliability merits a response.

After concluding that the search was constitutional because the trash pull alone provided probable cause for the warrant, the majority extends this reasoning to the statutory violation. According to the majority, the requirements of MCL 780.653 are not implicated at all because the affidavit was not "based upon" information from the anonymous source, but was instead "based upon" the trash pull.[9] In its reasoning, the majority attaches significance to the state of mind of the affiant, who stated in the affidavit that "based upon the items found [in the trash pull]," she had probable cause to believe that evidence of illegal drug activity would be found.

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[9] MCL 780.653 provides that an

> affidavit may be based upon information supplied to the complainant by . . . [an] unnamed person if the affidavit contains . . . affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

This reasoning overlooks several key facts. It ignores that (1) in addition to describing the trash-pull evidence, the affidavit included a paragraph describing the information provided by the anonymous source; (2) the information from the anonymous source was *the only evidence* indicating a narcotics *distribution* operation, the offense for which the warrant was issued; and (3) the subjective basis of the affiant's belief does not control the magistrate's decision. But most notably, the majority overlooks the introductory language of MCL 780.653, which provides that "[t]he magistrate's finding of reasonable or probable cause shall be *based upon all the facts related within the affidavit* made before him or her."[10] (Emphasis added.) We cannot isolate a portion of the affidavit presented to the magistrate and decide that the affidavit was "based upon" only that portion. The statute instructs that the magistrate's finding shall be based upon *all the facts* in the affidavit, which included the information provided by the unnamed source. The warrant was still *based upon* the information provided by the unnamed source, even if the affidavit contained additional information regarding the trash pull. The statutory violation was not excused simply because the warrant was also based on the trash pull. If the affidavit had supplied only the trash-pull information, the affidavit would not have supported a warrant to search for evidence of marijuana distribu-

[10] The majority apparently takes the position that although the first and second sentences of MCL 780.653 both use the phrase "based upon," the meaning of this phrase in each sentence is completely independent of the meaning in the other. But in interpreting a statute, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). The fact that the first sentence of MCL 780.653 compels the magistrate to base his finding on all the facts in the affidavit cannot be ignored when reading the second sentence of the statute.

tion, such as scales, plastic bags, firearms, and currency. So, clearly, the information provided by the anonymous source was an integral part of the magistrate's decision to approve a warrant to search for evidence of distribution.[11]

The requirements of MCL 780.653 applied to this warrant because the affidavit was based upon information from an unnamed source. Thus, even if there were no constitutional violation, defendant would be entitled to a remedy as a result of the statutory violation.

V. CONCLUSION

I agree with the Court of Appeals holding that the affidavit in support of the search warrant failed to establish probable cause to search for evidence of marijuana sale and distribution. I would affirm the order to suppress the evidence gathered from the search and would remand for further proceedings.

KELLY, J., concurred with CAVANAGH, J.

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[11] The majority characterizes my position as "whenever an affidavit makes the slightest reference to information supplied by an informant, the requirements of MCL 780.653 must be complied with." *Ante* at 483 n 44. This generalization obscures the bottom line, which is that *this affidavit* was based upon information from an unnamed source; thus, MCL 780.653 must be complied with.

In re CERTIFIED QUESTION FROM THE FOURTEENTH DISTRICT COURT OF APPEALS OF TEXAS
(MILLER v FORD MOTOR COMPANY)

Docket No. 131517. Argued May 10, 2007 (Calendar No. 2). Decided July 25, 2007.

Glenn Miller, individually and as personal representative of the estate of Carolyn Miller, deceased, Cleveland "John" Roland, and others brought a negligence action in the 239th Judicial District Court in Texas against Ford Motor Company, seeking, in part, damages following the death of Carolyn Miller, who contracted mesothelioma from washing the clothes of Roland, her stepfather, that were exposed to asbestos while Roland worked for independent contractors who were hired on various occasions by Ford to reline the interiors of blast furnaces at a Ford plant in Michigan. A jury awarded a judgment to the plaintiffs. After the trial court denied Ford's motion for judgment notwithstanding the verdict, Ford filed an appeal in the Fourteenth District Court of Appeals of Texas. At Ford's request and over the plaintiffs' objections, that court certified the following question to the Michigan Supreme Court, pursuant to MCR 7.305(B):

> Whether, under Michigan Law, Ford, as owner of the property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court, to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

The Supreme Court granted the request to answer the certified question, 477 Mich 1277 (2006), and heard oral argument.

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

The certified question is answered in the negative. Under Michigan law, Ford, as the owner of the property on which

asbestos-containing products were located, did not owe to Carolyn Miller, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household who was working on that property as the employee of independent contractors where there was no further relationship between Ford and Miller. The matter is returned to the Fourteenth District Court of Appeals of Texas for such further proceedings as that court deems appropriate.

1. In Michigan, the question whether a defendant owes an actionable legal duty to a plaintiff is one of law that the court decides after assessing the competing policy considerations for and against recognizing the asserted duty. The ultimate inquiry is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. The inquiry involves considering, among any other relevant considerations, the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. The most important factor is the relationship of the parties. Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other factors must be considered.

2. Consideration of the social benefits of imposing a duty versus the social costs indicates that a duty should not be imposed under the facts of this case because imposing a duty would expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.

The certified question is answered in the negative.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would not have substantively decided the appeal because the certified question improperly asks the Supreme Court to decide the specific case pending before the Texas appeals court without the benefit of examining the intricacies of the case on direct appeal under the applicable standard of review. Further, Michigan law does not compel the conclusion that the defendant could not be found to owe a duty to the plaintiff. Giving proper consideration to all the variables in a duty analysis, the extreme toxicity of asbestos, the evidence that this defendant knew of the hazards of asbestos at the relevant times, and the fact that imposing a duty under these particular circumstances would not create unlimited liability, and giving priority to the health and well-being of people rather than to corporate vitality, it is reasonable to impose a duty on this employer to mitigate the risk of take-home asbestos exposure.

Justice WEAVER, joined by Justice KELLY with respect to part II of Justice WEAVER's opinion, dissenting, would decline to answer the question certified by the Fourteenth District Court of Appeals of Texas. Const 1963, art 3, § 8 limits the Michigan Supreme Court's authority to answer certified questions to requests by either house of the Michigan Legislature or by the Governor for the Supreme Court's opinion on important questions of law upon solemn occasions regarding the constitutionality of legislation after it has been enacted but before its effective date. MCR 7.305(B) improperly expands the Supreme Court's limited constitutional authority by allowing the Supreme Court to consider questions on Michigan law not controlled by Michigan Supreme Court precedent but certified by a federal court, a state appellate court, or a tribal court. Answering a certified question from another state's intermediate appellate court, as the Supreme Court has done in this case, is unprecedented in other jurisdictions.

NEGLIGENCE — DUTY — THIRD PARTY EXPOSURE TO ASBESTOS.

Under Michigan law, the owner of property on which asbestos-containing products were located does not owe a legal duty to a person who was never on or near that property to protect that person from exposure to asbestos fibers carried home on the clothing of a member of the person's household who was working on that property as an employee of an independent contractor where there was no further relationship between that person and the property owner.

Neil A. Kay, Waters & Kraus LLP (by *Charles S. Siegal, Leslie C. Maclean,* and *Loren Jacobson*), *Clark, Depew & Tracey* (by *Sean Tracey* and Craig Depew), and *Michael P. Fleming, P.C.* (by *Michael Fleming*), for the plaintiffs.

Dickinson Wright PLLC (by *Kathleen A. Lang* and *Phillip J. De Rosier*), *Robert W. Powell*, and *Craig A. Morgan*, for the defendant.

Amici Curiae:

Lipson, Neilson, Cole, Seltzer & Garin, P.C. (by *C. Thomas Ludden*), and *Deborah J. La Fetra* and *Timothy Sandefur,* for the Pacific Legal Foundation.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for the Michigan Defense Trial Counsel.

Michael B. Serling, P.C. (by *Michael B. Serling*), *Lanier Law Firm* (by *C. Taylor Campbell*), and *Kay Gunderson Reeves*, for the International Union of Bricklayers and Allied Craftworkers, Trowel Trades, Local No. 1 of Michigan.

Clark Hill PLC (by *F. R. Damm* and *Paul C. Smith*) for the Michigan Manufactures Association.

Charfoos & Christensen, PC (by *David R. Parker*), for the Michigan Trial Lawyers Association.

Shook, Hardy & Bacon L.L.P. (by *Victor E. Schwartz, Mark A. Behrens, Christopher E. Appel*, and *Dana M. Mehrer*) (*Crowell & Moring LLP* by [*Paul W. Kalish*]), *Robin S. Conrad, Amar D. Sarwal, Ann W. Spragens, Robert J. Hurns, Sherman Joyce, Jan Amundson, Quentin Riegel, Karen R. Harned, Elizabeth A Guadio, Donald D. Evans*, and *Gregg Dykstra*, of counsel), for the Coalition for Litigation Justice, Inc., the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Federation of Independent Business Legal Foundation, the American Chemistry Council, the Property Casualty Insurers Association of America, the National Association of Mutual Insurance Companies, and the American Tort Reform Association.

MARKMAN, J. Plaintiffs filed suit in Texas against defendant, alleging that the decedent contracted mesothelioma from washing the work clothes of her stepfather, who worked for independent contractors hired by defendant to reline the interiors of blast furnaces with materials that contained asbestos. A jury

found in favor of plaintiffs. Pursuant to MCR 7.305(B), the Fourteenth District Court of Appeals of Texas certified the following question to this Court:

> Whether, under Michigan law, Ford, as owner of the property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court,[1] to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

Having granted the request to answer the certified question, and having heard oral argument, we answer the question in the negative.[2] Under Michigan law,

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[1] The jury was asked to decide whether defendant was negligent and was instructed that "[n]egligence is the failure to use ordinary care." Therefore, the legal duty specified in the jury charge submitted by the trial court was the duty to use ordinary care.

[2] Justice WEAVER restates her belief that this Court lacks the authority to answer certified questions, but she has not prevailed on this issue. See, e.g., *In re Certified Question* (*Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc*), 468 Mich 109; 659 NW2d 597 (2003); *In re Certified Question* (*Wayne Co v Philip Morris, Inc*), 465 Mich 537, 543-545; 638 NW2d 409 (2002), involving certified questions in which Justice WEAVER participated in this Court's substantive decisions. For one justice's response to Justice WEAVER's constitutional arguments, see *In re Certified Question* (*Melson v Prime Ins Syndicate, Inc*), 472 Mich 1225, 1231-1242 (2005) (MARKMAN, J., dissenting). Moreover, we see no constitutional distinction in whether a certified question has come to this Court from another state's supreme court or from its court of appeals. See MCR 7.305(B) (allowing this Court to consider certified questions from a "federal court, state appellate court, or tribal court").

Concerning Justice CAVANAGH's solicitude for Justice YOUNG's "constitutional conscience," *post* at 526, Justice YOUNG, like Justice WEAVER, has written that this Court lacks the authority to answer certified questions, but his position did not carry the day. See *Melson, supra* at 1226 (YOUNG, J., concurring). Five justices, including Justice CAVANAGH, disagreed. Just as Justice CAVANAGH is within his rights as a supporter of certified questions not to answer a certified question in a particular case (his position here), Justice YOUNG as an opponent of certified questions is within his rights to answer a

Ford, as the owner of the property on which asbestos-containing products were located, did not owe to Carolyn Miller, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household who was working on that property as the employee of independent contractors, where there was no further relationship between defendant and Miller. Having answered the certified question, we now return the matter to the Fourteenth District Court of Appeals of Texas for such further proceedings as that court deems appropriate.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs allege that the decedent, Carolyn Miller, died from mesothelioma, an incurable and fatal form of lung cancer, that she contracted from washing the work clothes of her stepfather, Cleveland "John" Roland.[3] From 1954 through 1965, Roland worked for independent contractors who were hired on various occasions by defendant to reline the interiors of blast furnaces used to melt iron ore at the Ford Rouge plant in Dearborn, Michigan. Plaintiffs allege that the materials used to reline the interiors of the blast furnaces contained asbestos. There is no dispute that Miller was never on or

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certified question, because this is now a part of our state's "judicial power." Indeed, Justice YOUNG has previously answered certified questions and, in fact, authored a majority opinion responding to a certified question. *Kenneth Henes, supra*. Justice YOUNG also joined Justice CAVANAGH's opinion in *Wayne Co, supra*. This is obviously all well known to Justice CAVANAGH, who made no similar objections to Justice YOUNG's participation in these previous cases in which he and Justice YOUNG were in agreement on the results. In respecting that the law is the law even where he disagrees with that law, Justice YOUNG's determination to respect the majority position of this Court and to participate in certified questions is the only honorable position that could be taken by a justice of this Court.

[3] Plaintiffs are the personal representative of the decedent's estate and the decedent's stepfather, husband, daughter, and mother.

near defendant's premises. Miller was diagnosed with mesothelioma in 1999 and died in 2000. After the Texas trial court denied defendant's motion for a directed verdict, a Texas jury awarded plaintiffs $9.5 million for Carolyn Miller's death on the basis of a theory of negligence.[4] After the trial court denied defendant's motion for judgment notwithstanding the verdict, defendant filed an appeal in the Fourteenth District Court of Appeals of Texas. At defendant's request and over plaintiffs' objections, the Fourteenth District Court of Appeals of Texas certified the above-quoted question to this Court. We granted the request to answer the question and heard oral argument. 477 Mich 1277 (2006).

II. STANDARD OF REVIEW

Whether a defendant owes a duty to a plaintiff to avoid negligent conduct is a question of law that is reviewed de novo.[5] *Dyer v Trachtman,* 470 Mich 45, 49; 679 NW2d 311 (2004), citing *Simko v Blake,* 448 Mich 648, 655; 532 NW2d 842 (1995).

III. ANALYSIS

A. LEGAL DUTY IN GENERAL

There is no dispute among the parties that the substantive law of Michigan governs plaintiffs' claims.[6] In Michigan, "the question whether the defendant owes

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[4] The jury awarded Miller's estate $4.5 million and Miller's husband, daughter, and mother a total of $5 million for Miller's death. The jury also awarded $500,000 to John Roland for his own injuries on a premises liability theory.

[5] As plaintiffs concede, this is a negligence action, not a premises liability action.

[6] Although defendant has raised a number of issues on appeal, including whether John Roland was even exposed to asbestos at defendant's plant, the only issue before us concerns defendant's duty to Carolyn Miller.

an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." *Friedman v Dozorc,* 412 Mich 1, 22; 312 NW2d 585 (1981). That is, " ' "[d]uty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Buczkowski v McKay,* 441 Mich 96, 100-101; 490 NW2d 330 (1992), quoting *Friedman, supra* at 22 n 9, quoting Prosser, Torts (4th ed), § 53, pp 325-326.[7] Thus, the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. The inquiry involves considering, among any other relevant considerations, " 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.' " *Dyer, supra* at 49, quoting *Murdock v Higgins,* 454 Mich 46, 53; 559 NW2d 639 (1997), citing *Buczkowski, supra* at 100.

The most important factor to be considered is the relationship of the parties. "[A] duty arises out of the existence of a relationship 'between the parties of such a character that social policy justifies' its imposition." *Dyer, supra* at 49, quoting Prosser & Keeton, Torts (5th ed), § 56, p 374. " 'The determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit

[7] See also *Buczkowski, supra* at 101 n 5, quoting *Samson v Saginaw Professional Bldg, Inc,* 393 Mich 393, 419; 224 NW2d 843 (1975) (LEVIN, J., dissenting) ("[T]he duty question turns on policy considerations . . . ."); *Smith v Allendale Mut Ins Co,* 410 Mich 685, 716 n 24; 303 NW2d 702 (1981) ("In imposing tort liability . . . a court is . . . concerned with whether it is appropriate public policy to impose liability for particular conduct . . . .").

of the subsequently injured person.' " *Buczkowski, supra* at 101 n 5, quoting *Rodriguez v Sportsmen's Congress,* 159 Mich App 265, 270; 406 NW2d 207 (1987). "The duty to protect others against harm from third persons is based on a relationship between the parties." *Buczkowski, supra* at 103, citing Prosser & Keeton, Torts (5th ed), § 56, p 385. "Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." *Friedman, supra* at 22. "Duty . . . 'concerns "the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other." ' " *Buczkowski, supra* at 100, quoting *Friedman, supra* at 22, quoting Prosser, Torts (4th ed), § 53, p 324. See also *Buczkowski, supra* at 100 (referring to "duty" as "the relational obligation between the plaintiff and the defendant").[8]

In *Dyer,* this Court focused exclusively on the relationship between the parties to determine whether the defendant owed the plaintiff a legal duty. We concluded that because there was only a limited relationship between the parties, only a limited duty could be imposed on the defendant. More specifically, we concluded that because there was only a limited relationship between the defendant physician performing the independent medical examination (IME) and the plaintiff patient, the physician only owed a limited duty to the patient, i.e., a duty to perform an IME in a manner not causing physical harm to the patient. In reaching

[8] See also *Simko, supra* at 655 ("In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship."); *Murdock, supra* at 54 ("Where there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury.").

this decision, we explained that "the duty of care in a medical malpractice action has its basis in the relationship between the physician and the patient." *Dyer, supra* at 50. Because we found that only a limited relationship existed, we did not even address the other factors, i.e., the foreseeability of the harm, the burden on the defendant, or the nature of the risk presented. Consideration of the other factors was unnecessary because when there is only a limited relationship between the parties, only a limited duty can be imposed.

In *Buczkowski,* this Court similarly focused exclusively on the relationship between the parties to determine whether the defendant owed the plaintiff a legal duty. We concluded that because there was no relationship between the parties, no duty could be imposed on the defendant. More specifically, this Court concluded that because there was no relationship between the retailer who sold the shotgun ammunition to the intoxicated customer and the bystander who was injured by the use of the ammunition, the retailer owed no duty to the bystander. We explained, "Our ultimate decision turns on whether a sufficient relationship exists between a retailer and a third party to impose a duty under these circumstances." *Buczkowski, supra* at 103. Because we found that no relationship existed, we again did not even address the other factors. This was unnecessary because when there is no relationship between the parties, no duty can be imposed.

On the other hand, even when there is a relationship between the parties, a legal duty does not necessarily exist. In order to determine whether a duty exists, the other enumerated factors must also be considered. The foreseeability of the harm is one of these. Just as the existence of a relationship between the parties is not dispositive, that the harm was foreseeable is also not

dispositive. A defendant does not have a duty to protect everybody from all foreseeable harms. Although foreseeability is a factor to be considered, "other considerations may be, and usually are, more important." *Id.* at 101.

> "[T]he mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. Also, to require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant. It is the fact of existence of this relationship which the law usually refers to as a duty on the part of the actor." [*Id.*, quoting *Samson v Saginaw Professional Bldg, Inc,* 393 Mich 393, 406; 224 NW2d 843 (1975).]

When the harm is not foreseeable, no duty can be imposed on the defendant. But when the harm is foreseeable, a duty still does not necessarily exist.[9]

To summarize, in determining whether a defendant owes a duty to a plaintiff, competing policy factors must be considered. Such considerations include the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other

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[9] See *Ross v Glaser,* 220 Mich App 183, 196 n 1; 559 NW2d 331 (1996) (MARKMAN, J., dissenting) ("[F]oreseeability is a *necessary* condition of duty, but not always a *sufficient* condition to establish duty[;] [t]hat foreseeability alone is insufficient to establish duty does not mean that a lack of foreseeability is insufficient to establish a lack of duty.") (emphasis in the original).

factors must be considered to determine whether a duty should be imposed. Likewise, where the harm is not foreseeable, no duty can be imposed, but where the harm is foreseeable, other factors must be considered to determine whether a duty should be imposed. Before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable. Once it is determined that there is a relationship and that the harm was foreseeable, the burden that would be imposed on the defendant and the nature of the risk presented must be assessed to determine whether a duty should be imposed.[10]

B. DUTY WITH REGARD TO ASBESTOS LIABILITY

Because this Court has never addressed whether property owners owe a duty to protect people who have never been on or near their property from exposure to asbestos carried home on a household member's clothing, it is helpful to review the decisions of other courts that have addressed this issue.

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[10] Plaintiffs and Justice CAVANAGH rely on the following two statements: found in *Clark v Dalman,* 379 Mich 251, 261; 150 NW2d 755 (1967): "duty . . . may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others" and "every person is under the general duty to so act, or to use that which he controls, as not to injure another." However, they read these statements out of context. First, these statements immediately follow the statement that "[a]ctionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Id.* at 260-261. Although Justice CAVANAGH quotes this sentence, he fails to give it any meaning. Second, the Court subsequently addressed whether a relationship existed between the parties before it concluded that a duty was owed. Therefore, contrary to plaintiffs' and Justice CAVANAGH's suggestion, *Clark* does not stand for the proposition that everybody owes a duty to everybody else.

In *CSX Transportation, Inc v Williams,* 278 Ga 888, 891; 608 SE2d 208 (2005), the Supreme Court of Georgia, answering a certified question from the United States Court of Appeals for the Eleventh Circuit, held that "an employer does not owe a duty of care to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." That court explained:

> " '[I]n fixing the bounds of duty, not only logic and science, but policy play an important role.' However, it must also be recognized that there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree. The recognition of a common-law cause of action under the circumstances of this case would, in our opinion, expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs. Accordingly, we decline to promulgate a policy which would extend the common law so as to bring the . . . plaintiff[s] within a class of people whose interests are entitled to protection from the defendant's conduct." [*Id.* at 890, quoting *Widera v Ettco Wire & Cable Corp,* 204 AD2d 306, 307-308; 611 NYS2d 569 (1994) (other citations omitted).][11]

In *In re New York City Asbestos Litigation,* 5 NY3d 486; 806 NYS2d 146; 840 NE2d 115 (2005), New York's highest court held that the defendant owed no duty to the defendant's employee's wife, who was allegedly injured from exposure to asbestos the employee introduced into the family home on soiled work clothes that the plaintiff wife laundered. That court explained:

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[11] As in Michigan, "mere foreseeability was rejected by [the Georgia Supreme] Court as a basis for extending a duty of care . . . ." *CSX Transportation, supra* at 890.

> "[I]n determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree" . . . . "Foreseeability, alone, does not define duty . . . ." . . . A specific duty is required because otherwise, a defendant would be subjected "to limitless liability to an indeterminate class of persons conceivably injured" by its negligent acts . . . . "Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs." [*Id.* at 493, quoting *Hamilton v Beretta USA Corp,* 96 NY2d 222, 232; 727 NYS2d 7; 750 NE2d 1055 (2001) (other citations and internal quotation marks omitted).]

The court was concerned about "limitless liability" and questioned why, if a duty was owed to an employee's spouse, a duty would not also be owed to the employee's babysitter or an employee of a neighborhood laundry. *In re New York City Asbestos Litigation, supra* at 498.

> [W]e must consider the likely consequences of adopting the expanded duty urged by plaintiffs. While logic might suggest (and plaintiffs maintain) that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low, experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality. [*Id.*]

The court explained, "[T]he 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.' Here, there is no relationship between the [defendant] and [the defendant's employee's wife]." *Id.*, quoting *Hamilton, supra* at 233. The court held that because there was no relationship between the defendant and the defendant's employee's wife, no duty could be imposed.

In *Adams v Owens-Illinois, Inc,* 119 Md App 395; 705 A2d 58 (1998), the Maryland Court of Special Appeals held that the defendant did not owe a duty to the

defendant's employee's wife who was allegedly exposed to asbestos from her husband's clothes. The court explained:

> If liability for exposure to asbestos could be premised on Mary Wild's handling of her husband's clothing, presumably Bethlehem would owe a duty to others who came in close contact with Edwin Wild, including other family members, automobile passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees. [*Id.* at 411.]

In *Zimko v American Cyanamid,* 905 So 2d 465, 482 (La App, 2005), the Louisiana Court of Appeals, "recogniz[ing] the novelty of the duty," held that the defendant owed a duty to the defendant's employee's son who was allegedly exposed to asbestos from his father's work clothes that he brought home. However, the Louisiana court relied exclusively on a New York intermediate appellate court decision that was subsequently reversed by New York's highest court. As explained by New York's highest court, "The [*Zimko*] court summarized [New York's intermediate appellate court's] decision . . . and, without providing an independent analysis, concluded that the father's employer owed a duty of care to the son." *In re New York City Asbestos Litigation, supra* at 496. Because the court in *Zimko* relied exclusively on a decision that has since been reversed, we do not find *Zimko* persuasive.

After New York's highest court reversed the decision by New York's intermediate appellate court in *In re New York City of Asbestos Litigation*, the Louisiana Court of Appeals reaffirmed its decision in *Zimko*. *Chaisson v Avondale Industries, Inc,* 947 So 2d 171 (La App, 2006). However, "Louisiana relies more heavily upon foreseeability in its duty/risk analysis . . . ." *Id.* at 182. Unlike Louisiana, Michigan relies more on the

relationship between the parties than foreseeability in determining whether a duty exists.

In addition, in Louisiana, unlike in Michigan, "a 'no duty' defense in a negligence case is seldom appropriate," *Zimko, supra* at 482; "resolution of a negligence case based on a finding that a defendant has 'no duty' should be reserved for the exceptional situation," *id.* at 482-483, such as "cases involving 'failure to act, injuries to unborn victims, negligently inflicted mental anguish or purely economic harm unaccompanied by physical trauma to the claimant or his property,' " *id.* at 482 n 19 (citation and emphasis omitted). In Michigan, however, "[o]nly if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." *Friedman, supra* at 22. See also *Murdock, supra* at 53 ("Only after finding that a duty exists may the fact-finder determine whether, in light of the particular facts of the case, there was a breach of the duty."). For these reasons, we do not find *Chaisson* persuasive.

In *Olivo v Owens-Illinois, Inc,* 186 NJ 394; 895 A2d 1143 (2006), the New Jersey Supreme Court held that if the defendant owed a duty to the worker, the defendant owed a duty to the wife of the worker who was exposed to asbestos when she washed the clothes of her husband, who was hired by an independent contractor to perform work at the defendant's premises.[12] However,

[12] It is important to note that the court did not hold that the defendant owed the worker's wife a duty. In fact, it held that if the defendant owed no duty to the worker, the defendant necessarily owed no duty to the worker's wife. *Olivo, supra* at 408 (If "no duty is owed to Anthony[,] . . . no derivative duty can be imposed on [the defendant] for Eleanor in respect of the exposure she experienced from asbestos borne home on Anthony's work clothing."). The court remanded the case because a question of fact existed regarding whether the defendant owed the worker a duty because the worker was an employee of an independent contractor.

as explained by the New York Court of Appeals, "*Olivo* is distinguishable legally in that New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis." *In re New York City Asbestos Litigation, supra* at 497. In *Olivo, supra* at 402, the New Jersey Supreme Court described "foreseeability of harm" as " ' "a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate." ' " (Citations omitted.) It further explained that, "in respect of a landowner's liability, whether a duty of care can be owed to one who is injured from a dangerous condition on the premises, to which the victim is exposed off-premises, devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals." *Id.* at 403. However, as explained above, Michigan, like New York, relies more on the relationship between the parties than foreseeability of harm when determining whether a duty exists.[13] For this reason, we do not find *Olivo* persuasive.[14]

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[13] We recognize that New York law differs from Michigan law in that New York does not consider foreseeability at all in determining whether a duty should be imposed, while we do give some consideration to this factor. See *In re New York City Asbestos Litigation, supra* at 494 ("[F]oreseeability bears on the scope of a duty, not whether a duty exists in the first place.").

[14] For the same reason, the California Court of Appeals decision in *Condon v Union Oil Company of California,* 2004 Cal App Unpub LEXIS 7975 (Cal App, 2004), is not persuasive. The court in that case relied exclusively on the forseeability factor. It stated, "Since it was known that a worker's clothing could be a source of contamination to others, then it was foreseeable that family members who were exposed to this clothing would also be in danger of being exposed." *Id.* at *13. In addition, *Satterfield v Breeding Insulation Co, Inc,* 2007 Tenn App LEXIS 230, *25 (Tenn App, 2007), which held that the defendant employer could be liable for the plaintiff's injuries caused by asbestos being taken home on her father's clothes, is not persuasive because "[i]n Tennessee, [unlike in Michigan,] 'the foreseeability prong [of the balancing test] is paramount

C. APPLICATION TO THIS CASE

As explained above, under Michigan law, the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing that duty. The inquiry involves considering, among any other relevant considerations: " 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.' " *Dyer, supra* at 49 (citations omitted).

In the instant case, the relationship between Miller and defendant was highly tenuous—defendant hired an independent contractor who hired Roland who lived in a house with Miller, his stepdaughter, who sometimes washed his clothes.[15] Miller had never been on or near defendant's property and had no further relationship with defendant. Therefore, the "relationship between the parties" prong of the duty test, which is the most important prong in this state, strongly suggests that no duty should be imposed.[16]

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because "foreseeability is the test of negligence." ' " (Citations omitted.)

[15] Although Justice CAVANAGH attempts to downplay the importance of the relationship prong, he is unable to cite a single decision in which this Court has found that a duty existed where a relationship did not exist. Moreover, it is noteworthy that, although Justice CAVANAGH does not dispute that relationship, or lack thereof, constitutes a factor that must be considered, he says nothing at all about the relationship, or lack thereof, between Miller and the defendant in this case, other than a conclusory statement that there was a relationship between Roland and defendant and that such a relationship should "extend[]" to Miller. *Post* at 530.

[16] Plaintiffs rely on *Shepard v Redford Community Hosp*, 151 Mich App 242; 390 NW2d 239 (1986). In *Shepard,* the plaintiff went to the defendant hospital and was diagnosed as suffering from an upper respiratory problem. In fact, the plaintiff was suffering from spinal meningitis. The plaintiff's son became infected with spinal meningitis and died. The Court of Appeals held that the defendant hospital owed the

The "burden [that would be imposed] on the defendant" prong also suggests that no duty should be imposed because protecting every person with whom a business's employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden.[17]

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plaintiff's son a duty because it had a physician-patient relationship with the plaintiff. *Shepard* is distinguishable from the instant case because in *Shepard* there was a physician-patient relationship between the plaintiff mother and the defendant, while in the instant case there was not even an employer-employee relationship between the stepfather and defendant. Because *Shepard* is distinguishable, we do not need to address whether it was decided correctly; however, we do note that the Court of Appeals concluded that a duty was owed solely on the basis of the existence of a relationship. See *Shepard, supra* at 246 ("Because defendant had a special relationship with plaintiff, we conclude that defendant owed a duty of reasonable care to [plaintiff's son]."). As we explained above, although the nonexistence of a relationship precludes the imposition of a duty, the existence of a relationship does not require the imposition of a duty. Instead, where the existence of a relationship is found, the other factors must be considered before a duty can be imposed.

[17] Justice CAVANAGH contends that "the potential burden must be examined *in this limited context*, not extrapolated to all other imaginable potential litigants." *Post* at 531 (emphasis added). He contends further that this question "should also be viewed in the extremely narrow confines of this particular case." *Post* at 536. However, this is not how a court of law properly determines the existence, or nonexistence, of a legal duty, for such a determination will apply not only in the instant case but in the next 500 cases as well. One cannot assess "social benefits" and "social costs" by considering only a "particular" case or without considering other "potential litigants." Unlike Justice CAVANAGH, we refuse to consider whether to impose a new legal duty without regard to the consequences of such a decision for future cases. As New York's highest court explained:

> Plaintiffs assure us that this will not lead to "limitless liability" because the new duty may be confined to members of the household of the employer's employee, or to members of the household of those who come onto the landlord's premises. This line is not so easy to draw, however. For example, an employer would certainly owe the new duty to an employee's spouse (assuming the spouse

Given what we know about asbestos today, i.e., that there is a causal relationship between exposure to asbestos and mesothelioma, and assuming that defendant directed the independent contractor to work with asbestos-containing materials, the "nature of the risk" was serious. Therefore, the "nature of the risk" prong suggests that a duty should be imposed.

However, the "foreseeability of the harm" prong suggests that no duty should be imposed. From 1954 to 1965, the period during which Roland worked at defendant's plant, we did not know what we know today about the hazards of asbestos. See *Exxon Mobil Corp v Altimore,* 2007 Tex App LEXIS 2971 (Tex App, 2007) (holding that because the Occupational Health and Safety Administration did not promulgate regulations prohibiting employers from allowing workers who had been exposed to asbestos to wear their work clothes home until 1972, the risk of "take home" asbestos exposure was not foreseeable to Exxon Mobil before

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lives with the employee), but probably would not owe the duty to a babysitter who takes care of children in the employee's home five days a week. But the spouse may not have more exposure than the babysitter to whatever hazardous substances the employee may have introduced into the home from the workplace. Perhaps, for example, the babysitter (or maybe an employee of a neighborhood laundry) launders the family members' clothes. In short, as we pointed out in *Hamilton*, the "specter of limitless liability" is banished only when "the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." [*In re New York City Asbestos Litigation, supra* at 498, quoting *Hamilton, supra* at 233.]

Unlike Justice CAVANAGH, the New York plaintiffs at least recognized that their burden in urging the creation of a new duty required an assessment of the consequences arising from such a duty for future cases. Moreover, Justice CAVANAGH fails to offer any principled way of distinguishing the claims of household members from other potential claimants—for instance, a person who sat next to Roland on the bus every day after work—on the basis of "the social benefit of a healthy people." *Post* at 544.

1972, and, thus, Exxon Mobil did not owe a duty to the plaintiff, who was allegedly exposed to asbestos brought home on her husband's clothes from 1942 to 1972). Further, plaintiffs' own expert conceded that the first published literature suggesting a "specific attribution to washing of clothes" was not published until 1965. Joint appendix at 897a. Therefore, the risk of "take home" asbestos exposure was, in all likelihood, not foreseeable by defendant while Roland was working at defendant's premises from 1954 to 1965.[18]

Because the ultimate inquiry in determining whether a duty should be imposed involves balancing the social benefits of imposing a duty with the social costs of imposing that duty, we cannot decide whether a duty should be imposed without "assessing the competing policy considerations . . . ." *Friedman, supra* at 22. We must be "concerned with whether it is appropriate public policy to impose liability . . . ." *Smith, supra* at 716 n 24. " ' "[I]n fixing the bounds of duty, not only logic and science, but policy play an important role." ' "

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[18] Justice CAVANAGH criticizes us for relying on *Altimore* rather than "the evidence produced at trial." *Post* at 532. However, he fails to point to *any* "evidence produced at trial" that suggests that the harm was foreseeable. He states that "the transcripts are repeatedly cut off during what appears to be testimony shedding further light on the question of foreseeability." *Post* at 535. If there are pages missing from the transcript that contain "testimony shedding further light on the question of foreseeability," plaintiffs obviously could have included those pages. This is a matter for the Fourteenth District Court of Appeals of Texas, not this Court. That court has certified a question of law, and we have answered that question of law on the basis of the information that has been presented to us.

Also, contrary to Justice CAVANAGH's contention, it should come as no surprise to the parties that we are addressing foreseeability given that it is well-established law in Michigan that foreseeability, is a factor to be considered in determining whether a legal duty should be imposed. Nevertheless, "other considerations may be, and usually are, more important." *Buczkowski, supra* at 101.

CSX Transportation, supra at 890, quoting *Widera, supra* at 307 (other citations omitted). " '[T]here is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree.' " *CSX Transportation, supra* at 890, quoting *Widera, supra* at 307. " '[I]n determining whether a duty exists, courts must be mindful of the precedential . . . effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.' " *In re New York City Asbestos Litigation, supra* at 493, quoting *Hamilton, supra* at 232 (other citations and internal quotation marks omitted). " 'Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs.' " *Id.*

As the United States Supreme Court has recognized, this country is experiencing an "asbestos-litigation crisis" as a result of the " 'elephantine mass of asbestos cases' lodged in state and federal courts . . . ." *Norfolk & W R Co v Ayers,* 538 US 135, 166; 123 S Ct 1210; 155 L Ed 2d 261 (2003) (citation omitted). Asbestos claims have given rise to one of the most costly products-liability crises ever within our nation's legal system. "Asbestos claims continue to pour in at an extraordinary rate [and] scores of employers have been forced into bankruptcy." Behrens & Cruz-Alvarez, *A potential new frontier in asbestos litigation: Premises owner liability for "take home" exposure claims*, 21 Mealey's Litig Rep Abs 1, 4 (2006). Some commentators have said that "[b]efore it ends, the litigation may cost up to $195 billion—on top of the $70 billion spent through 2002." *Id.* These same commentators have explained:

> Premises owner liability for "take home" exposure injuries represents the latest frontier in asbestos litigation.

> These actions clearly involve highly sympathetic plaintiffs. Yet, as several leading courts have appreciated, the law should not be driven by emotion or mere foreseeability. Broader public policy impacts must be considered, including the very real possibility that imposition of an expansive new duty on premises owners for off-site exposures would exacerbate the current "asbestos-litigation crisis." Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes . . . .
>
> Furthermore, adoption of a new duty rule for employers could bring about a perverse result: nonemployees with secondary exposures could have greater rights to sue and potentially reap far greater recoveries than employees. Namely, secondarily exposed nonemployees could obtain noneconomic damages, such as pain and suffering, and possibly even punitive damages; these awards are not generally available to injured employees under workers' compensation. [*Id.* at 5.]

In *Henry v Dow Chemical Co,* 473 Mich 63; 701 NW2d 684 (2005), this Court held that mere exposure to a negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, does not give rise to a negligence action. We explained:

> [W]e have on occasion allowed for the development of the common law as circumstances and considerations of public policy have required. But as Justice YOUNG has recently observed, our common-law jurisprudence has been guided by a number of prudential principles. See YOUNG, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences," *id.* at 307, a principle that is quite applicable to the present case.

> Plaintiffs have asked us to recognize a cause of action that departs drastically from our traditional notions of a valid negligence claim.[19] Beyond this enormous shift in our tort jurisprudence, judicial recognition of plaintiffs' claim may also have undesirable effects that neither we nor the parties can satisfactorily predict. For example, recognizing a cause of action based solely on exposure—one without a requirement of a present injury—would create a potentially limitless pool of plaintiffs. [*Id.* at 83 (citations and emphasis omitted).]

Just as recognizing a cause of action based solely on exposure would create a potentially limitless pool of plaintiffs, so too would imposing a duty on a landowner to anybody who comes into contact with somebody who has been on the landowner's property. "We would be unwise, to say the least, to alter the common law in the manner requested by plaintiffs when it is unclear what the consequences of such a decision may be and when we have strong suspicions . . . that they may well be disastrous." *Id.* at 88 (citation omitted). "The recognition of a common-law cause of action under the circumstances of this case would, in our opinion, expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.[20] Accordingly, we decline to promulgate a

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[19] In response to the "asbestos-litigation crisis," this Court adopted an administrative order precluding trial courts from " 'bundling' asbestos-related cases for settlement or trial." Administrative Order No. 2006-6, 476 Mich xliv. One of the purposes of this order was to ensure that asbestos litigants are subject to traditional legal standards. Therefore, it would be inconsistent for us now to suggest that traditional legal standards should not apply to asbestos litigants.

[20] Justice CAVANAGH would impose a duty here because the social benefit of compensating somebody for a loved one's death is "tremendous." *Post* at 538. We certainly do not quarrel with him in this characterization. However, we do not believe that this automatically allows courts to ignore the social costs of imposing a duty. Although every death, or serious injury, is indeed "tremendous," this is no warrant for placing responsi-

policy which would extend the common law so as to bring the . . . plaintiff[s] within a class of people whose interests are entitled to protection from the defendant's conduct." *CSX Transportation, supra* at 890 (citation omitted).[21]

Finally, plaintiffs argue that under the "inherently dangerous activity" doctrine, property owners may owe a duty to somebody who has never been on their property even where they do not owe a duty to their own employees or the employees of an independent contractor that they have hired. Plaintiffs are correct

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bility upon an inappropriate defendant. Not every death or serious injury, however genuinely "tremendous," is legally compensable by someone else. Under Justice CAVANAGH's approach, no matter how attenuated or remote the relationship between the parties, if a plaintiff has suffered a death, or presumably any kind of serious injury, he or she would prevail. This is simply not the law in Michigan or in any other state. Nor could it be the law in any reasonably functioning society that desires that its resources be devoted to something other than litigation. Justice CAVANAGH would impose liability here because Carolyn Miller died. One need not fail to recognize the gravity of this occurrence to recognize that additional analysis is required under traditional legal rules.

[21] Plaintiffs and Justice CAVANAGH rely heavily on *Olivo, supra* at 405, which held that any duty owed to the members of a worker's household constitutes a "derivative duty," i.e., one derived from the duty owed to the worker himself. Thus, even under *Olivo,* no duty is owed to a worker's household members unless a duty is owed to the worker himself. Justice CAVANAGH, however, concludes that defendant owed Miller a duty without considering whether defendant owed Roland a duty. Because Roland was an employee of an independent contractor, defendant would have owed him a duty under Michigan law only if it could be shown that the "common work area" doctrine was satisfied *and* that defendant "retained control" over the work being performed. *Ormsby v Capital Welding, Inc,* 471 Mich 45, 55; 684 NW2d 320 (2004). To our knowledge, there was no evidence presented establishing the " 'unusually high degree of control' " over the relining projects required by *Ormsby, supra* at 55 (citation omitted). Indeed, the jury instructions given on this point seem inconsistent with Michigan law. However, given that we conclude that defendant owed no duty to Miller regardless of whether defendant owed a duty to Roland, it is not necessary for us to decide whether defendant owed a duty to Roland.

that under the "inherently dangerous activity" doctrine, property owners may owe a duty to a person who has never been on their property even though they owe no duty to their employees or the employees of their independent contractors. *DeShambo v Anderson,* 471 Mich 27, 38; 684 NW2d 332 (2004). However, the "inherently dangerous activity" doctrine is not at all applicable to the instant case. "[U]nder this doctrine, the landowner must itself owe some duty to the specific third party, . . . the negligent act that causes the injury cannot be collateral to the work contracted for, and . . . the injury that occurs must be reasonably expected by the landowner." *Id.* at 34.

First, for the reasons discussed above, defendant owed no duty to Miller. In addition, the "inherently dangerous activity" doctrine only applies to persons on the defendant's property, passing by the property, or on neighboring property. See *Detroit v Corey,* 9 Mich 165 (1861) (a passerby fell into a ditch); *Darmstaetter v Moynahan,* 27 Mich 188 (1873) (a passerby ran into a wall of ice); *McWilliams v Detroit Central Mills Co,* 31 Mich 274 (1875) (a passerby was run over by a railroad car); *Rogers v Parker,* 159 Mich 278; 123 NW 1109 (1909) (a fire spread to neighboring land); *Inglis v Millersburg Driving Ass'n,* 169 Mich 311; 136 NW 443 (1912) (a fire spread to the plaintiff's adjoining land); *Olah v Katz,* 234 Mich 112; 207 NW 892 (1926) (a neighbor's child fell in a hole); *Wight v H G Christman Co,* 244 Mich 208; 221 NW 314 (1928) (sparks from a steam shovel started an adjacent house on fire); *Watkins v Gabriel Steel Co,* 260 Mich 692; 245 NW 801 (1932) (a worker fell from third story as a result of improperly fastened steel joists); *Tillson v Consumers Power Co,* 269 Mich 53; 256 NW 801 (1934) (excavation on property caused damage to an adjacent property); *Grinnell v Carbide & Carbon Chemicals Corp,* 282 Mich

509; 276 NW 535 (1937) (a boat exploded, seriously injuring its passengers); *Barlow v Krieghoff Co,* 310 Mich 195; 16 NW2d 715 (1944) (a child fell into a bucket of hot tar on an adjacent lot); *McDonough v Gen Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972) (a boom fell on a worker); see also *DeShambo, supra,* at 33 (" ' "[A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences *to his neighbor* must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see the doing of that which is necessary to prevent mischief, and cannot relieve himself of his responsibility by employing some one else." ' ") (citations omitted; emphasis in the original); Prosser & Keeton, Torts (5th ed), § 71, p 514 (inherently dangerous activity doctrine is limited to activity that poses a "specific risk or set of risks to *those in the vicinity*") (emphasis added). The "inherently dangerous activity" doctrine has never been applied to extend a property owner's duty to somebody completely disconnected from the property.[22]

Second, "the negligent act that causes the injury cannot be *collateral* to the work contracted for . . . ." *DeShambo, supra* at 34 (emphasis added). Here, the work contracted for was the relining of blast furnaces. Plaintiffs argue that defendant was negligent in providing the workers with materials that contained asbestos.

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[22] Further, the "inherently dangerous activity" doctrine only applies to nondelegable duties. *DeShambo, supra* at 34 (the inherently dangerous activity doctrine is "founded on the existence of a duty on behalf of the landowner, or employer of an independent contractor, and the duty must be of the type that is nondelegable"). The removal of asbestos containing materials is certainly not a nondelegable duty. Otherwise, a homeowner who hired a person to remove asbestos from his house could be held liable to somebody who that person exposed to asbestos. This cannot be the case. Homeowners must be able to delegate this duty to professionals who are specifically trained in removing asbestos without fear of liability.

This allegedly negligent act—providing unsafe materials—was "collateral" to the work contracted for—the relining of the blast furnaces.

Finally, "the injury that occurs must be reasonably expected by the landowner." *Id*. As discussed above, the risk of "take home" asbestos exposure, in all likelihood, was not reasonably expected by defendant while Roland was working at defendant's plant from 1954 to 1965. For these reasons, the "inherently dangerous activity doctrine" does not apply here.

IV. CONCLUSION

In Michigan, "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." *Friedman, supra* at 22. The social benefits of imposing a duty must outweigh the social costs of doing so. The inquiry involves considering, among any other relevant considerations: " 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.' " *Dyer, supra* at 49, quoting *Murdock, supra* at 53, citing *Buczkowski, supra* at 100. However, the most important factor pertains to the relationship between the parties. Because any relationship between Miller and defendant was highly tenuous, the harm was, in all likelihood, not foreseeable, the burden on defendant would be onerous and unworkable, and the imposition of a duty, under these circumstances, would " 'expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs,' " *CSX Transportation, supra* at 890 (citation omitted), we conclude that a legal duty should not be imposed. For these reasons, we answer the

certified question in the negative. That is, we hold that, under Michigan law, defendant, as owner of the property on which asbestos-containing products were located, did not owe to the deceased, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household who was working on that property as the employee of independent contractors, where there was no further relationship between defendant and the deceased. Having answered the certified question, we now return the matter to the Fourteenth District Court of Appeals of Texas for such further proceedings as that court deems appropriate.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). I dissent from the majority opinion because I do not believe that this Court should substantively decide this appeal. In fact, without the participation of Justice YOUNG, who strongly believes that this Court lacks the constitutional authority to answer the certified question,[1] this Court would not have answered the question. I would point out the curiosity that Justice YOUNG's constitutional conscience would allow him to subordinate his deeply held belief to provide the fourth vote to answer the question in this case. Despite the fact that he has participated in answering certified questions before, the fact remains that had he not provided the deciding vote to answer *this* certified question, he would have caused the Court not to answer the question, which surely would have aligned much better with his view against providing a

[1] See *In re Certified Question (Veliz v Cintas Corp)*, 474 Mich 1228 (2006) (YOUNG, J., concurring); *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005) (YOUNG, J., concurring).

foreign court with a "didactic exegesis on our law" than answering it. See *In re Certified Question (Veliz v Cintas Corp)*, 474 Mich 1228 (2006) (YOUNG, J., concurring). This situation differs from the previous cases in which Justice YOUNG participated because in those cases there were enough votes to answer the question regardless of his participation. In other words, his vote in those cases had no impact on the fact that the question was answered.[2]

In any event, I further disagree that Michigan law compels the result the majority reaches. Contrary to the majority's conclusion, defendant could be found to owe a duty to Carolyn Miller with respect to asbestos contamination through take-home exposure. Regarding our role in this case, it is my view that the question certified to us by the Texas court improperly asks us to decide the specific case pending before that court. The Texas court asked

> [w]hether, under Michigan law, Ford, as owner of property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court, to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

By this wording, the Texas court has asked this Court to decide the case without the benefit of examining it on direct appeal under an applicable standard of review. Moreover, in my view, this state's well-developed negligence precedents would enable the Texas court to

[2] Compare this to *Melson*, *supra*, wherein Justice YOUNG could have provided, but did not provide, the fourth vote to answer the question. Thus, I fail to see the same laudability of this inconsistent and unpredictable behavior that Justice MARKMAN does. See *ante* at 502-503 n 2.

decide the case before it without resort to an advisory opinion or a substantive decision from this Court.

The answer to the Texas court's formulation of the certified question depends on the intricacies of this specific case, and because of these complexities I would decline to answer the question. I do not believe that we should entangle ourselves in an appeal pending in another state by determining whether this defendant owed a duty to Carolyn Miller. If anything, we should be determining only whether Michigan law would permit the Texas court to hold that defendant owed a duty to Carolyn Miller. But by deciding the case, this Court oversteps its advisory role and decides issues of fact without the benefit of full review.

However, because the majority decides the case, I must register my disagreement with its analysis. Contrary to the majority's position, I would hold that a duty can be imposed in the present case. I am guided first and foremost by traditional principles of negligence set forth by this Court in *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967):

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, *which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.* *Pinnix* v. *Toomey*, (1955), 242 NC 358, 362 (87 SE2d 893).

> Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. [Emphasis added.]

The majority ignores these fundamental principles, and I do not find its attempt to diminish their import, *ante* at 509 n 10, persuasive. Further, the majority misstates other aspects of Michigan law. For instance, although the majority spends considerable time opining that, in a duty analysis, "[t]he most important factor to be considered is the relationship of the parties," *ante* at 505, 515, this is not a bright-line rule in this state, and it is not true in every factual situation. In *Buczkowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992), this Court recognized that "[c]ourts take a variety of approaches in determining the existence of a duty, utilizing a wide array of variables in the process. Frequently, the first component examined by the court is the foreseeability of the risk. However, other considerations may be, and usually are, more important." The fact that the relationship between the parties is a component of a duty analysis and may, at times, be given more weight than another of the components certainly does not mean that the relationship is the most important inquiry.[3] How heavily to weigh each of the several factors depends on the precise situation at hand.[4]

Many variables are considered in a duty analysis. As the *Buczkowski* Court noted:

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[3] It should be noted that in *Buczkowski*, the nature of the injured person's claim involved the criminal act of a third party. Here, no third-party conduct is involved. The analysis, therefore, will not be identical to that in *Buczkowski*.

[4] For a recent case in which the relationship of the parties was hardly mentioned but in which foreseeability was this same majority's paramount focus, see *Brown v Brown*, 478 Mich 545; 739 NW2d 313 (2007).

> Dean Prosser described the several variables that consistently go to the heart of a court's determination of duty as including: foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach. [*Id.* at 101 n 4, quoting Prosser & Keeton, Torts (5th ed), § 53, p 359 n 24.]

Each of these factors is significant, and the majority incorrectly represents the law in this state by asserting that the relationship between the parties is the most important. Only by subordinating these factors to that of relationship is the majority able to discount every opinion of another state in which a duty was found with respect to take-home exposure.

With respect to relationship, the majority states that because Carolyn Miller was never "on or near defendant's property," the relationship prong "strongly suggests that no duty should be imposed." *Ante* at 515. But the majority's severely curtailed view of "relationship" seems to be based on its view of premises liability law rather than on the principles of ordinary negligence. Under the latter (and the former as well, although that is not at issue here), a harmed person need not visit the property of the injuring party. This case involves an employer who exposed a worker to asbestos, knowing that the asbestos fibers were toxic and could be carried home, thus exposing the worker's family to asbestos. Under these circumstances, I have no difficulty concluding that the relationship that a jury found defendant had to Cleveland "John" Roland extended to Carolyn Miller. To conclude otherwise, as does the majority, ignores basic negligence principles and gives employers carte blanche to expose workers to communicable toxic substances without taking any

measure whatsoever to prevent those substances from harming others. This I cannot do. Indeed, as discussed later in this dissent, our government also refuses to grant this free pass.

Moreover, I disagree that the burden defendant would bear by shouldering a duty with respect to Carolyn Miller is so great that innocent people must suffer without recourse. Our federal government has stated that it "is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed Reg 22615 (1986). In assessing whether defendant should have a duty, I would find that the extreme toxicity of asbestos weighs heavily in favor of finding that defendant had a duty to protect those whom defendant put at risk by exposing them to it.

The majority also seriously overstates what the consequences of imposing a burden on defendant would truly be by asserting that, if a duty were imposed, businesses would have to "protect[] every person with whom a business's employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact . . . ." *Ante* at 516. That is incorrect. The certified question is specific to this case in that it asks whether this defendant should be found to have a duty owed to Carolyn Miller. Thus, the potential burden must be examined in this limited context, not extrapolated to all other imaginable potential litigants.[5] And again, as will be discussed in this dissent,

[5] In response to the majority, *ante* at 516 n 17, I did not write the certified question. The Texas appellate court wrote the certified question, and it wrote it in probably the most specific way possible. The majority oversteps the bounds of the question by considering factors that are not

defendant now has a regulatory duty to minimize the potential for take-home exposure. Thus, holding that defendant had a duty to this particular person would not impose nearly the burden the majority claims. Questions of duty specifically entail drawing lines, and under a properly tailored rule, the duty could be appropriately limited. Thus, the majority mischaracterizes the burden and concludes, on the basis of unwarranted extremism, that the burden is too great. I would not conclude that the burden of imposing a duty on defendant, whose actions led to Carolyn Miller's exposure to a toxic substance, would be too large to bear.

I further take issue with the majority's conclusion regarding foreseeability. In its analysis, the majority commits three errors. First, it reasons that because foreseeability was not found with respect to Exxon Mobil in *Exxon Mobil Corp v Altimore*, unpublished opinion of the Texas Court of Appeals, issued April 19, 2007 (Docket No. 14-04-01133-CV), "the risk of 'take home' asbestos exposure was, in all likelihood, not foreseeable by defendant while [John] Roland was working at defendant's premises from 1954 to 1965." *Ante* at 518. But the *Altimore* court based its holding on the evidence produced at trial, as it should have. See *Altimore*, *supra*, 2007 Tex App LEXIS 2971 at *36. This Court's conclusion, too, should be based on the evidence produced at trial. It is improper for this majority to rely on another court's holding to determine whether this defendant in the present case knew or should have known of the risk.

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at issue in this case. And there is nothing novel about deciding the legal question of duty as it pertains to a particular set of parties. Although duty is a question of law, it will always be answered in the context of a unique set of circumstances. The factors used in a duty analysis make that clear; for instance, the relationship of *these* parties and whether the harm was foreseeable to *this* defendant are considered.

It may be of interest to the reader that in a different case involving Exxon Mobil, the evidence showed that Exxon Mobil was fully aware of the possibility of take-home exposure:

> Exxon Mobil was aware by 1937 that exposure, of sufficient duration and intensity, to asbestos dust or raw asbestos was associated with asbestosis. Moreover, a report prepared in 1937 specifically for the petroleum industry, detailed the hazards associated with "occupational dust," including asbestos particles, which was prevalent at petroleum plants. [*Olivo v Owens-Illinois, Inc*, 186 NJ 394, 404; 895 A2d 1143 (2006).]

The majority's mention of only the case in which Exxon was not found to know of the risk is curious.

It is also worth noting that it has not proved unusual to find that an employer knew or should have known about the risk of take-home exposure at the times relevant to this case. In *Condon v Union Oil Co of California*, unpublished opinion of the California Court of Appeals, issued August 31, 2004 (Docket No. A102069), the court relied on expert testimony indicating that

> in 1924 in the United States, it was recognized that workers handling toxic substances should have separate lockers for work and street clothes to prevent their families from being exposed to any toxic dust from the workers' clothes. [The expert] testified that in 1948, a leading industrial hygienist in the oil industry recommended that refinery workers change clothes prior to going home, and that the refinery launder the work clothes to avoid contaminating the worker's home with carcinogenic materials. [*Condon, supra,* 2004 Cal App Unpub LEXIS 7975 at *13.]

In any event, it should be self-evident that a finding regarding foreseeability must be based on the evidence specific to a particular case. And here, plaintiffs presented evidence, which the jury clearly believed, that

this defendant knew of the hazards of asbestos at the relevant times. The focus should be on what this defendant knew, not on what Exxon Mobil was found to know in *Altimore*. By ascribing no weight to the evidence that plaintiffs produced at trial and relying on another court's findings regarding the evidence produced at a different trial involving a different defendant, the majority upends the jury's finding and improperly decides a factual matter.

Nor should the analysis hinge on what date the first literature connecting take-home exposure with clothes washing was published, the majority's second error. See *ante* at 518 ("[P]laintiffs' own expert conceded that the first published literature suggesting a 'specific attribution to washing of clothes' was not published until 1965."). And defendant asserts that no foreseeability can be found before 1972—the year the Occupational Safety and Health Administration (OSHA) began regulating the taking home of clothing exposed to asbestos. But research on the dangers of exposure to asbestos had been going on for decades, and warnings appeared far earlier. In fact, "[a]s early as 1916, industrial hygiene texts recommended that plant owners should provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes." *Olivo*, *supra* at 404. The question is not what year literature was published regarding the dangers of washing contaminated clothing or what year OSHA instituted regulations. Neither of those dates is dispositive if it can be shown, which it apparently was, that defendant had some other source of knowledge and information at the relevant time. Consequently, were the foreseeability inquiry properly conducted and limited to the evidence produced at this trial, this factor might have weighed in plaintiffs' favor.

Importantly, though, and this pertains to the majority's third error, the question of foreseeability is a question addressable only on full appellate review, of which we do not have the benefit. First, there is no stated standard of review under which to substantively review the jury's findings for correctness. Further, the parties have not submitted the entire trial transcript, but instead have provided only excerpts. While the portions that have been submitted contain some of plaintiffs' expert's testimony regarding what defendant knew and what information was available to defendant, the transcripts are repeatedly cut off during what appears to be testimony shedding further light on the question of foreseeability.[6] Thus, a proper review of

[6] The majority asserts that because the transcripts do not contain the full discussion of foreseeability that occurred at trial, evidence regarding defendant's knowledge of the dangers of exposing workers to asbestos must not exist. *Ante* at 518 n 18. I find this an extremely backward way to go about the analysis. First, I must mention again that *the jury found foreseeability*. I would not surmise, as does the majority, that this finding was based on nothing. The majority must believe that the jury was either unintelligent or deliberately failed to follow the jury instructions. I find both conclusions insulting and refuse to make them. Further, there is a perfect explanation of why the parties did not include the entire transcript: *this Court was not supposed to factually redecide the issue of foreseeability*. Rather, this Court should, if anything, consider what was found about foreseeability in the course of weighing the duty factors. The difference between weighing *the jury's finding* with respect to foreseeability in the duty analysis and reaching its *own* factual conclusions about foreseeability is a critical difference the majority fails to grasp. See *ante* at 518 n 18.

The majority is free to thoroughly review the trial testimony excerpts as I have done. On doing so, it would indeed find numerous instances of testimony that support the jury's findings. The record is far from devoid of such evidence. But I cannot in good conscience render a definitive conclusion regarding foreseeability for the mere fact that the transcript is incomplete.

The fact that the majority believes that other factors are more important than foreseeability, *ante* at 518 n 18, does not mitigate the fact

whether this defendant knew of the risks posed by take-home exposure is impossible for this Court to conduct, and the majority errs by nevertheless conducting it. This is yet another reason why it is both irregular and improper for this Court to substantively decide this case.

Moving on, I differ greatly with the majority regarding the outcome of what it deems the "ultimate inquiry": "whether the social benefits of imposing a duty outweigh the social costs of imposing that duty." *Ante* at 515. First, this question should also be viewed in the extremely narrow confines of this particular case. Specifically, the Texas court has asked whether this defendant had a duty to Carolyn Miller. Holding that this defendant had a duty to Carolyn Miller would not create a universal cause of action for every potential take-home exposure case. Thus, the majority needlessly invokes the sky-is-falling genre of arguments advanced by commentators who have been openly critical of asbestos litigation and tort recovery in general. See *ante* at 519-520. Quite simply, there has been no showing in this case that were defendant found to have a duty, " 'a potentially limitless pool of plaintiffs' " or " 'an almost infinite universe of potential plaintiffs' " would be created. *Ante* at 521 (citations omitted). In fact, one of the very commentators the majority quotes recently wrote that "after years of downward spiral, the asbestos litigation tide finally may be turning." Behrens &

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that the majority decides the question of foreseeability using an incorrect process. Moreover, I do not see anything left for the Texas court's determination, contrary to the majority's statement that "[t]his is a matter for the Fourteenth District Court of Appeals of Texas, not this Court." *Ante* at 518 n 18. In my reading, the majority decides that the risk was not foreseeable to defendant. See *id.* However, because this Court's answer to a certified question is purely advisory and does not constitute binding precedent, the Texas court is free to draw its own conclusions with respect to the meaning, or applicability, of the majority opinion.

Goldberg, *The asbestos litigation crisis: The tide appears to be turning*, 12 Conn Ins L J 477, 478 (2006).[7]

And several courts have adequately addressed the majority's concern with reasoning I find persuasive. One explained that the public policy concerns would "dissipate" because it was only recognizing a duty based on "the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband." *Olivo*, *supra* at 405. Another recognized that a rule could be properly tailored so as to avoid creating this majority's feared "infinite universe of potential plaintiffs": "[L]imitless liability would not be created in this case if we found a duty under these particular facts and circumstances." *Chaisson v Avondale Industries, Inc*, 947 So 2d 171, 182 (La App, 2006), clarified on reh 947 So 2d 200 (2007).[8]

But even so, the majority's conclusion that the social costs of imposing a duty outweigh the social benefits requires elevating corporate vitality over the health and well-being of humanity. The majority's statements re-

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[7] Interestingly, this same article attributes the "asbestos litigation crisis" not to those who, like plaintiffs' decedent, are or were truly ill, but to what the authors describe as healthy plaintiffs who have been "unearth[ed]" by profitable "mass screenings programs." Behrens & Goldberg, *supra* at 479. The authors observe that " 'the "asbestos litigation crisis" would never have arisen and would not exist today' if not for the claims filed by the unimpaired." *Id.*, quoting Brickman, *Lawyers' ethics and fiduciary obligation in the brave new world of aggregative litigation*, 26 Wm & Mary Environmental L & Pol'y R 243, 273 (2001). If this is correct, the majority's striving to shelter defendant from liability in the case of someone who did truly ail is unnecessary. According to the majority's own authority, it is not people like Carolyn Miller who are the "problem."

[8] And I would note that the absence of any evidence that Roland rode a bus home from work every day should alleviate the majority's concern that fellow passengers could sue defendant under my rationale. See *ante* at 517 n 17.

garding the social burden abound with tales of corporate bankruptcy, litigation crises, and the costs in dollars that have stemmed *from exposing workers to asbestos*.[9] See *ante* at 519-520. But the majority is strangely silent with respect to the toll that asbestos exposure has taken on human life. By focusing solely on the losses suffered by businesses, the majority fails to account for the social benefits that would ensue from ensuring that people who are exposed to detrimental substances and who, consequently, suffer ruined health, life-altering and life-ending diseases, and the loss of family members, are compensated.[10] When workers are protected from deadly substances, society benefits. When corporations are held accountable for the consequences their processes have on those who toil to make the corporations viable, society benefits. When our justice system fairly places the burden of responsibility for dangerous products on the offending party, rather than the one who suffers, society benefits.

Unlike the majority, I would find a tremendous social benefit in imposing corporate accountability, and I would conclude that the social benefits of corporate responsibility and a valued, healthy society easily out-

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[9] I emphasize this because my sense from reading the majority's opinion is that the majority believes that blame for the financial toll asbestos exposure has taken lies with the people who have been injured and who have sued rather than with those who exposed them to the product. This, to me, would be a gross misunderstanding.

[10] And the majority's dire global predictions omit mention of the fact that take-home exposure cases represent only about six percent of total asbestos cases. Plaintiffs' brief on appeal, p 30, citing Roggli et al., *Malignant mesothelioma and occupational exposure to asbestos: A clinicopathological correlation of 1445 cases*, 26 Ultrastructural Pathology 55 (2002). For two other recent examples of an improperly skewed analysis of corporate cost versus social benefit, see *Greene v A P Products, Ltd*, 475 Mich 502; 717 NW2d 855 (2006), and *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005).

weigh the burden of imposing a duty on corporations to mitigate the risk of take-home exposure, especially in light of the fact that they have been required to do so anyway for the last 35 years.

And the majority proclaims that "[n]ot every death or serious injury, however genuinely 'tremendous,' is legally compensable by someone else." *Ante* at 522 n 20. This is true, but with respect to this case, it is a direct consequence of the majority's holding that an employer who allowed a contaminated worker to expose his family to a deadly substance had no duty to act differently. It is not that the death is inherently not compensable. Rather, it is after such a holding that the death is not compensable. But the majority fails to comprehend that who must compensate this victim of harm is determined by its own creation and interpretation of the law. The majority should not disregard its singular role in preventing compensation and then shrug off the consequences of that role by saying, in essence, "Sorry, not everything is compensable."

And I would not impose liability simply "because Carolyn Miller died" or allow a plaintiff to prevail "no matter how attenuated or remote the relationship between the parties, if a plaintiff has suffered a death, or presumably any kind of serious injury . . . ." *Ante* at 522 n 20. Readers will see through these empty allegations simply by reading this dissent, in which it is thoroughly explained why each factor in the analysis of whether a duty should be imposed weighs in plaintiffs' favor. And readers perusing the opinions of other states that have found a duty in similar circumstances may reject out of hand the majority's assertions that "[t]his is simply not the law . . . in any other state. Nor could it be the law in any reasonably functioning society that desires that its resources be devoted to something other than

litigation." *Ante* at 522 n 20. For instance, a Louisiana court easily found a duty for reasons similar to mine:

> In considering the moral, social, and economical factors of imposing a duty, we find that public policy also weighs in favor of finding a duty. First, the economic impact of imposing a duty on Zachry is minimal. The fact that this case presents *res nova* determinations for this Court demonstrates the small number of cases. Second, there is a public policy need to prevent future harm like this from occurring. If courts allow employers to turn a blind eye to potential work hazards simply because they are hired by someone else, companies may be more likely to rely upon others' representations and perform no safety inspections of their own. Third, the possibility of limitless liability is of no concern because finding a duty in this case would not create a categorical duty rule, but one based upon the facts and circumstances of this case. Fourth, the historical precedent and development of institutional guidelines show that courts are holding companies liable for negligence based on unsafe work conditions. This desire for accountability is also shown in the strengthening of OSHA [Occupational Safety and Health Administration] regulations to allow for minimal asbestos exposure to workers and none to household members. Finally, public policy favors a duty in this case where a "construction contractor" took no independent steps to protect its employees' family members from household exposure to hazardous materials. [*Chaisson*, *supra* at 183-184.]

Indeed, not even our federal government believes that requiring employers to protect workers and their families from asbestos exposure is too cumbersome a burden. In fact, quite the opposite is true. OSHA has promulgated stringent requirements on employers whose employees encounter asbestos in the work environment. See 29 CFR 1926.1101. In no uncertain terms, OSHA has set forth strict procedures to decontaminate workers who handle asbestos on the job. These rigorous measures reflect OSHA's awareness that the deadly and

communicable nature of asbestos fibers merits mandating an involved process to prevent the spread of asbestos fibers:

> (1) Requirements for employees performing Class I asbestos jobs involving over 25 linear or 10 square feet of TSI [thermal system insulation] or surfacing ACM [asbestos-containing material] and PACM [presumed asbestos-containing material].
>
> (i) *Decontamination areas*. The employer shall establish a decontamination area that is adjacent and connected to the regulated area for the decontamination of such employees. The decontamination area shall consist of an equipment room, shower area, and clean room in series. The employer shall ensure that employees enter and exit the regulated area through the decontamination area.
>
> (A) *Equipment room*. The equipment room shall be supplied with impermeable, labeled bags and containers for the containment and disposal of contaminated protective equipment.
>
> (B) *Shower area*. Shower facilities shall be provided which comply with 29 CFR 1910.141(d)(3), unless the employer can demonstrate that they are not feasible. The showers shall be adjacent both to the equipment room and the clean room, unless the employer can demonstrate that this location is not feasible. Where the employer can demonstrate that it is not feasible to locate the shower between the equipment room and the clean room, or where the work is performed outdoors, the employers shall ensure that employees:
>
> (*1*) Remove asbestos contamination from their worksuits in the equipment room using a HEPA [high-efficiency particulate air filter] vacuum before proceeding to a shower that is not adjacent to the work area; or
>
> (*2*) Remove their contaminated worksuits in the equipment room, then don clean worksuits, and proceed to a shower that is not adjacent to the work area.

(C) *Clean change room*. The clean room shall be equipped with a locker or appropriate storage container for each employee's use. When the employer can demonstrate that it is not feasible to provide a clean change area adjacent to the work area or where the work is performed outdoors, the employer may permit employees engaged in Class I asbestos jobs to clean their protective clothing with a portable HEPA-equipped vacuum before such employees leave the regulated area. Following showering, such employees however must then change into street clothing in clean change areas provided by the employer which otherwise meet the requirements of this section.

(ii) *Decontamination area entry procedures*. The employer shall ensure that employees:

(A) Enter the decontamination area through the clean room;

(B) Remove and deposit street clothing within a locker provided for their use; and

(C) Put on protective clothing and respiratory protection before leaving the clean room.

(D) Before entering the regulated area, the employer shall ensure that employees pass through the equipment room.

(iii) *Decontamination area exit procedures*. The employer shall ensure that:

(A) Before leaving the regulated area, employees shall remove all gross contamination and debris from their protective clothing.

(B) Employees shall remove their protective clothing in the equipment room and deposit the clothing in labeled impermeable bags or containers.

(C) Employees shall not remove their respirators in the equipment room.

(D) Employees shall shower prior to entering the clean room.

(E) After showering, employees shall enter the clean room before changing into street clothes.

* * *

(2) Requirements for Class I work involving less than 25 linear or 10 square feet of TSI or surfacing ACM and PACM, and for Class II and Class III asbestos work operations where exposures exceed a PEL [permissible exposure limit] or where there is no negative exposure assessment produced before the operation.

(i) The employer shall establish an equipment room or area that is adjacent to the regulated area for the decontamination of employees and their equipment which is contaminated with asbestos which shall consist of an area covered by a impermeable drop cloth on the floor or horizontal working surface.

(ii) The area must be of sufficient size as to accommodate cleaning of equipment and removing personal protective equipment without spreading contamination beyond the area (as determined by visible accumulations).

(iii) Work clothing must be cleaned with a HEPA vacuum before it is removed.

(iv) All equipment and surfaces of containers filled with ACM must be cleaned prior to removing them from the equipment room or area.

(v) The employer shall ensure that employees enter and exit the regulated area through the equipment room or area.

(3) *Requirements for Class IV work*. Employers shall ensure that employees performing Class IV work within a regulated area comply with the hygiene practice required of employees performing work which has a higher classification within that regulated area. Otherwise employers of employees cleaning up debris and material which is TSI or

surfacing ACM or identified as PACM shall provide decontamination facilities for such employees which are required by paragraph (j)(2) of this section. [29 CFR 1926.1101(j)(1) to (3).]

(2) *Laundering*.

(i) The employer shall ensure that laundering of contaminated clothing is done so as to prevent the release of airborne asbestos in excess of the TWA [time-weighted average limit] or excursion limit prescribed in paragraph (c) of this section.

(ii) Any employer who gives contaminated clothing to another person for laundering shall inform such person of the requirement in paragraph (i)(2)(i) of this section to effectively prevent the release of airborne asbestos in excess of the TWA and excursion limit prescribed in paragraph (c) of this section.

(3) *Contaminated clothing*. Contaminated clothing shall be transported in sealed impermeable bags, or other closed, impermeable containers, and be labeled in accordance with paragraph (k) of this section. [29 CFR 1926.1101(i)(2) to (3).]

These requirements were instituted despite the financial and other costs to businesses of implementing them. Although these regulations were not in place when John Roland and Carolyn Miller were exposed to asbestos, their existence demonstrates how seriously our government considered the social *detriments* of asbestos exposure when it imposed these obligations on businesses. While the majority views the alleged projected financial costs of take-home exposure liability as too heavy a social burden, I would conclude that whatever those costs may be, they pale in comparison to the social benefit of a healthy people.

Further, in a duty analysis, the extremely toxic nature of asbestos and the fact that the risk of injury can be reduced must be given proper weight because

duty is a function of the level of risk. As the Tennessee Court of Appeals explained:

> The foreseeability of [the plaintiff's] injury is further buttressed by the severe gravity of the possible harm—mesothelioma and subsequent death. "[T]he degree of foreseeability needed to establish a duty of care decreases in proportion to the magnitude of the foreseeable harm. 'As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.' " *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994) (quoting Prosser [& Keeton, Torts (5th ed)], § 31, at 171. [*Satterfield v Breeding Insulation Co, Inc*, unpublished opinion per curiam of the Tennessee Court of Appeals, issued April 19, 2007 (Docket No. E2006-00903-COA-R3-CV).]

Although the majority states that the nature of the risk weighs in plaintiffs' favor, it seems to struggle with giving that factor the weight it deserves. The data, research, and studies definitively establishing a causal relationship are too numerous to mention, but I would point the majority to OSHA's final standards regarding asbestos in the workplace, in which the toxic ramifications of asbestos exposure were painstakingly detailed. See Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed Reg 22612 (1986). The following are but a few of the conclusions explained in that lengthy document:

> OSHA has followed these guidelines in making a determination that the risk of material health impairment resulting from occupational exposure to asbestos is significant. The epidemiological and toxicological evidence and testimony presented in the November notice and in Section IV (Health Effects) of this preamble clearly show that exposure to asbestos is carcinogenic to humans and additionally causes disabling fibrotic lung disease.

* * *

> Clinical evidence of the adverse effects associated with exposure to asbestos, tremolite, anthophyllite, and actinolite, is present in the form of several well-conducted epidemiological studies of occupationally exposed workers, family contacts of workers, and persons living near asbestos, tremolite, anthophyllite, and actinolite mines. These studies have shown a definite association between exposure to asbestos, tremolite, anthophyllite, and actinolite and an increased incidence of lung cancer, pleural and peritoneal mesothelioma, gastrointestinal cancer, and asbestosis. The latter is a disabling fibrotic lung disease that is caused only by exposure to asbestos. Exposure to asbestos, tremolite, anthophyllite, and actinolite has also been associated with an increased incidence of esophageal, kidney, laryngeal, pharyngeal, and buccal cavity cancers. [51 Fed Reg 22646, 22755.]

In fact, "a joint NIOSH-OSHA Asbestos Work Group stated that there was no level of exposure to asbestos below which clinical effects did not occur . . . ." *Id.* at 22616.

The severely dangerous character of asbestos should factor much more heavily in the analysis of whether defendant had a duty to mitigate the risk involved. The measures to prevent take-home exposure essentially boil down to ensuring that workers shower and change clothes after encountering asbestos. Just those simple actions have the potential to completely eliminate the risk of take-home exposure. But the majority makes this difficult to discern by grossly overstating the burden of imposing a duty. It concerns itself not with the gravity of the health risks or even with the relatively marginal costs of prevention. Instead, the majority's central focal point is this statement: "Asbestos claims have given rise to one of the most costly products-liability crises ever within our nation's legal system." *Ante* at 519.

It is a sad day for our citizens indeed when, confronted with a substance that is so dangerous that compensating victims for their losses has had such hefty financial consequences, this Court tilts the scales of justice to *lessen* liability. The analysis should be the opposite. The more dangerous the product, the more critical it is to impose a duty of protection. If protection and accountability increase, litigation eventually decreases because, obviously, the protections reduce injury.

I am persuaded by the reasoning from courts in our sister states that have held that imposing a duty on an employer to mitigate the risk of take-home exposure is reasonable. Like the court in *Zimko v American Cyanamid*, 905 So 2d 465 (La App, 2005), I would conclude that, assuming defendant knew or should have known of the dangers of take-home exposure, " 'it is hardly a quantum leap to extend the duty of care owed to employees to members of the employee's household who predictably come into routine contact with the employee's clothing. Such persons would certainly fall within the "range of reasonable apprehension" created by defendant's alleged negligence.' " *Id.* at 483, quoting *In re New York City Asbestos Litigation*, 14 AD3d 112, 121; 786 NYS2d 26 (2004). And as the court stated in *Olivo*:

> "The inquiry should be not what common law classification or amalgam of classifications most closely characterizes the relationship of the parties, but . . . whether in light of the actual relationship between the parties *under all of the surrounding circumstances the imposition* . . . of a general duty to exercise reasonable care in preventing foreseeable harm . . . *is fair and just*." [*Olivo*, *supra* at 402, quoting *Hopkins v Fox & Lazo Realtors*, 132 NJ 426, 438; 625 A2d 1110 (1993) (emphasis added).]

Fortunately, the majority does not foreclose the possibility of finding a duty with respect to take-home

exposure under different circumstances. But I would hold that, under close examination of the circumstances of this case, and accepting the jury's finding that defendant knew or should have known of the risk of take-home exposure, imposing a duty on defendant would be, without doubt, fair and just. Accordingly, I dissent.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). I dissent from this Court's decision to answer a question certified from the Fourteenth District Court of Appeals of Texas.

I. CONSTITUTIONALITY

I would decline to answer the certified question in this matter because Michigan Court Rule 7.305(B) represents an improper expansion of this Court's limited power under the Michigan Constitution to answer certain certified questions from the Governor and Legislature, and the majority's use of MCR 7.305(B) to answer a question certified by another state's intermediate appellate court is unprecedented. I continue to question this Court's authority to answer such questions.[1]

MCR 7.305 addresses "certified questions." MCR 7.305(B)(1) articulates the power the Michigan Su-

[1] See, e.g., *Proposed Amendment of MCR 7.305*, 462 Mich 1208 (2000) (WEAVER, J., dissenting); *In re Certified Question (Wayne Co v Philip Morris, Inc)*, 622 NW2d 518 (Mich, 2001) (WEAVER, J., dissenting); *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109; 659 NW2d 597 (2003) (WEAVER, J., concurring in the result only); *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005) (WEAVER, J., concurring).

preme Court has created for itself to answer certified questions from other courts, stating:

> When a federal court, a state appellate court, or 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 Michigan Supreme Court.

MCR 7.305 is a modified version of the Uniform Certification of Questions of Law Act (UCQLA), which provides states a model for court rules on certified questions of law.[2] The UCQLA has not been adopted by the people of Michigan by constitutional amendment, nor has it been adopted by the Michigan Legislature.

MCR 7.305(B) improperly expands this Court's power by granting the Michigan Supreme Court the authority to answer a certified question beyond the scope authorized by the Michigan Constitution. Article 3, § 8 of the Michigan Constitution states:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitu-

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[2] The "power to answer" section of the 1995 version of the UCQLA, 12 ULA, § 3, p 73, provides:

> The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

The UCQLA suggests that "an appellate court of another State" or "the highest court of another State" may be the appropriate certifying body. Further, the UCQLA suggests that the answer to a certified question would be determinative.

> tionality of legislation after it has been enacted into law but before its effective date.

MCR 7.305(B) goes beyond the duties articulated in article 3, § 8 because it undeniably expands the scope of those who may request answers to questions of law, when the questions can be answered, and what types of questions may be answered.

MCR 7.305(B) broadly permits "a federal court, state appellate court, or tribal court" to certify questions of law to the Michigan Supreme Court, while the Michigan Constitution only allows for the issuance of advisory opinions in response to certain requests from the state Legislature or the Governor. Further, MCR 7.305(B) allows an issuing body to ask "a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent." Article 3, § 8, on the other hand, constrains the question of law to be one that is "important" and rests on the "constitutionality of legislation after it has been enacted into law but before its effective date." Moreover, MCR 7.305(B) lacks any language limiting when the Court may answer a certified question, leaving the door and the docket open to the whims of the majority. In contrast, the Michigan Constitution limits advisory opinions by the Supreme Court, on the constitutionality of legislation, to be issued only on "solemn occasions" and "after [legislation] has been enacted into law but before its effective date." Const 1963 art 3, § 8. MCR 7.305 unduly expands the scope of this Court's judicial powers.

Furthermore, MCR 7.305(B) does not and cannot give binding effect to Michigan Supreme Court opinions answering certified questions. Any such answers are merely advisory and do not have binding or precedential value. Thus, this Court's opinion answering the ques-

tion certified by the Texas Court of Appeals has no more precedential value than a brief submitted to that court.[3]

II. OTHER CONCERNS BEYOND CONSTITUTIONALITY

This Court's decision to answer a certified question from another state's intermediate appellate court is

[3] As noted by Justice LEVIN in *In re Certified Question (Bankey v Storer Broadcasting Co),* 432 Mich 438, 467-471; 443 NW2d 112 (1989):

> In the instant case, the response to the certified question will not determine the controversy. No binding order or judgment will be entered. The response will not be made effective by a final judgment, decree or process of this Court. No decision of this Court that will be binding on the parties or that will be res judicata of an issue will be entered by the Court. The response does not end the controversy, and this Court has no way of enforcing its response to the certified question by appropriate means.
>
> * * *
>
> It appears that because the response to the certified question in the instant case would not be determinative of the cause or controversy and, even if it were, the response cannot be enforced through an order or judgment of this Court, that the response to this certified question is not the exercise of judicial power but closer to an advisory opinion.
>
> The 1908 Constitution did not authorize this Court to issue advisory opinions. The 1963 Constitution authorizes the Court to provide the Legislature or the Governor with an advisory opinion.
>
> * * *
>
> Advisory opinions are not precedentially binding under the doctrine of stare decisis.[18]

[18] *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465; 242 NW2d 3 (1976); *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), "modified" on other grounds *DiFranco v Pickard*, 427 Mich 32, 58; 398 NW2d 896 (1986).

unprecedented. This Court's decision to use MCR 7.305(B) to answer the certified question in this case exceeds how other states have answered certified questions. Although MCR 7.305(B) grants this Court the authority to answer a certified question from "a federal court, state appellate court, or tribal court," the power is not constitutionally derived and goes beyond how any other state has ever applied certified question laws.

Forty-six states have adopted or created a modified version of the UCQLA, § 1-14 (1995) and not one single state has utilized the reach of its rule as broadly as the majority does here today.[4] By answering a certified question from an intermediate appellate court of another state, the majority does what no other state has done even when it has been explicitly granted the power to do so. Nineteen states, including Michigan, permit another state to certify questions of law to the supreme court of that state.[5] Of those 19 states, eight

[4] See Alabama, ARAP Rule 18; Alas R App Proc 407; Ariz Sup Ct R 27; Arkansas, AR S Ct & Ct App Rule 6-8; Cal Rule of Court 8.548; Colorado, CAR 21.1; Conn Practice Book § 82-1; Del Sup Ct R 41; Fla R App P 9150; Ga Sup Ct Rule 46; Hawaii, HRAP Rule 13; Idaho, IAR Rule 12.2; Ill Sup Ct Rule 13; Ind R App P 64; Iowa Code § 684A.1; Kansas, KSA § 60-3201; Ky CR Rule 76.37; La Sup Ct R XI; Me R App P 25; Md Courts and Judicial Proceedings Code Ann § 12-603; Massachusetts, ALM Sup C Rule 1:03; Michigan, MCR 7.305(B); Miss, MRAP 20(a); Mont Code Ann, Ch 21, Rule 44; RRS Neb § 24-219; Nev RAP 5; NH Sup Ct Rule 34; NM RAP 12-607; ND R App P 47; Ohio S Ct R XVIII; 20 Okla St § 1602; Oregon, ORS § 28.200; PA Sup Ct Internal Operating Proc 10; RI Sup Ct Art I, Rule 6; South Carolina, SCACR 228; SD Codified Laws § 15-24A-1; Tenn Sup Ct R 23, § 1; Tex R App P 58; Utah R App P 41; Vermont, VRAP Rule 14; Va Sup Ct R Pt 5, 5:42; Wash Rev Code (ARCW) § 2.60.020; W VA Code § 51-1A-3; Wis Stat § 821.01; Wyoming, WRAP 11.01.

[5] See Cal Rule of Court 8.548; Conn Practice Book § 82-1; Del Sup Ct R 41; Ga Sup Ct Rule 46; Iowa Code § 684A.1; Kansas, KSA § 60-3201; Ky CR Rule 76.37; Md Courts and Judicial Proceedings Code Ann § 12-603; Massachusetts, ALM Sup Ct Rule 1:03; Michigan, MCR 7.305(B); Mont Code Ann, Ch 21, Rule 44; NM RAP 12-607; ND R App P 47;

restrict the asking court to the "court of last resort" or the "highest appellate court" of another state.[6] Five states, including Michigan, allow "an" or "any appellate court" of another state to certify questions of law to the supreme court of that state—by reference an intermediate appellate court may be authorized to certify a question to the state supreme court.[7] From my research, it appears that *no state has ever answered a question certified to it by another state intermediate appellate court*. The majority's decision today to answer a question certified by the Texas Court of Appeals is unprecedented. It leaves to another time for one to ponder why the majority chooses to reach so far "deep into the heart of Texas" to answer a question posed by the Texas Court of Appeals, an intermediate appellate court.

III. CONCLUSION

I dissent from this Court's decision to answer the certified question in this case because MCR 7.305(B) goes beyond this court's constitutional authority to answer certified questions and the majority's decision to answer the certified question in this case is unprecedented and unnecessary.

KELLY, J., concurred with part II of Justice WEAVER's opinion.

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20 Okla St § 1602; Oregon, ORS § 28.200; South Carolina, SCACR 228; Va Sup Ct R Pt 5, 5:42; W VA Code § 51-1A-3; Wis Stat § 821.01.

[6] See Cal Rule of Court 8.548; Conn Practice Book § 82-1; Del Sup Ct R 41; Ky CR Rule 76.37; Massachusetts, ALM Sup Ct Rule 1:03; Mont Code Ann, Ch 21, Rule 44; Va Sup Ct R Pt 5, 5:42; Wis Stat § 821.01.

[7] See Ga Sup Ct Rule 46; Md Courts and Judicial Proceedings Code Ann § 12-603; Michigan, MCR 7.305(B); NM RAP 12-607; 20 Okla St § 1602.

GOLDSTONE v BLOOMFIELD TOWNSHIP PUBLIC LIBRARY

Docket No. 130150. Argued April 10, 2007 (Calendar No. 2). Decided July 26, 2007.

George H. Goldstone brought an action in the Oakland Circuit Court against the Bloomfield Township Public Library, seeking a declaratory judgment that would require the library to grant him and other residents of the city of Bloomfield Hills access to the same library materials, programs, services, and activities as the defendant gives to Bloomfield Township residents who support the library by local taxes, including book-borrowing privileges. The court, Denise Langford Morris, J., granted summary disposition for the defendant, concluding that the defendant's determination to permit nonresident borrowing only in accordance with the execution of a contractual agreement with a nonresident's community does not violate Const 1963, art 8, § 9. The plaintiff appealed. The Court of Appeals, OWENS, P.J., and FITZGERALD and SCHUETTE, JJ., affirmed. 268 Mich App 642 (2005). The Supreme Court granted the plaintiff's application for leave to appeal. 477 Mich 919 (2006).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

Const 1963, art 8, § 9 does not require each individual public library facility in Michigan to offer nonresident book-borrowing privileges.

1. A public library is only available to a person, for purposes of the Michigan Constitution, if he or she has reasonable borrowing privileges. However, not every public library facility in Michigan must be identically available to all residents of the state. Const 1963, art 8, § 9 does not refer to "each and every" public library or to "individual" public library facilities, but refers only to the legislative obligation to provide for the "establishment and support of public libraries." It is the public library as an entity or institution that must be made available to all residents, not each individual public library facility.

2. By enacting numerous laws that encourage local control of public libraries and that establish a system in which communities with public libraries can enter into agreements with communities

without public libraries in order to extend access to such libraries, the Legislature has made public libraries genuinely "available."

3. The plaintiff would undo the incentives enacted by the Legislature for the establishment and maintenance of public libraries. He would disincentivize communities from building libraries by making them identically available to persons who had and who had not paid for them; he would disincentivize communities from maintaining libraries by making improvements and new accessions identically available to persons who had and who had not paid for them; he would disincentivize communities without libraries from entering into cooperative agreements with library communities by allowing persons to enter into individual agreements; and he would deprive communities with libraries of the revenues that would be lost as a result of the combination of these disincentives. As a result, over time, the plaintiff would almost certainly produce an environment in which fewer new libraries are constructed, fewer new books are purchased, fewer cooperative agreements are reached, and local support of public libraries declines. Public libraries would become less, not more, available.

4. Contrary to the plaintiff's argument, Const 1963, art 8, § 9 does not entitle nonresidents to library privileges that are identical to those of the residents of communities with libraries and at a significantly lower cost than borne by the residents. That is, nonresidents are not entitled to identical library privileges subsidized by the taxpayers of another community.

Affirmed.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, agreed with the majority that the understanding most common to the people when Const 1963, art 8, § 9 was ratified was that libraries were lending institutions, but disagreed with the majority's conclusion that the people understood the provision to mean that libraries would only be "generally" available rather than actually available. Considering the common-sense meaning of the language of the provision, the circumstances surrounding the adoption of the provision, and the purpose it was meant to accomplish, the provision is properly understood to mean that any Michigan citizen may borrow books from any Michigan public library.

Justice WEAVER, dissenting, fully concurred with Justice CAVANAGH's dissent, and wrote separately to state that the majority's skewed interpretation of the phrase "available to all residents of the state" unconstitutionally divests the people of Michigan of their constitutionally promised right of full access to libraries and provides another example of the majority's misuse of the power of interpretation to create policy and law.

1. CONSTITUTIONAL LAW — PUBLIC LIBRARIES — AVAILABILITY.

A public library is only available to a person if he or she has reasonable borrowing privileges (Const 1963, art 8, § 9).

2. CONSTITUTIONAL LAW — PUBLIC LIBRARIES — NONRESIDENT USE.

It is the public library as an entity or institution, not each individual public library facility, that must be made available to all state residents (Const 1963, art 8, § 9).

Robert E. Toohey for the plaintiff.

Seyburn, Kahn, Ginn, Bess and Serlin, P.C. (by *Joel H. Serlin* and *Barry M. Rosenbaum*), for the defendant.

Amici Curiae:

Clark Hill PLC (by *Andrew C. Richner, Paul C. Smith*, and *F. R. Damm*), for the Detroit Public Library.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Thomas F. Schimpf* and *Matthew H. Rick*, Assistant Attorneys General, for the Department of History, Arts and Libraries.

Foster, Swift, Collins & Smith, P.C. (by *Stephen O. Schultz* and *Stephen J. Rhodes*), for the Michigan Library Association, the Michigan Townships Association, and the Michigan Municipal League.

MARKMAN, J. We granted leave to appeal to consider whether Const 1963, art 8, § 9, which states that public libraries "shall be available to all residents of the state," requires each individual public library facility in Michigan to offer nonresident book-borrowing privileges.[1]

[1] The term "nonresident" is used throughout this opinion to refer to a person who is a resident of the state of Michigan, but not a resident of the municipality having the library from which that person desires to borrow books.

The lower courts answered this question in the negative, and we agree, although for different reasons. Therefore, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a resident of the city of Bloomfield Hills. The city does not have its own public library, but from 1964 to November 12, 2003, had entered into a "library service agreement" with defendant Bloomfield Township Public Library that, for a fee, permitted city residents full access to the library and to other area libraries that were also signatories to the agreement. When the agreement expired in 2003, the city of Bloomfield Hills and the township library did not renew it. As a result, city residents, including plaintiff, were allowed by the township only to visit the library and to use its materials on site. They were not allowed to borrow library materials or to fully access online databases and other programs, services, and activities that were regularly available to township residents.

Plaintiff believed that, notwithstanding the lack of a service agreement between the township library and the city, the Michigan Constitution guaranteed availability to him and to all other state residents. Thus, he felt he had the right to full use of the library and its collections, including borrowing privileges. Plaintiff sought a nonresident library card and offered to pay a borrowing fee. Pursuant to its local policies, the township library refused and asserted that the access it allowed was sufficient to meet the requirements of Const 1963, art 8, § 9.

Plaintiff brought an action seeking a declaratory judgment against the township library, demanding borrowing rights equivalent to those of a township resident on the basis that such rights are assured by Const 1963,

art 8, § 9. Anything less, plaintiff argued, such as that which was offered by the township—library access with no borrowing privileges—violated the constitutional guarantee. The township library argued to the contrary that, under Const 1963, art 8, § 9, there was no constitutional right to the unlimited access plaintiff sought, and that it could constitutionally enforce its policy.

The trial court granted summary disposition to the township library, ruling that, by allowing onsite use, the library satisfied the constitutional requirement that libraries be "available" to state residents. The Court of Appeals affirmed, agreeing that the availability requirement of Const 1963, art 8, § 9 created no constitutional mandate that libraries provide nonresident borrowing privileges or make all resident services accessible to nonresidents. 268 Mich App 642, 652; 708 NW2d 740 (2005). After hearing oral argument on plaintiff's application for leave to appeal, this Court granted leave to appeal. 477 Mich 919 (2006).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision granting or denying a motion for summary disposition. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). Issues of constitutional construction are questions of law that are also reviewed de novo. *Id.* When interpreting constitutional provisions, our primary objective " 'is to realize the intent of the people by whom and for whom the constitution was ratified.' " *Studier v Michigan Pub School Employees Retirement Bd*, 472 Mich 642, 652; 698 NW2d 350 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). That is, we seek the " 'common understanding' " of the people at the time the constitution was ratified. *Studier, supra* at 652, quoting 1 Cooley, Con-

stitutional Limitations (6th ed), p 81 (citations and internal quotation marks omitted). This involves applying the plain meaning of each term used at the time of ratification, unless technical, legal terms are used. *Studier, supra* at 652.

III. ANALYSIS

A. CONST 1963, ART 8, § 9

Const 1963, art 8, § 9 states:

> The legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof.

Defendant argues that a public library is "available" for purposes of our constitution when it is subject to entry and its resources subject to use on site. We disagree. Instead, we agree with plaintiff that a public library is only "available" when a person enjoys reasonable borrowing privileges. In particular, we agree with plaintiff that, in construing our constitution, "available" must be assessed specifically in conjunction with "public libraries." Although this may not necessarily be true with regard to research libraries or private libraries, we believe that the "common understanding" is that "public libraries" are only "available" to a person if he has reasonable borrowing privileges.[2]

However, we disagree with plaintiff's premise that Const 1963, art 8, § 9 requires that each individual public library facility in Michigan must be "available"

[2] Although Justice CAVANAGH agrees with us that public library "availability" encompasses book borrowing, he criticizes us for not adequately explaining why this is so. *Post* at 571 n 1. Given this view, it is curious that he would provide absolutely no explanation of his own for why he *agrees* with us in this regard.

on identical terms to all residents of the state. Rather than addressing the obligations of individual library facilities, this provision is better understood, in our judgment, as assuring the availability of public libraries in general.[3] That is, the Legislature shall make public libraries available, not necessarily each individual library facility. Const 1963, art 8, § 9 does not refer to "each and every" public library or to "individual" public library facilities, but refers only to the legislative obligation to provide for the "establishment and support of public libraries." By this use of the plural, as well as the use of the broad terms "establishment and support," we believe that the constitution refers to "public libraries" as an entity, i.e., public libraries as an institution. It is this *entity*, this *institution*—the public library—that must be made "available" to all residents, not each individual library facility.[4]

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[3] Justice CAVANAGH describes us as holding that as long as libraries are " 'generally' available," see, e.g., *post* at 570, art 8, § 9 is satisfied. In so doing, he mischaracterizes this opinion. We do not hold that "general" availability satisfies the constitution. Instead, we hold that "availability" must be understood in terms of the public library as an institution rather than in terms of each individual library facility.

[4] Justice CAVANAGH criticizes us for ignoring the "common understanding" of the ratifiers. See *post* at 575. More accurately, we simply disagree with Justice CAVANAGH concerning such "common understanding." He points to nothing occurring at the constitutional convention, nothing communicated by the convention, and nothing understood by the people in ratifying the product of the convention that supports his interpretation of the "common understanding." Indeed, much of what Justice CAVANAGH cites from the debates, if not altogether irrelevant, affirmatively supports our position. See, e.g., *post* at 577, quoting 1 Official Record, Constitutional Convention 1961, at 822 (" 'The committee presumes that legislation may be written so that each library may make reasonable rules for the use and control of its books. . . . [T]o make libraries more available to the people their services may be expanded through cooperation, consolidation, branches and bookmobiles.' "); *post* at 578 n 2, citing 1 Official Record, Constitutional Convention 1961, at 835 ("The committee conveyed that it was the Legislature's place to

By way of example, the very same article of the constitution states that, "[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const 1963, art 8, § 1. Such "encourage[ment]" of schools, to continue "forever," does not, we believe, prohibit the cities of Detroit or Saginaw, for example, from ever closing an underutilized or an out-of-date school, for *individual* school facilities are simply not the subject of this provision. Rather, it is schools as an entity, as an institution, that must "forever be encouraged."[5] Likewise, in Const 1963, art 8, § 9, it is not each individual library facility that must be made available, but rather public libraries as an entity or as

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legislate the details."). Because we believe that the actual language of the proposed constitution constitutes the best evidence of the "common understanding," *Studier*, *supra* at 652, we rely on this language. Considering this language (as well as the circumstances that necessitated modification of the "library provision" of the former constitution, see n 11 of this opinion), we do not believe that the ratifiers understood Const 1963, art 8, § 9 to require each individual library facility to allow each resident of the state to borrow books—regardless of all other considerations, including the impact of such a policy on communities' incentives to establish and maintain local public libraries.

Justice CAVANAGH approvingly cites the amici curiae briefs and the affidavits of two former constitutional convention delegates. However, just as this Court is not bound by what individual members of the Legislature subsequently state was the specific intent behind a particular statute, *Bd of Ed of Presque Isle Twp School Dist No 8 v Presque Isle Co Bd of Ed*, 364 Mich 605, 611-612; 111 NW2d 853 (1961), we are not bound by what two of 144 convention delegates state 45 years after the fact was the specific intent behind a particular constitutional provision. Indeed, this stricture is even more true with respect to a constitutional provision than a statute because it is not the intent of the delegates that is controlling, but the intent of the ratifiers—"we the people."

[5] See also Const 1963, art 8, § 8 ("Institutions, programs and services for the care, treatment, education or rehabilitation of . . . [the] disabled shall always be fostered and supported."). Does this provision truly require that no *individual* "institution, program or service" can ever be eliminated or replaced, or does it simply establish a constitutional policy of encouraging such "institutions, programs and services"?

an institution that must be made available.

And this is precisely what the Legislature has done. Acting pursuant to its constitutional obligation to "provide by law for the establishment and support of public libraries which shall be available to all residents of the state," the Legislature has enacted numerous laws.[6] The premise of these laws appears to be that the mandate of the constitution can best be achieved by (a) the encouragement of local control of public libraries[7] and (b) the establishment of a system in which communities with public libraries can enter into agreements with communities without public libraries in order to extend access to such libraries.[8]

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[6] Justice CAVANAGH criticizes us for considering "later-enacted legislation" to modify the meaning of "available." *Post* at 570. More accurately, we look to "later-enacted legislation" as evidence that the Legislature has fulfilled its constitutional obligation to provide for the "establishment and support of public libraries." Ironically, Justice CAVANAGH himself looks to both "later-enacted legislation" and "later-issued" Attorney General opinions. *Post* at 581-584.

We agree with Justice CAVANAGH that it is not for the Legislature to ultimately determine the meaning of "available" under art 8, § 9. See *post* at 573. Rather, after the Legislature and the governing bodies of the libraries have established rules for availability (as they have done here), the courts must ultimately determine whether what they have done meets the constitutional standard of availability under art 8, § 9.

[7] See MCL 397.206 ("Every [municipal] library . . . shall be forever free to the use of the inhabitants where located."); MCL 397.301 (stating that "any county shall have the power to establish a public library free for the use of the inhabitants of such county . . . with the body having control of such library, to furnish library service to the people of the county"); MCL 397.561a ("A library may charge nonresident borrowing fees to a person residing outside of the library's service area, including a person residing within the cooperative library's service area to which that library is assigned, if the fee does not exceed the costs incurred by the library in making borrowing privileges available to nonresidents including, but not limited to, the costs, direct and indirect, of issuing a library card, facilitating the return of loaned materials, and the attendant cost of administration.").

[8] MCL 397.301 (stating that "any county . . . may contract for the use . . . of a public library already established within the county"); MCL

By these principles—local control and the encouragement of interjurisdictional agreements—the Legislature has sought to satisfy its constitutional obligations by incentivizing communities both to build and to maintain libraries and to extend their availability to communities that lack a library. Had the Legislature acted unwisely in the adoption of these principles, it nonetheless would be entitled to considerable deference from this Court, for it is the Legislature explicitly that has been given primary responsibility by the constitution for the "establishment and support of public libraries." However, it seems clear that the Legislature, with the support of the public library community, has acted wisely.

Justice CAVANAGH acts considerably less wisely in seeking to substitute his own judgment for that of the

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397.213(1) (stating that "a township, village, or city adjacent to a township, village, or city that supports a free public circulating library . . . may contract for the use of library services with that adjacent township, village, or city"); MCL 397.214(2) (stating that "the library board of directors of a township, city, or village supporting and maintaining a free public circulating library . . . may enter into a contract with another township, city, or village to permit the residents of that other township, city, or village the full use of the library)"; MCL 397.216 ("After fulfilling the contractual requirements, the people of a township, village, or city which has contracted for library services with another township, village, or city shall have all rights in the use and benefits of the library that they would have if they lived in the township, village, or city where the library is established."); MCL 397.555 ("To be eligible for membership in a cooperative library, a local library shall . . . (d) Maintain an open door policy to the residents of the state, as provided by section 9 of article VIII of the state constitution of 1963."); MCL 397.561 ("Following establishment of a cooperative board, residents of the cooperative library's area are eligible to use the facilities and resources of the member libraries subject to the rules of the cooperative library plan. Services of the cooperative library, including those of participating libraries, are to be available at reasonable times and on an equal basis within the areas served to schoolchildren, individuals in public and nonpublic institutions of learning, and a student or resident within the area.").

Legislature. He would undo the incentives enacted by the Legislature for the establishment and maintenance of public libraries. He would disincentivize communities from building libraries by making them identically available to persons who had and who had not paid for them; he would disincentivize communities from maintaining libraries by making improvements and new accessions identically available to persons who had and who had not paid for them; he would disincentivize non-library communities from entering into cooperative agreements with library communities by allowing persons to enter into individual agreements; and he would deprive library communities of the revenues that would be lost as a result of the combination of these disincentives.[9]

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[9] Indeed, although he skirts the question, Justice CAVANAGH, by apparently requiring library communities to subsidize nonresidents entering into individual agreements, would incentivize such agreements while disincentivizing cooperative agreements. He skirts this question by failing to make clear what amount Mr. Goldstone could be required to pay the Bloomfield Township library for his new "constitutional right" of borrowing privileges. Does Justice CAVANAGH agree with Delegate Higgs, whom he quotes, *post* at 579, that *no* charges at all could be imposed under the constitution for this privilege? Does Justice CAVANAGH agree with plaintiff himself that the library could not recoup the "indirect" costs of taxation that are borne by citizens of Bloomfield Township for their library? On these and related questions, Justice CAVANAGH uncharacteristically defers to the Legislature to "sort[] out [the] financial details." *Post* at 578. Thus, he avoids addressing what is at the heart of plaintiff's argument, namely that nonresidents are *constitutionally entitled* to identical library privileges as residents, and at a significantly lower cost than borne by residents. That is, nonresidents are entitled to identical library privileges *subsidized by the taxpayers of another community*. This anomalous result is not compelled by Const 1963, art 8, § 9, and further highlights the transformation of state library policy, and the distorted incentives, that Justice CAVANAGH would institute.

Justice CAVANAGH simply makes no sense on the issue of fees. At one point, he states, "I offer no opinion regarding whether . . . fees are

As a result, over time, Justice CAVANAGH would almost certainly produce an environment in which fewer new libraries are constructed, fewer new books are purchased, fewer cooperative agreements are reached, and local support of public libraries declines. Public libraries would become less, not more, available, although Justice CAVANAGH doubtless would take solace that every resident would have absolutely identical access to the dwindling and outworn library resources of the state.

Pursuant to Const 1963, art 8, § 9, it is the Legislature that is empowered to exercise judgments concerning how to "provide by law for the establishment and support of public libraries." Although Justice CAVANAGH is free to disregard economic realities and to ignore the logic of incentives and disincentives, the Legislature is not obligated to proceed along these same lines. The Legislature, altogether reasonably we believe, has determined that the "availability" of public libraries is best achieved through the institutions of local control and the encouragement of cooperative agreements. We defer to this judgment.

Indeed, it appears from statistics offered by the Michigan Department of History, Arts and Libraries that less than 1/5 of 1 percent of the population of Michigan does not have a public library available either directly through their communities or through a cooperative agreement.[10]

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permitted," *post* at 585 n 6, yet at another point, he states, "libraries can protect themselves from the financial ruin the majority predicts simply by exercising their rights to charge a fee for nonresident book borrowing . . . ." *Post* at 580 n 4. At yet another point, he asserts that it is the "Legislature's place to legislate the details," *post* at 578 n 2, but then criticizes us for commenting on the incentives and disincentives that the Legislature must have weighed in carrying out its constitutional obligation to "provide by law for the establishment and support of public libraries." *Post* at 586-587.

[10] The department asserts that there are only 21 townships in Michigan with a population totaling 17,055 that do not have a library and that do

This is to be contrasted with the history of the predecessor provision to Const 1963, art 8, § 9, which mandated that the Legislature establish public libraries in every township and city. After 125 years of such a mandate in 1962, a public library had been established in only 7 percent of the cities and townships of Michigan.[11] Particularly against this historical backdrop, the Legislature's judgment that public libraries can best be made available by encouraging local control and cooperative agreements, and thereby incentivizing their "establishment and support," appears to be an entirely reasonable and responsible judgment that should not be upset by this Court.[12]

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not contract with another city or township for library services. Inexplicably, the department does not indicate how many cities are similarly lacking. Although we cannot imagine that this figure is very high, Bloomfield Hills obviously is one such city.

[11] In 1963, there were "over a million [Michigan residents that] ha[d] no access to public libraries." Cushman, *Libraries in the proposed new state constitution*, 29 Michigan Librarian 1, 4 (1963).

Perhaps more than anything, it is this hard fact—the relatively modest success of the predecessor provision in ensuring public library access to the people of Michigan—that explains the majority's and Justice CAVANAGH's different understandings of the significance of the "circumstances" surrounding the ratification of Const 1963, art 8, § 9. Contrary to his assertion, we do not "ignore" these circumstances; we simply interpret them differently than he does. The predecessor provision mandated that the Legislature establish public libraries in every township and city. Justice CAVANAGH argues that it is illogical to believe that the citizens of Michigan would willingly give up the constitutional guarantee of a library in their own township or city for a constitutional guarantee of public libraries in general being made available. *Post* at 591. However, the Address to the People accompanying Const 1963, art 8, § 9, observed that the predecessor provision "has never been adhered to as a matter of practice." 2 Official Record, Constitutional Convention 1961, p 3397. We believe that it is entirely "logical" that the people would relinquish an illusory and unrealistic "right" in order to achieve a *reality* of greater library access. And history in this regard has proven the people right.

[12] Justice CAVANAGH presents us with several questions. First, "[o]n what basis is the majority's conclusion reached"? *Post* at 572. Our

B. OTHER CONSTITUTIONAL ARGUMENTS

Plaintiff also argues that the township library's policy of not offering nonresident book-borrowing privileges violates his First Amendment "right to receive information" under the United States Constitution[13] and his right not to be deprived of "the equal protection of the laws" under the United States and Michigan constitutions.[14] We disagree.

Plaintiff cites four cases to support his argument that the township library's policy of not offering nonresident book-borrowing privileges violates the First Amendment. The first case—*Martin v City of Struthers,* 319 US 141; 63 S Ct 862; 87 L Ed 1313 (1943)—held that a municipal ordinance that prohibited people from knocking on doors to distribute leaflets violated the First Amendment. The second case—*Griswold v Connecticut,* 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965)—held that a state statute prohibiting the use of contraceptives violated the right of marital privacy. The third case—*Kreimer v Morristown Bureau of Police,* 958 F2d

conclusion is reached on the basis of the language of Const 1963, art 8, § 9 and the circumstances surrounding the change in language from its predecessor provision. Second, "why does the majority rely only on its 'belief' of what the provision means, rather than on its belief of what the people believed it meant?" *Post* at 572. What we "believe" the provision to mean and what we believe that the people "believed" it to mean are one and the same, and Justice CAVANAGH cites nothing to suggest that the people believed it to mean something else or that they had a contrary "common understanding." Finally, "[w]hat exactly *are* 'generally available' libraries?" *Post* at 572 (emphasis in the original). Again, we do not hold that each individual library facility must be "generally available." Rather, we hold that public libraries in general must be available. See n 3 of this opinion.

[13] We must emphasize once again, see n 9, that the right asserted by plaintiff is better characterized as the "right to receive information *subsidized by the taxpayers of another community*."

[14] US Const, Am I; Const 1963, art 1, § 2; US Const, Am XIV.

1242 (CA 3, 1992)—held that a public library's rule prohibiting disruptive behavior and offensive bodily hygiene did not violate the First Amendment. The fourth case—*Salvail v Nashua Bd of Ed,* 469 F Supp 1269 (D NH, 1979)—held that a school board's removal of a certain magazine from the library based on its content violated the First Amendment. First, we must note that we are, of course, not bound by either *Kreimer* or *Salvail*. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). Second, and most importantly, not one of the cases that plaintiff cites held, or even remotely suggested, by implication or otherwise, that the First Amendment requires a public library to offer nonresident book-borrowing privileges.

The most relevant case cited is *Kreimer, supra* at 1255, which merely held that the First Amendment protects "the right to some level of access to a public library." In this case, the township library indisputably allows nonresidents "some level of access to a public library." Therefore, even under *Kreimer*—the most relevant and the most favorable case that plaintiff has cited in support of his argument, although we emphasize again not a case that is controlling or that has been adopted in this state—it is clear that a township library's policy of not offering nonresident book-borrowing privileges does not violate the First Amendment.

Plaintiff's equal protection challenge likewise fails. Plaintiff alleges no discrimination here based on race, national origin, ethnicity, gender, or illegitimacy. Accordingly, this Court applies a "rational basis" analysis.[15] See, e.g., *Crego v Coleman*, 463 Mich 248, 259-260;

[15] The rules governing the interpretation of statutes apply with equal force to the interpretation of local ordinances. See, e.g., *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

615 NW2d 218 (2000). Under such an analysis, "courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Id*. at 259. In order to have a law declared unconstitutional, a challenger must demonstrate that it is arbitrary and that the law is " 'wholly unrelated . . . to the objective of the statute.' " *Id*., quoting *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). No showing of this sort is possible here. The purpose of the township library's residency requirement is to create a viable means of establishing and maintaining a local public library; it is a means consistent with the Legislature's constitutional direction to make public libraries available to the residents of this state. For the reasons discussed in this opinion, the library's regulations are a reasonable way to achieve its purpose, and, thus, there is no equal protection violation.

IV. CONCLUSION

Const 1963, art 8, § 9 does not require each and every individual public library facility in Michigan to offer nonresident book-borrowing privileges. Accordingly, we affirm the Court of Appeals decision affirming summary disposition for the township library.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). Imposing a bizarre semantical construct on Const 1963, art 8, § 9, and ignoring the circumstances surrounding its ratification, the majority's decision in this case divests Michigan citizens who reside in a town that does not have a library of their constitutional right to borrow books from other

libraries. Despite the clear mandate from the people of this state that libraries "shall be available to all residents of the state," Const 1963, art 8, § 9, the majority decides that as long as libraries are "generally" available, the constitutional obligation is fulfilled. The majority accomplishes this through an unusual analysis that fails to account for the history of and purpose behind the constitutional amendment. In doing so, the majority attributes a trade-off to the people of this state that the people did not make. Thus, I dissent.

To obtain a true understanding of what the constitutional language means and how it must be enforced, one must actually consider the people's understanding of what it meant to have our libraries "available," for it is the people's understanding of the amendment at the time they ratified it that governs the analysis. One cannot, as the majority does, *ante* at 561-566, consider concerns that may have arisen later or that exist today, such as policy issues or hypothetical financial considerations. Nor may we look to other constitutional provisions or later-enacted legislation as clues to the amendment's meaning. See *ante* at 561-562. Rather, the people's understanding is properly evaluated in a way we have explained as follows:

> In interpreting the constitution, this Court has developed two rules of construction. First, the interpretation given the constitution should be "the sense most obvious to the common understanding"; the one which "reasonable minds, the great mass of people themselves, would give it". *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971); *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 405; 292 NW2d 442 (1980) (quoting Cooley's Const Lim [6th ed], p 81). Secondly, "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished may be considered". *Traverse City School Dist*, 384 Mich 405. See *Kearney v Board of State Auditors*,

> 189 Mich 666, 673; 155 NW 510 (1915). [*Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982).]

Although the majority acknowledges the existence of this standard, *ante* at 558-559, and at least purports to apply it to conclude that the people understood libraries to be lending institutions,[1] the majority makes no further mention of these principles as it proceeds to decide how the concept of "availability" must be interpreted. Thus, the majority reaches the unexplained (and inexplicable) conclusion that the people intended that libraries would "in general" be available.

The majority's core analytical misstep occurs *ante* at 559-560, where it states,

> However, we disagree with plaintiff's premise that Const 1963, art 8, § 9 requires that each individual public library facility in Michigan must be "available" on identical terms to all residents of the state. Rather than addressing the obligations of individual library facilities, this provision is better understood, in our judgment, as assuring the availability of public libraries in general. That is, the Legislature shall make public libraries available, not necessarily each individual library facility. Const 1963, art 8, § 9 does not refer to "each and every" public library or to "individual" public library facilities, but refers only to the legislative obligation to provide for the "establishment and support of public libraries." By this use of the plural, as well as the use of the broad terms "establishment and support," we believe that the constitution refers to "public libraries" as an entity, i.e., public libraries as an institution. It is this *entity*, this *institution*—the public library—that must be made "available" to all residents, not each individual library facility.

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[1] Although I agree with the majority that the common understanding of the term "public library" at the time of ratification was that of an institution from which books could be borrowed, I note that the majority appears to divine that meaning from thin air rather than discuss how it may have reached it.

I must echo what every reader must now be thinking: "What?" On what basis is the majority's conclusion reached? And why does the majority rely only on its "belief" of what the provision means, rather than on its belief of what the people believed it meant? What exactly *are* "generally available" libraries? The authority on which the majority's conclusion is drawn is glaringly absent.

I fail to see the relevance of the other constitutional provisions the majority proffers to support its conclusion. The people's intent with respect to Const 1963, art 8, § 9, is not assessed by reference to Const 1963, art 8, § 1, a provision regarding "schools and the means of education," or Const 1963, art 8, § 8, a provision regarding institutions, programs, and services for the disabled. Moreover, the majority's attempt to analogize the three provisions is a stretch so thin it defies credibility. And the majority should review Const 1963, art 8, § 2, which states in part, "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Under the majority's rationale, this provision would mean that schools should be "generally available," but would stop short of guaranteeing that every student has a right to have a school fully available to him. Further, Const 1963, art 8, § 1, is a general statement that espouses the importance of education in general, while the subsequent provisions of article 8, such as § 2 (schools) and § 9 (libraries), detail the specific means by which education will be promoted.

The majority's subsequent orations on library funding issues are not only irrelevant to the analysis, but they also demonstrate a critical misunderstanding of the issue at hand. The majority fails to grasp that the interpretation of "available" is not subject to post-

ratification whims of the Legislature, courts, or governing boards of libraries. It is not the Legislature's province to determine "that the 'availability' of public libraries is best achieved through the institutions of local control and the encouragement of cooperative agreements." *Ante* at 565. Rather, the meaning of the term "available" was set when the people ratified Const 1963, art 8, § 9, and that meaning is not now modifiable. Under the clear language of the constitutional provision, the Legislature is to enact laws that "establish" and "support" public libraries, which libraries must be "available" to all people. Nothing in the language allows any entity to alter the meaning of "available" or govern its scope after the fact. Moreover, we are not to determine what meaning of "available" makes the most sense today, as the majority prefers to do, but how that term was understood in 1963.

Rather than being charged with determining what it means to have libraries available, the constitutional provision requires the Legislature to enact laws that *establish* our public libraries and to develop ways in which those libraries can be *supported*, while the local library boards may promulgate regulations relating to the logistical and administrative tasks intrinsic to running a library, including the process for lending books to nonresidents who are not otherwise covered by a cooperative agreement. Const 1963, art 8, § 9; see also OAG, 1983-1984, No 6,188, p 195 (October 17, 1983). The distinction, though fine, and though missed by the majority, is material. Local library boards may adopt rules that assist them with administering the libraries in the process of making them "available." For instance, local library boards might regulate the number of books that can be borrowed at one time, the cost of borrowing fees, or the length of time a book can be borrowed. Similarly, library boards can regulate the use of their

meeting rooms, the length of time one can use a computer, or the hours the library will be open. They cannot, however, impede the fundamental principle of "availability" as that term was understood when ratified.

Thus, we must determine what sense of the "availability of libraries" was most obvious to the common understanding of the great mass of the people of this state. *Soap & Detergent*, *supra* at 745. Having conducted my own inquiry into the people's intent, I agree with the majority that the understanding most common to the people was that libraries were lending institutions. But the analysis cannot end there; rather, we must also examine the " 'circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished,' " *Soap & Detergent*, *supra* at 745, quoting *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), to reach an understanding of what it meant to the people to have these lending libraries "available." Although such an analysis would lead to the conclusion that the people ratified a constitutional provision that would do more than promote some ethereal sense that lending libraries would "in general" be available, whatever that might mean, the majority blatantly ignores the people's understanding and in fact, as noted, makes no inquiry into it whatsoever.

In construing the meaning of a constitutional provision with the ultimate goal of discerning the people's intent, "the technical rules of statutory construction do not apply." *Traverse City School Dist*, *supra* at 405, citing *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819). Further,

> "it is not to be supposed that [the people] 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.' " [*Id.*, quoting Cooley, Constitutional Limitations, p 81 (emphasis in original).]

The majority's theory about "general availability" and plural and singular word forms are hypertechnical conclusions that run roughshod over the principle explained by Justice Cooley. The majority's interpretation *is* both a dark *and* abstruse meaning that is quite opposite to the sense most obvious to the common understanding. At the time this amendment was ratified, in the face of language that read, "The legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state . . . ," the people of Michigan certainly did not understand that language to convey an indeterminate promise that libraries would "in general" be available, which, in the majority's view, means merely that some library somewhere in the state must lend books. Rather, basic common sense dictates that this wording guaranteed *actual* availability of libraries to all people in the sense that each library would be available for each citizen's use. Indeed, the people ratified a constitutional provision that mandated the availability of lending institutions to "*all citizens*," not "some citizens" or just citizens who are under a library service agreement.

The majority's declaration that when ratifying the constitutional amendment, the people believed they were ratifying a provision that would replace their indelible right to full library access with an impotent "right" to have the availability of libraries "generally" encouraged, almost hints of a shell game. Moreover, the majority violates a cardinal rule of construction by adding words to the provision. Rather than seek the

dark or abstruse meaning, or assume that the people parsed the language and came to this agreement on its grammar, syntax, and semantics, I would heed the axiomatic principles that guide us in determining the meaning behind a constitutional provision. The *commonsense* meaning must be imposed, and the circumstances surrounding the amendment must be examined.

I must note the irony of the majority's conclusion that the citizens would have understood libraries to be lending institutions, which is clearly a commonsense interpretation, contrasted with its peculiar conclusion that the people would have understood "availability" as a term that did not guarantee availability to each citizen, which is clearly not a commonsense interpretation. The majority swings twice but hits only once.

Having discussed the commonsense meaning behind the provision, which, in my view, is easily detectable, I turn now to the circumstances that existed during the time the constitutional provision was proposed and ratified. The circumstances surrounding the promulgation of article 8, § 9, were captured in the record made of the discussion and debates about the constitutional amendment at the constitutional convention. Before the 1963 constitutional amendments were ratified, the previous constitution required each Michigan township and city to maintain at least one public library. Const 1908, art 11, § 14. Sparking the committee on education's proposed revisions to that mandate was the reality that many townships and cities were not maintaining a public library, mostly for financial reasons. Thus, the delegates sought to relieve townships and cities of the burden of maintaining a library while still preserving the right of the people to access a library. See, generally, 1 Official Record, Constitutional Convention 1961, pp 822-837.

Of paramount concern, as reflected in the transcript of the convention debate, was library funding. Delegates discussed at length the necessity of allowing the Legislature to promulgate regulations that would promote the economic feasibility of reducing the required number of libraries while increasing the number of citizens who may use the libraries. Delegate Alvin M. Bentley, chairman of the committee on education, thoroughly explained that while the time had come to transition from the original constitutional mandate, the new constitutional mandate would not only preserve, but increase library availability:

> This section continues the fine Michigan tradition of encouragement and support of public libraries throughout the state, but it does attempt to eliminate some of the confusing elements of the present article XI of section 14. The 1908 constitution states: "The legislature shall provide by law for the establishment of at least 1 library in each township and city; . . ." This has never been adhered to as a matter of practice. Today, only 1 out of 15 townships has a library.
>
> The present language emphasizes that "public" libraries will be "available" to residents without fixing how or where the libraries themselves shall be organized. The committee presumes that legislation may be written so that each library may make reasonable rules for the use and control of its books.
>
> Under this proposal present libraries will be retained. But to make libraries *more available to the people* their services may be expanded through cooperation, consolidation, branches and bookmobiles. [1 Official Record, Constitutional Convention 1961, p 822 (emphasis added).]

With financial concerns at the forefront, the scope of privileges that would be afforded to nonresidents using another municipality's library was thoroughly explored

during the debate.[2] Most delegates were clear that the citizens in towns with libraries should not be required to subsidize the costs of nonresidents using their libraries, but, prudently, they left the sorting out of financial details to the Legislature.[3] ("*The legislature shall provide by law for the establishment and support of public libraries* which shall be available to all residents of the state under regulations adopted by the governing bodies thereof." Const 1963, art 8, § 9 [emphasis added].)

But not all delegates were convinced that the question of cost-based library use was open on the face of the amendment's language. Delegate Milton E. Higgs, for example, questioned whether the constitutional language meant not only that making libraries available to all citizens meant that all citizens could borrow books, but that no charge could be assessed for the privilege:

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[2] Defendant argues that had the intent behind the constitutional amendment been to require all public libraries to offer all services to all people, the provision would have explicitly detailed the inner workings of the new library system. But the committee on education was strongly against including any specificity in the constitutional language for the good reason that it was the constitution. The committee delegates strove for brevity, something they specifically discussed during the convention debates. The committee conveyed that it was the Legislature's place to legislate the details. See 1 Official Record, Constitutional Convention 1961, p 835 ("[T]he committee believed that this provision should be in this respect as broad and general in scope as possible. . . . [O]bviously we recognize that there must be qualifications, there must be reservations, there must be individual problems which must be met. And I submit that we cannot and we should not try to meet them in this constitution. Let's leave that up to the legislative and statutory action."). For obvious practical reasons, the delegates chose not to expound endless details about the library system in the constitutional language.

[3] I must correct the majority. It is not *I* who am leaving these details to the Legislature, *ante* at 564 n 9; it is the *people of Michigan* who left these details to the Legislature by ratifying a constitutional amendment that said precisely that.

> I would say that when you say "which shall be available to all residents of the state" in the constitution, that you could not limit or qualify that in any way by the requirement of a deposit for the use of the book to guarantee its return or anything else. You say "It shall be available to all residents of the state." This is like saying in a criminal case, "You've got a right of appeal." When you say, "You've got a right of appeal," you've got that right whether you've got the money to pay for it or not. In fact, if you don't have the money to pay for it, the county has to provide it in that case, and I say in this case the same thing would apply. [1 Official Record, Constitutional Convention 1961, p 836.]

Indeed, the debate centered primarily on how libraries would be funded under the new language and whether nonresidents would or could be made to pay for using the services, including book lending, of libraries in other municipalities, not on whether nonresidents could borrow books at all. In fact, when the topic of book borrowing was broached, delegate Karl K. Leibrand expressed concern that providing a free "full time library service [to nonresidents], with the circulation of books, [would be] an undue burden." 1 Official Record, Constitutional Convention 1961, p 834. In response, the chairperson of the subcommittee on libraries of the committee on education, delegate Vera Andrus, explained that contracts between municipalities were one solution to that concern and that the language of the proposed amendment "doesn't say free." *Id.* at 835. Elsewhere in the dialogue, delegate Bentley asked, "[A]s long as a person from any part of the state can come up to your library and conform with your local regulations and rules, he can have that library and its services and its books made available to him. Would you say that that was covered?" *Id.* at 836. Delegate Higgs responded, "I would say that would be covered." *Id.*

These passages and the balance of the debate on the proposal quite clearly evidence that the key concern was, given that library services must be made available to all citizens, how the libraries would pay for the increase in use. As is also clear, the unanimous resolution of that question was to engraft onto the constitutional amendment a grant of authority for the Legislature to promulgate laws that would provide for this support. But the assumption was that library services, free or not free, would be fully available to all citizens.[4] *Glaringly absent from the debate is any proffering of the idea that Michigan residents would be unilaterally deprived of the right to borrow books if they live in a community without a library.*

In fact, two delegates who were present during and participated in the constitutional convention debates have appeared before this Court as amici curiae to share their recollections of how the proposed constitutional amendment was commonly understood at that time. And in our quest to ascertain the meaning behind the constitutional provision, their thoughts are enlightening and beneficial.[5] Former delegates Tom Downs and Milton Higgs have averred to this Court that the constitutional provision was intended, and was commonly understood, to mean that "the words, 'available to ALL RESIDENTS OF THE STATE,' included borrowing books during days and hours the library would

[4] Although I cannot emphasize enough that the financial intricacies of our public library system are the Legislature's domain, the majority grievously errs by blinding itself to the fact that libraries can protect themselves from the financial ruin the majority predicts simply by exercising their rights to charge a fee for nonresident book borrowing that fully reflects the cost of that service. MCL 397.561a.

[5] Not to the majority, however, which readily tosses aside the insights of these former delegates. See *ante* at 560-561 n 4. It must be irrelevant to the majority that the statements of the former delegates today are consistent with what they said at the convention 45 years ago.

normally be open to the public." Affidavit of Milton E. Higgs, May 25, 2006. Higgs further explained that "it was commonly understood by the delegates that some libraries required a nominal fee for a nonresident of the district reflecting costs . . . ." *Id.* And Higgs shed further light on the meaning of the phrase "under regulations adopted by the governing bodies thereof." He pointed out that those words

> were added to committee proposal 31 during the floor debate to allow some flexibility to the word "available" understanding that such regulations be reasonable and that county law libraries although available to the public would be free to continue the practice of limiting circulation of its books so that they would be immediately available for the judge, the lawyers, and the litigants having business with the court when needed. [*Id.*]

Downs has the same recollections from his participation in the constitutional convention. He recalls "[t]hat the common understanding expressed by the delegates was that the purpose of Article VIII was to insure ready access to the means of education by all citizens of Michigan regardless of area of residency" and that the provision "required public libraries to permit all state residents to borrow books regardless of area of residency." Affidavit of Tom Downs, May 5, 2006. Forty-five years later, both gentlemen agree with what seems clear from the transcript of the constitutional convention debates: the intent behind the constitutional provision was to enlarge citizens' access to libraries by allowing citizens to use any library in the state and to obligate the Legislature to provide funding for this system.

And the Legislature promptly did address funding matters by enacting a series of regulations that established mechanisms through which adequate funding could be achieved. Probably the most significant of the

Legislature's solutions to the new library system's financial challenges was the State Aid to Public Libraries Act (SAPLA), former MCL 397.501 *et seq.*, passed in 1965. In the push for the passage of that bill, the Michigan Library Association's president exhorted the members to continue with the association's "major effort" toward its "top priority concern with its basic objective: *good* library service easily available to every citizen of Michigan." Purdy, *The president comments*, 29 Michigan Librarian 1, 1 (1963). The president identified the funding proposal as a "concrete, practical step toward such universal access[.]" *Id.* In fact, the president credited the association's "rural and small town" members for the passage of the preceding library funding bill of 1937, stating that those members impressed upon the Legislature that they "*wanted* good library service and *demanded* that the State accept its share of the responsibility for seeing that they got it." *Id.* at 2. This is yet additional evidence of the emphasis that was placed on the availability of full library services to all Michigan citizens, even those in rural areas whose towns could not afford their own libraries.

Amended several times since, the SAPLA is now codified at MCL 397.551 *et seq.* The SAPLA encourages townships and cities to create coordinated library systems by establishing cooperative library plans. These cooperative plans enable townships and cities to enter into contracts wherein a town without a library pays financial consideration to a town with a library so that the first town's residents can use the library of the neighboring town. See, e.g., MCL 397.555. Undoubtedly, these cooperative agreements ease the financial burden of allowing nonresidents to use the public library of another town or city.

Not every city and township without its own library, however, would establish a cooperative agreement with another town. So the parameters of a person's ability to use another town's library when residing in a town with neither a library nor a cooperative agreement also had to be addressed. When the question regarding the right of a library to refuse service to a nonresident first arose, Attorney General Frank Kelley was asked whether Const 1963, art 8, § 9, affords nonresidents full use of any public library. In light of the language and history of the constitutional provision, the Attorney General sagely concluded that

> all public libraries and their facilities shall be available for use by all state residents, subject to reasonable rules governing the use and control of the library facilities. Clearly, under the constitutional mandate, and the Convention debates, *supra*, the right of state residents to use the facilities of any public library includes not only the right to enter a public library and read books there, *but the same right to borrow books that is offered to residents of the community in which the library is established subject to reasonable regulations* . . . .
>
> *The framers of Const 1963, art 8, § 9, supra, did not intend to create, or perpetuate, a library system where library privileges are not provided to state residents on an equal basis.* [OAG, 1979-1980, No 5,739, p 874 (July 15, 1980) (emphasis added).]

Subsequently, after another lengthy analysis of the plain language of the constitutional amendment and the purposes surrounding the amendment as reflected in the convention debates, the Attorney General explained that the fees to borrow books that are charged to a nonresident who is not covered under a cooperative agreement must reasonably reflect the costs incurred by the library in making those privileges available and that the costs must be proportionate "to the cost, direct

and indirect, of issuing a library card, facilitating the return of loaned books, and the attendant cost of administration." OAG, 1983-1984, No 6,188, p 203. This opinion prompted the Legislature to codify the Attorney General's pronouncements as follows:

> A library may charge nonresident borrowing fees to a person residing outside of the library's service area, including a person residing within the cooperative library's service area to which that library is assigned, if the fee does not exceed the costs incurred by the library in making borrowing privileges available to nonresidents including, but not limited to, the costs, direct and indirect, of issuing a library card, facilitating the return of loaned materials, and the attendant cost of administration. [MCL 397.561a.]

The Attorney General's conclusions about the focus of the constitutional convention debates match my own. And the series of events that occurred after Const 1963, art 8, § 9, was ratified demonstrates the consistency with which the meaning of the provision has been understood for more than 40 years. Beginning with the committee on education's explanations at the constitutional convention and spanning numerous legislative enactments and three attorney general opinions, the unified understanding was and has been that Const 1963, art 8, § 9, allows any Michigan citizen to borrow books from any Michigan public library. To address the resulting fiscal concerns and, thus, protect the libraries' financial integrity, the Legislature promptly authorized local library boards to assess fees for that privilege.[6]

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[6] Curiously, plaintiff does not argue what the majority attributes to him. The majority states that plaintiff argues that he is entitled to the "borrowing rights equivalent to those of a township resident" and that "[a]nything less, . . . such as that which was offered by the township—library access with no borrowing privileges—violated the constitutional guarantee." *Ante* at 557-558. To the contrary, plaintiff fully accepts that the constitutional language allows defendant and local library boards to

But despite the categorical evidence that the intent behind the provision was to continue to make libraries *fully available to all* while removing the burdensome requirement that every township and city maintain a public library, *and the striking absence of any evidence to the contrary*, the majority decides with the flick of a pen that a citizen without a public library in his town is at the mercy of each individual library across the state with respect to whether he can check out a book. Under the majority's "rationale," as long as some library somewhere in the state allows book lending, that is close enough.[7]

And the majority's philippic response to this dissent entirely ignores that the Legislature has given libraries the authority to assess fees for nonresident book borrowing that reflect the direct and indirect costs of that practice. MCL 391.561a. But even so, the majority's attention to the purported financial ramifications of

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charge him a nonresident book borrowing fee pursuant to MCL 391.561a. And in his efforts to borrow books from defendant, he offered to pay a fee accordingly. (Because plaintiff does not challenge the Legislature's authority to allow such fees, I offer no opinion regarding whether such fees are permitted by the Constitution. Moreover, I believe such a discussion would be imprudent because that issue is not presented in this case, so I will not be baited into that discussion by the majority. See *ante* at 564-565 n 9. And while it should not be necessary, I will assist the majority by pointing out that questioning whether nonresident book borrowing fees may be unconstitutional is not inconsistent with my recognition that the statute does indeed permit them. See *ante* at 564-565 n 9.)

[7] Contrast the majority's conclusion that the constitution ensures only the availability of libraries "in general" with its statement that it is "entirely 'logical' " that the people ratified the provision "to achieve a reality of greater library access." *Ante* at 566 n 11 (emphasis omitted). I fail to see how a belief that the people were attempting to achieve a reality of *greater library access* is consistent with the conclusion that the constitution guarantees the people nothing more than the existence of a book lending library somewhere in the state. Moreover, the majority could not be more wrong that "history in this regard has proven the people right" after today's decision. See *ante* at 566 n 11.

nonresident book borrowing *is not the concern of this Court*. The debate over funding was had, quite thoroughly in my opinion, at the constitutional convention, and the decision was made to place the responsibility for funding fully available libraries squarely in the hands of the Legislature.

The majority seems to be suggesting that nonresident book borrowing would bankrupt the entire library system and compel all public libraries into a downward spiral of decrepitness and decay that will culminate in crumbling buildings and dusty old dog-eared collections that nobody wants to read. See *ante* at 563-565. I refuse to credit such thespian antics. The Legislature has an obligation to ensure that the libraries the public has a right to have available are adequately supported. If financial struggles ensue, the Legislature is more than equipped to deal with them, and the people of this state are more than equipped to handle their concerns through the democratic process. Similarly, if the people's choice to require the full availability of libraries was fiscally unwise, its correction "is not a judicial function, but rather 'must be left to the people and the tools of democracy: the "ballot box, initiative, referendum, or constitutional amendment." ' " *People v Maffett*, 464 Mich 878, 895; 633 NW2d 339 (2001) (CORRIGAN, J., dissenting), quoting *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999), citing *Dedes v Asch*, 446 Mich 99, 123-124; 521 NW2d 488 (1994) (RILEY, J., dissenting). See also *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 389; 630 NW2d 297 (2001) (CORRIGAN, J., concurring); *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring). This Court has no place "incentivizing," "disincentivizing," or otherwise engaging in any policy decisions with respect to financing. See *ante* at 563-564 and n 9. In fact, "ignor[ing] the

logic of incentives and disincentives," as I am accused of doing, *ante* at 565, is to interpret the constitutional language as written and to avoid engaging in judicial activism.

Moreover, it is the majority who now gives the green "incentivization" light for library boards to politicize their accessibility by creating regulations that reach far further than merely preventing nonresident book borrowing onsite. For example, when Bloomfield Township and the city of Bloomfield Hills could not agree on a price for the renewal of their library service agreement,[8] which failure resulted in city of Bloomfield Hills residents' loss of borrowing and other privileges at defendant library, defendant commanded a "reciprocal agreement" with *90 other libraries* in which those libraries agreed not to lend books to any city of Bloomfield Hills resident. Thus, despite that plaintiff was issued a MichiCard[9] from the Pontiac Public Library, he was refused book borrowing privileges at the Baldwin Public Library and the West Bloomfield Public Library, even though both libraries belong to the network of libraries accepting the MichiCard. Those libraries informed plaintiff that under their agreement with defendant, they "cannot furnish borrowing services to Bloomfield Hills city residents unless they have a valid card from

[8] Defendant declined during discovery to provide information about the costs of providing library services to nonresidents; thus, it is impossible to comment about the fairness, or lack thereof, of the price it demanded from the city of Bloomfield Hills in the contract renewal negotiations. But for the interested reader, the city had been paying $226,460 annually, and the township asked for $463,550 annually in the contract that failed.

[9] The MichiCard is a statewide library card that allows holders of the card to use the services, including book borrowing, of any participating library in the state. Participating libraries are reimbursed by the state for postage costs incidental to shipping books to patrons, as well as the replacement costs of items that are not returned.

the Bloomfield Township Public Library." The majority allows this to continue, foisting on our citizens a public library system that is subject to calculated measures to deprive plaintiff and others like him of the full use of libraries. Surely this is not what our citizens envisioned when they ratified a constitutional amendment that was to broaden library availability. Indeed, to plaintiff, who is now denied book borrowing privileges by 90 libraries, libraries are "generally *not* available."[10]

It should be borne in mind that the proposed constitutional amendment did not represent a marked change in existing practices. Before the ratification of Const 1963, art 8, § 9, Michigan citizens enjoyed the right to fully and freely use the public library in their town. No new rights were created by the adoption of the constitutional amendment; there was simply a shift in how access to a library would be afforded. Delegate E. L. Cushman shared her thoughts on the impact of the constitutional provision with the Michigan Library Association in an article entitled *Libraries in the proposed new state constitution*, 29 Michigan Librarian 4, 4-5 (1963):

> Michigan differs from most states in that libraries have been mentioned in our constitutions from the first in 1835 through the 1850 document down to the present one of 1908.[11]
>
> The proposed new constitution of 1963 continues and strengthens this tradition. The new wording accomplishes several things:

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[10] In fact, not only can plaintiff not borrow books from defendant, defendant also refuses to allow plaintiff to use the Internet at the facility. And while nonresident children can use the Internet in the "Youth Room," they are denied remote access to the system.

[11] I proudly note that Michigan citizens were the first in the nation to bestow upon themselves a constitutional right to access a library.

> The addition of the word "support" "acknowledges the growing need for statewide support for public libraries" . . . . While this need has been recognized by the legislature, the new wording gives it increased emphasis.
>
> The new language recognizes the need for libraries available to all residents of Michigan, whereas now over a million have no access to public libraries.[12]
>
> * * *
>
> In brief, the new constitution continues the present systems of organization and financing, while placing increased emphasis on state support of libraries and on the need for statewide library services.

Thus, instead of guaranteeing that the library a person could access would be in that person's town, the constitutional amendment guaranteed that all libraries would be available to all people. The notion of "availability"—and the attendant rights—remained constant. There is simply no basis on which to conclude, and the majority provides none, that the people of this state understood or agreed that the constitutional amendment meant that libraries would be "generally" available, or that as long as some libraries are fully available to some people, the constitutional mandate is fulfilled.

As defendant itself recognizes, "Clearly, as was set forth in the Address [to the People], the delegates intended for existing libraries *to fill the void in service* created by the failure of so many local communities to build their own libraries." (Emphasis added.) In lieu of requiring all townships and cities to provide a library to their residents, the revision would "fill the void" by

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[12] Curiously, the majority cites the statistic mentioned in this sentence, *ante* at 566 n 11, but ignores the context in which the statistic was used—namely, to emphasize the need to make libraries *fully available to all people*.

requiring *all* libraries to be available to all citizens. The provision was a replacement of a system that, while not working as intended, allowed all residents the full use of a library. The revision was intended to fix what was broken, not to remove from the citizenry the full use and enjoyment of libraries. And the intent behind the revision was clearly reflected in the convention debates and has been manifested by the legislative promulgation of regulations that allow the new system to work.

The majority trivializes the importance of the constitutional convention debate and incorrectly characterizes its content. *Ante* at 560-561 n 4. The majority states that it prefers to look to the "actual language" of the constitution rather than at how the delegates were discussing and describing its meaning. *Ante* at 560 n 4. But what the delegates understood the proposed constitution to mean has critical importance because it was their understanding that was then conveyed to the people in an effort to educate the people about the proposed amendments before the people voted on it in April 1963. In other words, the people derived their understanding of the constitutional language from what was written by those participating in the constitutional convention. So the explanation provided to the people was premised on the delegates' understanding after having participated in the framing of the new text. It should come as no surprise, then, that the publication *What the Proposed New State Constitution Means to You*, written by the delegates and circulated to Michigan citizens, explained that "[t]he proposed new language emphasizes that 'public' libraries will be 'available' to residents without fixing how or where libraries shall be organized." *Id.* at 81. The publication states

nothing about the proposed language guaranteeing only "general" library availability.[13]

The majority's "generally available" theory has no basis in fact or logic and requires the belief that the citizens of Michigan willingly gave up the guarantee of a free, community-based, fully accessible library for the unknown of a possibly cost-based, possibly distant library that would have the authority to severely restrict usability. It requires one to accept that the people gave up not only their right to have a free library in their town, but also the right to borrow books from *any library*. This conclusion is incredible both as a basic premise and when viewed in the historical context of the constitutional amendment.

In 1963, when asked to ratify a constitutional amendment that would relieve communities of the burden of maintaining a library in exchange for ensuring that all libraries would be "available" to all people, the people of Michigan spoke. Pointlessly, the majority's refusal to engage in a comprehensive attempt to understand that voice divests the citizenry of a right it gained through reasoned compromise. What was a practical and calculated exchange of rights at the time is lost today through imposing on clear language an amorphous postulation that is unsupported by both common sense and history.

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[13] I can locate nothing from any other organization attempting to educate its members about the proposed constitutional changes that conveys a contrary understanding. Rather, the people of Michigan were being informed that the constitutional amendment *expanded* library service. For example, the brochure circulated by the League of Women Voters informed the League's members that "[p]rovisions for the handicapped and for libraries are broadened. . . . The legislature is called on to provide for establishment and support of libraries 'available to all residents'." *It's Your Choice: The 1908 or the 1963 Constitution*, The League of Women Voters of Michigan, November 1962, p 16.

Article 11, § 1, of the 1908 Constitution, existing today as Const 1963, art 8, § 1, reads as follows: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." At the constitutional convention, delegate Harold E. Bledsoe expressed alarm that the inherent purpose of promoting library availability to Michigan citizens was becoming overshadowed by some quibbling about the potential differences between city library funding and county and township library funding. Highlighting the prominence that Const 1908, art 11, § 1, should have over funding disputes in the interest of promoting the education of our citizenry, delegate Bledsoe eloquently stated as follows:

> Now, to me, I cannot disassociate the means of education from libraries. . . .
>
> We must move forward and build libraries, big libraries, big schools, better schools, better libraries if we are to move forward and remove our nation from the position of a second class power in the field of science . . . . [1 Official Record, Constitutional Convention 1961, pp 830-831.]

Delegate Bledsoe, and countless others who share his views about the critical role education should be given in our society, would undoubtedly be saddened by today's decision and by the story plaintiff tells of a young boy who, according to plaintiff, lives in a city that has no public library. Some students in the child's class live in the township in which defendant is located and, thus, can borrow books from defendant and complete research and homework assignments with those resources. The young boy cannot. Consequently, defendant's refusal to allow nonresidents to borrow books is disadvantaging this child academically.

The majority's decision will permit this story to be repeated endlessly across the state. For example, in rural areas that cannot afford to maintain their own libraries, there may not be a library for miles and miles around. If the residents of such an area can manage to reach a library, they must now be prepared to conduct their reading and research endeavors onsite. This is not what our citizens bargained for, and it is precisely the opposite of what the then-Michigan Governor extolled in 1962. Speaking to the Michigan Library Association, the Governor encapsulated the challenge facing Michigan to strengthen and expand Michigan libraries so that every person would have full access to this great resource. Governor Swainson stated:

> Every resident of Michigan is entitled to good library service. It is imperative, therefore, that we continue our strides toward that goal. Access for everyone to the great funds of knowledge and information found in our libraries is essential. I cannot overstress the need for it. Our total library resources must be within the reach of everyone. Information and the means to obtain it are vital to our progress if we are to cope with the problems and complexities of today's changing world. An enlightened public is indispensable to the preservation and progress of our democratic society. [Governor John B. Swainson, *Library Service to the People of Michigan: Goals, Status, Progress*, Michigan Library Association District Meetings 1962.

On May 1, 1963, shortly before our 1963 Constitution was ratified, United States Supreme Court Justice William J. Brennan, Jr., honored Law Day at the 75th anniversary of the Newark (New Jersey) Public Library. Justice Brennan explained that it was "most appropriate, and a most happy coincidence for [him], that the Library — so much an institution which has long been a staunch pillar of freedom, should celebrate its birthday on the very day which the Nation sets aside for recognition of the Rule of

Law and its contributions to liberty." Brennan, *Law, liberty & libraries*, 88 Library J 2417, 2417 (1963). His speech eloquently cataloged the irreplaceable value libraries have in a free and educated society. Like me and scores of others, Justice Brennan understood that "[o]ne of the liberties we Americans prize most highly is our freedom to read what we wish and when we wish." *Id.* at 2418.

While the doors of Michigan libraries remain physically open, the majority tramples the intent of our people by misinterpreting the law to the severe disadvantage of those who wish to educate themselves. As plaintiff queried, "Given the universal understanding that our libraries and their books exist to help us become better educated and more successful and informed citizens, one wonders why defendant seeks to make the books of our public libraries less available to the people, not more." One wonders this same thing about the majority.

Milton E. Higgs, one of 144 candidates elected to serve as a delegate to the Michigan constitutional convention, is no less emphatic today than he was 45 years ago that the purpose of the constitutional amendment was to fully open public libraries to the citizens regardless of residency, and that this included the right to borrow books. Mr. Higgs states:

> [T]he delegates considered and understood the impact of clear and unambiguous words being imbedded in the Constitution which would, as a matter of law, be binding on the Legislature and the Courts prohibiting abrogation of the right of all residents of this State pursuant to reasonable regulations to have access and borrow books from any "public" library in the spirit of ANDREW CARNEGIE who said, "THERE IS NOT SUCH A CRADLE OF DEMOCRACY UPON THE EARTH AS THE FREE PUBLIC LIBRARY, THIS REPUBLIC OF LETTERS, WHERE NEITHER RANK, OFFICE, NOR WEALTH RECEIVES THE SLIGHTEST CONSIDERATION." [Affidavit of Milton E. Higgs, May 25, 2006.]

Michigan citizens are poorer after today's decision. Accordingly, I dissent.[14]

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

WEAVER, J. *(dissenting).* I concur fully with Justice CAVANAGH's dissent, which thoroughly exposes the perversely unrestrained misinterpretation of the phrase "available to all residents of the state" within Const 1963, art 8, § 9 by the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. The majority's skewed interpretation of that phrase denies all the people of Michigan their constitutional right to full and equal use of libraries.

Libraries are vitally important institutions in a democracy. The people of Michigan adopted a constitutional provision that expressly guarantees that all residents of Michigan have access to libraries. Const 1963, art 8, § 9 states:

> The legislature shall provide by law for the establishment and support of public libraries *which shall be available to all residents of the state* under regulations adopted by the governing bodies thereof. All fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of such public libraries, and county law libraries as provided by law. [Emphasis added.]

Thomas Jefferson stated, in notably similar language to Const 1963, art 8, § 9:

> I have often thought that nothing would do more extensive good at small expense than the establishment of a small

[14] Because this issue can be resolved by properly interpreting the constitutional language, I would not reach the questions whether defendant's practices violate plaintiff's rights to due process or equal protection.

> circulating library in every county, to consist of a few well chosen books, to be lent to the people of the country under such regulations as would secure their safe return in due time. [Letter from Thomas Jefferson to John Wyche, May 19, 1809.]

A learned public is essential to a democracy. In explaining the importance of the availability of books, Thomas Jefferson further stated:

> Books constitute capital. A library book lasts as long as a house, for hundreds of years. It is not then an article of mere consumption but fairly of capital, and often in the case of professional men, setting out in life, it is their only capital. [Letter from Thomas Jefferson to former President James Madison, Sept. 16, 1821.]

Libraries ensure that information is available to all people, not only to the privileged. An essential function of a library is to provide the public with equitable access to information. The people of Michigan, through the Michigan Constitution, have declared that equitable access to libraries is something that they desire as a society to promote a democratic government in Michigan. The Michigan Constitution of 1908 stated that a library should be established in every township in Michigan. Const 1908, art 11, § 14. This goal proved to be financially unfeasible, especially for many of the small townships, and the constitutional provision was never strictly enforced. When the 1963 constitution was being drafted, due concern was given to the importance of constitutionally established libraries and their importance to the people of Michigan.

The key to the proper and restrained interpretation of "available to all residents of the state" by this Court is to determine what the ratifiers of the constitution, the people, believed "shall be available to all residents of the state" meant when they agreed to give up their

right to a library guaranteed in every township under the old constitution. As Justice CAVANAGH aptly points out, the people of Michigan believed (as indicated by the common understanding of "available to all residents of the state" and by the extensive, thorough constitutional convention debates) that they were giving up their constitutional right to have a library in every township because they were corollarily ensuring access to libraries to all residents of the state. However, the majority of four admits that its decision today leaves entire pockets of the Michigan community without access to any library whatsoever.[1] The majority of four's decision today is not only unconstitutional, it also lacks common sense.

The majority of four's unrestrained and mistaken decision directly contradicts the intent of the ratifiers of

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[1] *Ante* at 565. The majority states:

> Indeed, it appears from statistics offered by the Michigan Department of History, Arts, and Libraries that less than 1/5 of 1 percent of the population of Michigan does not have a public library available either directly through their communities or through a cooperative agreement.[10]

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[10] The department asserts that there are only 21 townships in Michigan with a population totaling 17,055 that do not have a library and that do not contract with another city or township for library services. Inexplicably, the department does not indicate how many cities are similarly lacking. Although we cannot imagine that this figure is very high, Bloomfield Hills obviously is one such city.

The majority admits that all the residents of the city of Bloomfield Hills will be left without library access, and further admits that there may be similarly situated residents across the state who will also be divested of their library access. Inexplicably, the majority brushes off the impact on these residents and cavalierly continues to proclaim that the majority opinion upholds the constitutional mandate to ensure that libraries "shall be available to all residents of the state."

the constitution and is unconstitutional because it divests the people of Michigan of their constitutionally promised right to full access to libraries.

The decision today is another example of the majority of four's misuse of the power of interpretation to create policy and law, taking away the rights of the people of Michigan and denying them justice in this Supreme Court. It is yet another example of judicial activism by the majority of four. See also *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006) (eroding rights under the Michigan Freedom of Information Act); *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004) (reducing no-fault insurance rights); *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006) (preventing trial by jury); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004) (overturning accountability for sexual harassment in the workplace); and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007) (reducing the rights of every citizen to protect the environment by suit under the Michigan Environmental Protection Act).

PEOPLE v HARPER
PEOPLE v BURNS

Docket Nos. 130988, 131898. Argued April 12, 2007 (Calendar Nos. 6 and 7). Decided July 26, 2007.

Bernard G. Harper, Jr., pleaded guilty in the Genesee Circuit Court of larceny in a building. Harper's prior record variable (PRV) score and offense variable (OV) score placed him in an intermediate sanction cell of the appropriate sentencing grid. Pursuant to MCL 769.34(4)(a), the sentencing court was required to impose an intermediate sanction unless the court stated on the record a substantial and compelling reason to depart and impose a prison term. The court, Geoffrey L. Neithercut, J., concluding that departure was justified for several reasons, including Harper's extensive criminal history, sentenced Harper to a two- to four-year term of imprisonment rather than an intermediate sanction. The Court of Appeals denied Harper's delayed application for leave to appeal. The Supreme Court granted Harper's application for leave to appeal to consider whether an intermediate sanction constitutes a statutory maximum sentence under *Blakely v Washington*, 542 US 296 (2004), for which the factors supporting a sentencing court's departure must be found by a jury beyond a reasonable doubt or admitted by the defendant. 477 Mich 933 (2006).

Jesse G. Burns pleaded guilty in the Allegan Circuit Court of attempted breaking and entering of a building. His PRV and OV scores placed him in an intermediate sanction cell, and the court, Harry A. Beach, J., placed Burns on probation. Burns subsequently violated several conditions of his probation. Following a probation violation hearing, the trial court found by a preponderance of the evidence that Burns had violated his probation, principally by committing acts that would constitute fourth-degree criminal sexual conduct. The court departed from the original guidelines recommendation and imposed an 18-month to 5-year term of imprisonment. Burns moved for resentencing, arguing that his sentence violated *Blakely*. The trial court denied the motion, and the Court of Appeals denied Burns's application for leave to appeal. The Supreme Court granted leave to appeal to consider whether an intermediate sanction is a statutory maxi-

mum sentence under *Blakely* for which the reasons for a departure must be found by a jury or admitted by the defendant when the defendant is being sentenced for a probation violation. 477 Mich 933 (2006).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices WEAVER, YOUNG, and MARKMAN, the Supreme Court *held*:

Because Michigan has a true indeterminate sentencing scheme, an intermediate sanction is not a maximum sentence governed by *Blakely*, and the statute requiring the imposition of an intermediate sanction in certain circumstances does not alter the maximum sentence that is required upon conviction and authorized by either the jury's verdict or the guilty plea.

1. In an indeterminate sentencing scheme, judicial fact-finding does not present the same constitutional problems as judicial fact-finding used to exceed a statutory maximum under a determinate sentencing scheme because the fact-finding never affects the statutory maximum sentence that was authorized by the jury's verdict of guilty or the guilty plea. Michigan's indeterminate sentencing scheme is valid under *Blakely*, as was previously held in *People v Drohan*, 475 Mich 140 (2006).

2. When a defendant's recommended minimum sentence range under the sentencing guidelines is in an intermediate sanction cell, the sentencing court must impose an intermediate sanction, which cannot include a prison term, unless the court states a substantial and compelling reason to depart and impose a prison term. Under Michigan's sentencing laws, however, guidelines calculations relate solely to a defendant's recommended minimum sentence range. The maximum portion of a defendant's sentence will be the maximum penalty prescribed by law, and a sentencing court generally must impose no less than that statutory maximum for felony convictions. The guidelines do not alter or affect the statutory maximum sentence that must be imposed solely on the basis of the jury's verdict or the guilty plea. The conditional limit on incarceration provided by MCL 769.34(a) is simply a matter of legislative leniency that does not implicate *Blakely*.

3. While an intermediate sanction may include probation, probation is a matter of grace, and a defendant never becomes entitled to its continuance.

4. The defendants in these cases were entitled to receive the statutory maximums set for their crimes and were on notice of these potential maximum sentences. *Blakely* does not foreclose the Legislature's ability to define circumstances under which a sen-

tencing court may exercise discretion within the limit of the maximum sentence authorized by the jury's verdict. *Blakely* prohibits a sentencing court from exceeding the sentence authorized by the jury's verdict or the guilty plea; it does not entitle a defendant to a sentence less than that authorized by the verdict or the plea. A defendant does not have a constitutional right under *Blakely* to an intermediate sanction.

5. The sentencing courts in these cases identified substantial and compelling reasons to depart from the guidelines recommendations. In *Burns*, this included conduct that occurred after the court sentenced Burns to probation and therefore could not have been considered when originally scoring the guidelines.

6. *Blakely* errors are not structural and are subject to harmless-error analysis. Even if an intermediate sanction is construed as a maximum sentence for *Blakely* purposes, if any error occurred in these cases, it was harmless beyond a reasonable doubt. The facts used by the sentencing courts to depart were uncontested and supported by overwhelming evidence, such that a jury would have reached the same result.

Affirmed.

Justice CAVANAGH, concurring in part and dissenting in part, concurred with the result reached in *Harper* because Harper admitted the facts used in his sentencing when he pleaded guilty and stated that he did not contest the information in his presentence investigation report. Justice CAVANAGH concurred with the result advocated by Justice KELLY's dissent in *Burns*, however, and would remand the case for resentencing because the court in *Burns* did not articulate substantial and compelling reasons to depart from the sentencing guidelines. It is unnecessary to reach the constitutional issue in that case.

Justice KELLY, dissenting, stated that it was unnecessary to reach the constitutional issue in *Burns* because the trial court failed to articulate substantial and compelling reasons to exceed the guidelines recommendation. Burns is entitled to resentencing. With regard to *Harper*, the trial court articulated substantial and compelling reasons to depart, but the judicial fact-finding that occurred in the course of that departure violated Harper's Sixth Amendment right to a trial by jury. In *Blakely* and cases following it, including *Cunningham v California*, 549 US ___; 127 S Ct 856 (2007), the United States Supreme Court articulated a bright-line rule: Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be proved to the jury beyond a reasonable doubt or admitted by the defendant. When a defendant, on the basis of only his or her

current conviction, admissions, and criminal record, is entitled to a sentence that is within the range specified in an intermediate sanction cell, MCL 769.34(4)(a) sets the defendant's maximum sentence: an intermediate sanction that can include a jail term of either the upper limit of the recommended minimum sentence range or 12 months, whichever is shorter. Any judicial fact-finding that raises the defendant's sentence higher than this statutory maximum is unconstitutional under *Blakely* and *Cunningham*. Without the trial court's fact-finding, Harper would have received an intermediate sanction that included no more than 12 months in jail. The Sixth Amendment violation in his case requires resentencing. The error was not harmless beyond a reasonable doubt.

SENTENCES — INTERMEDIATE SANCTIONS — PROBATION.

An intermediate sanction described in the statutes setting forth Michigan's indeterminate sentencing scheme is not a maximum sentence governed by the requirement of *Blakely v Washington*, 542 US 296 (2004), that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt; in Michigan, the maximum portion of a defendant's indeterminate sentence is prescribed by statute, and the statute requiring the imposition of an intermediate sanction in certain circumstances does not alter the maximum sentence that is required upon conviction and authorized by either the jury's verdict or the guilty plea (MCL 769.8[1], 769.34[4][a]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Donald A. Kuebler*, Research, Training, and Appeals Chief, for the people in *Harper*.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Douglas E. Ketchum*, Assistant Prosecuting Attorney, for the people in *Burns*.

State Appellate Defender (by *Michael L. Mittlestat*) for Bernard G. Harper, Jr.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for Jesse G. Burns.

Amici Curiae:

Kimberly Thomas and *Miller, Canfield, Paddock and Stone, P.L.C.* (by *Hideaki Sano*), for Criminal Defense Attorneys of Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, and *William E. Molner*, Assistant Attorneys General, for the Attorney General and the Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. We granted leave to appeal in these two cases to determine whether an "intermediate sanction" described in MCL 769.31(b) and MCL 769.34(4) constitutes a maximum sentence under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), for which the facts supporting a departure must be found by a jury beyond a reasonable doubt or admitted by the defendant. We conclude that because Michigan has a true indeterminate sentencing scheme, an intermediate sanction is not a maximum sentence that is governed by *Blakely*.

Under Michigan law, the *maximum* portion of a defendant's indeterminate sentence is prescribed by MCL 769.8(1), which requires a sentencing judge to impose no less than the prescribed statutory maximum sentence as the maximum sentence for most felony convictions. Michigan's unique law requiring the imposition of an intermediate sanction upon fulfillment of the conditions of MCL 769.34(4)(a) does not alter the maximum sentence that is required upon conviction and authorized by either the jury verdict or the guilty plea.[1] Rather, the conditional

[1] Accordingly, we reject the Court of Appeals contrary conclusion in *People v Uphaus,* 275 Mich App 158; 737 NW2d 519 (2007).

limit on incarceration contained in MCL 769.34(4)(a) is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury verdict or the guilty plea, a circumstance that does not implicate *Blakely*.[2]

Finally, even if an intermediate sanction were a statutory maximum for purposes of *Blakely* and the sentencing courts in these cases violated *Blakely*, we conclude that any error was harmless. In both cases, the facts used by the sentencing judges to support the sentence were uncontested and supported by overwhelming evidence, such that we are convinced beyond a reasonable doubt that a jury would have reached the same result. Accordingly, we affirm the defendants' convictions and sentences.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v HARPER*

On February 14, 2005, defendant Harper pleaded guilty of larceny in a building, which is a class G offense that carries a statutory maximum sentence of four years' imprisonment.[3] He admitted that, between December 11 and December 16, 2004, he stole coats from

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[2] As Justice Kennedy noted in *Harris v United States,* 536 US 545, 566; 122 S Ct 2406; 153 L Ed 2d 524 (2002), "[t]he Fifth and Sixth Amendments ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but *they do not promise that he will receive 'anything less' than that.*" (Emphasis added; citation omitted.) See also *Apprendi v New Jersey,* 530 US 466, 498-499; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (Scalia, J., concurring), indicating that the Sixth Amendment provides "the right to have a jury determine those facts that determine the maximum sentence the law allows," and that a defendant receiving a lesser sentence "may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted)."

[3] MCL 750.360; MCL 750.503; MCL 777.16r.

his employer, the Old News Boys of Flint, a nonprofit organization that solicits donations to aid needy families in Flint. Harper then sold some of the coats.

As part of the plea agreement, the prosecutor dismissed a related embezzlement charge.[4] The prosecutor also agreed not to seek an enhanced sentence based on Harper's status as a fourth-offense habitual offender.[5] The parties made no other agreement regarding Harper's sentence.

Harper did not contest that his criminal record included two prior convictions for high severity felonies, three prior convictions for low severity felonies, and one prior misdemeanor conviction. Accordingly, he received an overall prior record variable (PRV) score of 72, based on scores of 50, 20, and 2 points, respectively, for PRV 1, PRV 2, and PRV 5.[6] His offense variable (OV) score consisted of the five points he received under OV 16, because his offense caused property with a value of $1,000 or more but not more than $20,000 to be "obtained, damaged, lost or destroyed."[7] These scores placed him in the E-I cell of the sentencing grid for class G offenses. As a result, his calculated minimum sentence range was zero to 17 months.[8]

Because his minimum sentence range had an upper limit of 18 months or less, the court was required to impose an intermediate sanction—which may include, for instance, a term of probation or a jail term of 12 months or less—unless the court stated on the record a

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[4] MCL 750.174(4)(a).

[5] As a fourth-offense habitual offender, Harper's potential maximum prison sentence for larceny in a building would have increased from 4 years to 15 years under MCL 769.12(1)(b).

[6] MCL 777.51; MCL 777.52; MCL 777.55.

[7] MCL 777.46(1)(c).

[8] MCL 777.68.

substantial and compelling reason to impose a prison term.[9] The Genesee Circuit Court concluded that departure was justified for several reasons, including Harper's extensive criminal history. The court noted Harper's record of three parole revocations, his history of absconding from parole, the bench warrants issued against him for failures to appear in court, and other "out of state" legal problems reflected in his presentence investigation report. The court added that the sentencing guidelines did not take into account that Harper had "ripped off a charity that was trying to do good for cold children." Accordingly, on March 11, 2005, the court sentenced Harper to a minimum prison term of 24 months, and a maximum term of 48 months with credit for time served.

The Court of Appeals denied defendant's delayed application for leave to appeal, citing lack of merit in the grounds presented. Harper then applied for leave to appeal in this Court. We granted leave to consider whether his sentence, as an upward departure from an intermediate sanction, violated his constitutional right to have " 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . submitted to a jury, and proved beyond a reasonable doubt.' " *Blakely, supra* at 301, quoting *Apprendi v New Jersey,* 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000).[10]

B. *PEOPLE v BURNS*

In July 2002, defendant Burns pleaded guilty of attempted breaking and entering of a building. His recommended minimum sentence range under the

[9] MCL 769.34(4)(a); MCL 769.31(b).

[10] 477 Mich 933 (2006).

guidelines was zero to 11 months, which placed him in an intermediate sanction cell. Burns was placed on probation for three years. Among the conditions of probation were that he must not violate the law, that he must not engage in threatening or assaultive behaviors, and that he must avoid alcohol and illegal drug consumption.

In June 2005, Burns was charged with four counts of violating the terms of his probation: using alcohol, committing fourth-degree criminal sexual conduct, engaging in harassment, and engaging in assaultive behavior. Burns pleaded not guilty to the probation violation charges.

A probation violation hearing was held. Two 18-year-old women testified that Burns had approached them near a boat ramp on Lake Michigan in Ottawa County. After engaging in small talk, Burns asked one of the women if she gave "good head." He also touched the woman on the buttocks and commented that it was "nice." Burns asked the other woman similar sexual questions and put his arm around her. The two women wrote down Burns's license plate number and reported the incident to the police.

A police officer came to investigate the complaint. The officer stopped Burns's boat. The two women identified Burns as the person who had assaulted them. Although Burns initially denied that the incident had occurred, he eventually admitted to the officer that he had asked the women if they knew how to give "a blow job." He also admitted that he had touched one woman on the buttocks and the other on the shoulder. He further told the officer that he had consumed about six beers and was "buzzed." Burns was administered a preliminary breath test that registered a blood alcohol level above the legal limit.

Burns called no witnesses and presented no evidence at the probation violation hearing. The trial court found, by a preponderance of the evidence, that Burns had been intoxicated, that he had committed fourth-degree criminal sexual conduct, and that he had done so in an intimidating, aggressive manner.

At the probation violation sentencing, the trial court departed from the original guidelines recommendation of zero to 11 months and imposed a sentence of 18 months to 5 years. The court explained its decision:

> Well, I'm glad to hear that you've found religion and the reason to—it can give some meaning to your life. It doesn't however change what you did here. You know, there wasn't any question but that you did this to these young girls. I don't understand in a sense why you put them through taking the stand and testify [sic] to the whole thing, because there wasn't any issue, you did it. It expresses an attitude to me that is very puzzling. It's kind of a mean spirited thing that you did. Not that you didn't have a perfect right to do it, I would never dispute your right to a hearing and to have testimony confirm it, but it wasn't a close case, it was a clear cut case of a great deal of abuse on your part. You were about as intimidating and—to those young girls and you scared the devil out of them.
>
> It's a difficult thing to understand how you could publicly do that to people, young girls you didn't even know, you didn't have any—it was gross, it was very gross. Very intimidating.
>
> I suspect because of the fact that you fondled the one young lady you're probably going to be looking at some serious time in Holland if you're convicted [of fourth-degree criminal sexual conduct]. I suspect you will be because the girls told the story very honestly in my opinion. You're very likely going to get convicted and go to prison for that one.
>
> I seldom ever exceed guidelines, in fact I can't recall a time that I have, but I'm going to in your case. The

> behavior that you exhibited here certainly is not or was not contemplated in arriving at your original guidelines. It was gross, it was abusive, and I believe there's a compelling reason to exceed guidelines.
>
> It's the sentence of this Court that you be committed to the Michigan Department of Corrections for a term of 18 months to a maximum of 5 years. You have credit I believe for 142 days in the county jail.

On the departure evaluation form, the court stated that the original guidelines recommendation of zero to 11 months failed "to consider [defendant's] violation behavior—which constitutes a substantial and compelling reason for a moderate departure . . . ."[11]

Burns moved for resentencing, arguing that the fact that his sentence exceeded the guidelines range on the basis of facts neither admitted by him nor found by a jury beyond a reasonable doubt violated his due process rights under *Blakely*. The trial court denied the motion because this Court had stated in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* did not apply to Michigan's indeterminate sentencing system. The court further explained:

> Therefore, the Court was not required to find Defendant guilty of 4th Degree Criminal Sexual Conduct beyond a reasonable doubt in order to consider that behavior for the purpose of exceeding guidelines. The Court found objective and verifiable evidence on the record, including Defendant's admission to the public safety officer that he touched the victim's "butt" and the uncontroverted testimony of the victims themselves that Defendant was harass-

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[11] Contrary to the apparent assumptions of Justice KELLY, *post* at 648-650, and Justice CAVANAGH, *post* at 646, the sentencing judge followed the proper procedure for stating his reasons for departure. A judge is required to "*state*[] *on the record* a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a) (emphasis added); see also MCR 6.425(E)(1)(e). The judge did precisely this.

> ing and intimidating. Such evidence was not considered in the original sentencing, and the Court maintains that Defendant's behavior constituted substantial and compelling reasons for exceeding statutory guidelines.

The Court of Appeals denied Burns's application for leave to appeal for lack of merit in the grounds presented. Burns then sought leave to appeal in this Court. We granted the application and directed the parties to address whether an intermediate sanction described in MCL 769.31(b) and MCL 769.34(4) is a statutory maximum sentence under *Blakely* "for which the departure reasons must be decided by a jury or admitted by the defendant, where the defendant is being sentenced for a violation of probation." 477 Mich 933 (2006).

II. STANDARD OF REVIEW

We review de novo questions of constitutional law. *People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004).

III. ANALYSIS

A. MICHIGAN'S STATUTORY SENTENCING SCHEME UNDER *BLAKELY*

Under the Due Process Clause of the Fifth Amendment and the jury trial guarantees of the Sixth Amendment, any fact that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt.[12] The Fourteenth Amendment requires that the states' criminal sentencing schemes conform to this rule.[13] The rule includes exceptions for the fact of prior convictions and any facts admitted by the defendant.[14]

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[12] *Apprendi, supra* at 476, 490.

[13] *Id.* at 476.

[14] *Blakely, supra* at 303; *Apprendi, supra* at 490.

Accordingly, when sentencing a defendant, a judge may not exceed the maximum sentence authorized by the jury verdict or the guilty plea except on the basis of the facts reflected in the jury verdict, the facts admitted by the defendant, and the defendant's record of prior convictions. In other words, the statutory maximum, for *Blakely* purposes, is the maximum sentence a judge may impose "*without* any additional findings." *Blakely, supra* at 304. In the wake of *Blakely,* state courts have been called upon to define the relevant statutory maximums within which judges may continue to exercise the traditional sentencing discretion legislatures afford them.

The first question in this inquiry involves whether a state's sentencing scheme is determinate or indeterminate. As we have previously explained, under a determinate scheme, conviction for an offense typically exposes a defendant to a sentence of a fixed term lying in a standard range for that offense.[15] In *Blakely,* for instance, Washington's scheme prescribed a "standard range" of 49 to 53 months for the defendant's conviction of second-degree kidnapping with a firearm.[16] A judge was authorized to depart beyond the standard range on the basis of " 'substantial and compelling reasons justifying an exceptional sentence.' "[17] The statute permitted the reasons for departure to be based on facts found by the sentencing judge.[18] In *Blakely*, the judge sentenced the defendant to an exceptional 90-month sentence on the basis of the judge's finding that the defendant perpetrated the kidnapping with "delib-

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[15] See *People v Drohan,* 475 Mich 140, 159-160; 715 NW2d 778 (2006), citing *Claypool, supra* at 730 n 14.

[16] *Blakely, supra* at 299, citing Wash Rev Code 9.94A.320.

[17] *Blakely, supra* at 299, citing Wash Rev Code 9.94A.120(2).

[18] *Blakely, supra* at 299, citing Wash Rev Code 9.94A.120(3).

erate cruelty."[19] Accordingly, the sentence violated the defendant's constitutional rights because it exceeded the fixed statutory maximum sentence range that was authorized solely by the facts that the defendant admitted when he pleaded guilty of second-degree kidnapping.[20]

In contrast, under an indeterminate scheme, a defendant receives a minimum sentence and a maximum sentence. In Michigan, for instance, the law provides that the maximum portion of a defendant's indeterminate sentence must be the "maximum penalty provided by law . . . ."[21] As will be explained in detail later in this

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[19] *Blakely, supra* at 300.

[20] *Id.* at 304-305.

[21] MCL 769.8(1); *Drohan, supra* at 160. Michigan's habitual-offender statutes are an exception to the Legislature's requirement that the maximum portion of a defendant's indeterminate sentence be the maximum penalty provided by law. The habitual-offender statutes grant a sentencing judge the discretion to increase the maximum portion of a recidivist's indeterminate sentence beyond the statutory limit on the basis of the fact of a prior conviction, as permitted by *Apprendi* and *Blakely*. *Id.* at 161 n 13; MCL 769.10(1)(a) (upon a second felony conviction, a judge may impose a maximum sentence of up to $1\frac{1}{2}$ times the statutory maximum prescribed for a first conviction of the offense); MCL 769.11(1)(a) (upon a third felony conviction, a judge may impose a maximum sentence of up to twice the statutory maximum); MCL 769.12(1)(a) and (b) (upon a fourth or subsequent felony conviction, a judge may impose a maximum sentence of up to 15 years for offenses carrying statutory maximum terms of less than 5 years and a sentence of life in prison for offenses carrying maximum terms of 5 years or more). When a judge imposes an increased maximum sentence under these statutes, the defendant's sentence remains an indeterminate sentence. Moreover, the judge is expressly prohibited from sentencing a recidivist to a maximum sentence that is less than the maximum term for a first conviction. MCL 769.10(2); MCL 769.11(2); MCL 769.12(2).

A very limited number of offenses carry determinate sentences in Michigan, such as first-degree murder, MCL 750.316 (life in prison without the possibility of parole), and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b (two

opinion, the sentencing judge ascertains the minimum portion of a defendant's indeterminate sentence by calculating the minimum sentence range under the statutory sentencing guidelines, which consider the circumstances of the crime as well as the defendant's criminal history. The judge may exceed the statutorily recommended minimum sentence range in a particular case if the judge finds a "substantial and compelling reason" to depart that the guidelines do not adequately take into account.[22] While the sentencing judge fixes the minimum portion of a defendant's indeterminate sentence, a defendant is still liable to serve his maximum sentence and may only be released before the maximum term has expired at the discretion of the parole board.[23]

Thus, under an indeterminate sentencing scheme like Michigan's, judicial fact-finding does not present the same constitutional problems as judicial fact-finding used to exceed the statutory maximum under a determinate scheme,[24] because judicial fact-finding under our scheme never affects the statutory maximum sentence that was authorized by the jury verdict of

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years in prison for a first offense, five years for a second offense, and ten years for a third or subsequent offense).

[22] MCL 769.34(3).

[23] MCL 791.234; MCL 791.235; *Drohan, supra* at 163.

[24] The United States Supreme Court has firmly established that, when a legislature defines the outer limit of an indeterminate sentence on the basis of the elements of an offense, judicial fact-finding may be employed to set the minimum sentence. *McMillan v Pennsylvania,* 477 US 79, 86-88, 93; 106 S Ct 2411; 91 L Ed 2d 67 (1986); see also *Harris, supra* at 567 (opinion of Kennedy, J.) ("Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.").

guilty or the defendant's guilty plea.[25] As the *Blakely* Court observed in distinguishing the two types of schemes:

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial

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[25] The fact that a defendant is always liable to serve the statutory maximum sentence in Michigan also distinguishes our scheme from the schemes Justice KELLY claims are indistinguishable. She compares, for instance, *Ring v Arizona,* 536 US 584, 592-593; 122 S Ct 2428; 153 L Ed 2d 556 (2002), in which the United States Supreme Court rejected an Arizona sentencing law allowing the sentencing judge to determine, at a separate posttrial hearing, whether the defendant would be subject to a maximum sentence of either death or life imprisonment. *Post* at 665-666. The state argued that the jury verdict authorized either sentence. The *Ring* Court disagreed, given that the maximum sentence of death could *only* be imposed if the judge found aggravating circumstances. *Ring, supra* at 603-604. An Arizona offender also could not know until sentencing was complete whether he would be subject to the death penalty for his crime. In contrast, and contrary to Justice KELLY's contention, Michigan's indeterminate sentences *do* "have only one maximum sentence," *post* at 659, and the statutes unambiguously notify Michigan offenders of the statutory maximum terms applicable to their crimes.

In her dissent in *People v McCuller,* 479 Mich 672; 739 NW2d 563 (2007), Justice KELLY also compares the federal sentencing system as it existed before the United States Supreme Court's decision in *United States v Booker,* 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). But the federal sentencing guidelines did not merely set a minimum sentence and leave a defendant liable to serve the statutory maximum, as in Michigan. Rather, in *Booker*, as Justice KELLY concedes, although a separate federal statute set an absolute maximum sentence of life in prison for the defendant's offense, in Booker's particular case "the guidelines *required* a *maximum* sentence of 21 years and 10 months' imprisonment." *McCuller, supra* at 714 (KELLY, J., dissenting) (emphasis added); see *Booker, supra* at 227. Accordingly, the judge's upward departure from that range on the basis of his own findings was impermissible given the then-mandatory nature of the guidelines, although the 30-year sentence imposed was within the outer limit of the absolute maximum. *Booker, supra* at 226-227. As we will more fully explain later in this opinion, Michigan's sentencing guidelines establish a defendant's *minimum* sentence. Our statutory maximums for a given offense are static.

> power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence . . . . [*Blakely*, *supra* at 308-309.]

Similarly, as we observed in *People v Drohan*, 475 Mich 140, 162; 715 NW2d 778 (2006), in Michigan, "the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict." For this reason, a defendant's constitutional rights are not violated when a sentencing judge exceeds the recommended minimum sentence range on the basis of a substantial and compelling reason, as the respective judges did in these cases; even an upward departure from the guidelines may not exceed the maximum penalty provided by law. *Id.* at 162 n 15. Therefore, we reaffirm our holding in *Drohan* that Michigan's indeterminate sentencing scheme is valid under *Blakely*. *Id.* at 162-164.

B. MICHIGAN'S INTERMEDIATE SANCTION CELLS

Nonetheless, defendants argue that at least one aspect of Michigan's sentencing scheme violates

Blakely. They claim that, when the guidelines minimum sentence range calls for an intermediate sanction, as it did in these cases, the intermediate sanction becomes the relevant statutory maximum sentence under *Blakely* and a defendant is *constitutionally entitled* to such a sanction. Accordingly, they claim that a judge may not exceed the range of intermediate sanction options by sentencing a defendant to an indeterminate prison term, even if the judge has a substantial and compelling reason to do so. We disagree. *Blakely* prohibits a judge from exceeding the maximum sentence authorized by the jury verdict or the guilty plea. *Blakely* does not, as defendants would have it, entitle a defendant to a sentence that is *less than* the one authorized by the verdict or plea.

A defendant's recommended minimum sentence range under the guidelines is determined on the basis of the defendant's record of prior convictions (the PRV score), the facts surrounding his crime (the OV score), and the legislatively designated offense class.[26] A court must generally sentence a defendant to a minimum prison term within the guidelines range[27] unless it states on the record a substantial and compelling reason to depart.[28] A substantial and compelling reason "exists only in exceptional cases," and is an "objective and verifiable" reason that "keenly or irresistibly grabs our attention" and is "of considerable worth in deciding the length of a sentence . . . ."[29] Departure may not be based on certain qualities of the defendant, such as

[26] MCL 777.21(1). The range for the minimum sentence may also be increased on the basis of a defendant's status as an habitual offender. MCL 777.21(3).

[27] MCL 769.34(2)(a).

[28] MCL 769.34(3).

[29] *People v Babcock,* 469 Mich 247, 258; 666 NW2d 231 (2003) (internal quotations and citation omitted).

gender, race, or employment status.[30] Departure also may not be based on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Finally, a minimum sentence, including a departure, may not exceed 2/3 of the statutory maximum sentence.[31]

When the upper and lower limits of the recommended minimum sentence range meet certain criteria, a defendant is eligible for an intermediate sanction. If the upper limit of the minimum sentence range exceeds 18 months and the lower limit is 12 months or less, the defendant's sentence range is in a "straddle cell."[32] When the range is in a straddle cell, the sentencing court may elect either to sentence the defendant to a prison term with the minimum portion of the indeterminate sentence within the guidelines range or to impose an intermediate sanction, absent a departure.[33] If the upper limit of the minimum sentence range is 18 months or less, as it was in these cases, the cell containing the range is an "intermediate sanction cell." Under these circumstances, the statute provides that

> the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the

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[30] MCL 769.34(3)(a).

[31] MCL 769.34(2)(b). MCL 769.34 does not apply when a defendant is convicted of an offense punishable by a prison sentence of "life or any term of years" because the minimum will never exceed 2/3 of the statutory maximum sentence of life authorized by the jury verdict. *Drohan, supra* at 162 n 14.

[32] *People v Stauffer,* 465 Mich 633, 636 n 8; 640 NW2d 869 (2002).

[33] MCL 769.34(4)(c).

> department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

MCL 769.31(b) defines "intermediate sanction" as "probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of" several options, including probation with any conditions authorized by law, probation with jail, treatment for substance abuse or mental health conditions, and other options such as house arrest and community service.[34] Defendants argue that, because the statute states that the sentencing

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[34] The nonexhaustive list of intermediate sanction options includes:

> (*i*) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.
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> (*ii*) Probation with any probation conditions required or authorized by law.
>
> (*iii*) Residential probation.
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> (*iv*) Probation with jail.
>
> (*v*) Probation with special alternative incarceration.
>
> (*vi*) Mental health treatment.
>
> (*vii*) Mental health or substance abuse counseling.
>
> (*viii*) Jail.
>
> (*ix*) Jail with work or school release.
>
> (*x*) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.
>
> (*xi*) Participation in a community corrections program.
>
> (*xii*) Community service.

court "shall" impose an intermediate sanction, they were constitutionally entitled under *Blakely* to either a jail term of 12 months or less or one or more of the other intermediate sanction options available to the sentencing court.

Most significantly, they cite *Cunningham v California,* 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007), in which the United States Supreme Court examined California's determinate sentencing law (DSL), which contains language that is superficially similar to the language describing intermediate sanction cells in MCL 769.34(4)(a) quoted above.[35] In *Cunningham,* the defendant was tried and convicted of continuous sexual abuse of a child under the age of 14.[36] The statute defining the offense prescribed three precise terms of imprisonment —lower, middle, and upper terms of 6, 12, and 16 years, respectively.[37] The statute that controlled which term a sentencing judge should impose provided that " 'the court *shall* order imposition of the middle term, *unless* there are circumstances in aggravation or mitigation of the crime.' "[38] Circumstances in aggravation or mitigation were to be determined by the court after considering the trial record, the probation officer's report, statements submitted by the parties, the victim, or the

(*xiii*) Payment of a fine.

(*xiv*) House arrest.

(*xv*) Electronic monitoring. [MCL 769.31(b).]

[35] *Cunningham, supra,* 127 S Ct at 861-862.

[36] *Id.,* 127 S Ct at 860.

[37] *Id.,* 127 S Ct at 861, citing Cal Penal Code 288.5(a) (stating that a person convicted of continuous sexual abuse of a child "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years").

[38] *Cunningham, supra,* 127 S Ct at 861, quoting Cal Penal Code 1170(b) (emphasis added).

victim's family, and " 'any further evidence introduced at the sentencing hearing.' "[39] The judge in *Cunningham* sentenced the defendant to the 16-year upper term on the basis of the judge's findings of aggravating facts, including the particular vulnerability of the victim and the defendant's violent conduct, which indicated a serious danger to the community.[40]

The *Cunningham* Court concluded that the sentence violated the defendant's rights because

> an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. . . . Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U.S., at 303, 124 S.Ct. 2531 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S., at 490, 120 S.Ct. 2348. [*Cunningham, supra,* 127 S Ct at 868.]

Defendants argue that MCL 769.34(4)(a), which similarly provides that the court "*shall* impose an intermediate sanction *unless* the court states on the

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[39] *Cunningham, supra,* 127 S Ct at 861-862, quoting Cal Penal Code 1170(b).

[40] *Cunningham, supra,* 127 S Ct at 860.

record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections," renders their sentences indistinguishable from the invalid sentence in *Cunningham*. We hold that the superficial similarity of the statutory language in California's determinate scheme does not transform Michigan's intermediate sanction cells into the relevant statutory maximums for *Blakely* purposes. Rather, the similar language in MCL 769.34(4)(a) yields a different result when read in the context of Michigan's indeterminate scheme.

Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole.[41] This general rule not only applies to our interpretation of Michigan's sentencing scheme, it requires us to examine it in the context of related statutes, including laws defining intermediate sanctions such as probation.[42] Further, we presume that a statute is constitutional. "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).[43]

Michigan's sentencing laws clearly require that the maximum portion of every indeterminate sentence be

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[41] *People v Buehler,* 477 Mich 18, 26-27; 727 NW2d 127 (2007).

[42] *Id.*

[43] See also *Sears v Cottrell,* 5 Mich 251, 259 (1858):

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they *manifestly* infringe some provision of the constitution that they can be declared void for that reason. In cases 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 the act.

no less than the "maximum penalty provided by law . . . ." MCL 769.8(1). Thus, the " 'statutory maximum' for *Apprendi* purposes," or "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*"[44] is the maximum term set by statute for each enumerated offense.[45] Thus, when Harper pleaded guilty of larceny in a building, his guilty plea alone required the imposition of a maximum sentence of four years' imprisonment. Similarly, when Burns pleaded guilty of attempted breaking and entering, his conviction required the imposition of a five-year maximum sentence. The guidelines calculations, which might result in an intermediate sanction cell, relate solely to a defendant's recommended *minimum* sentence range. The guidelines do nothing to alter or affect the maximum sentence that must be imposed solely on the basis of the jury verdict or the guilty plea. The language of our sentencing scheme makes this clear in several ways.

MCL 769.8 describes a judge's general sentencing powers and duties:

> (1) When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, *the court* imposing sentence shall not fix a definite term of imprisonment, but *shall fix a minimum term*, except as otherwise provided in this chapter. *The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.*

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[44] *Blakely, supra* at 303 (emphasis in original).

[45] As we have explained, the habitual-offender statutes provide a slight exception to this rule by permitting a sentencing judge to increase a maximum sentence on the basis of the fact of prior conviction. See n 21 of this opinion; see also *Drohan, supra* at 161 n 13.

> (2) Before or at the time of imposing sentence, the judge shall ascertain by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct, which facts and other facts that appear to be pertinent in the case the judge shall cause to be entered upon the minutes of the court. [Emphasis added.]

Thus, the statute requires that a judge "shall fix a minimum term," but "[*t*]*he maximum penalty provided by law shall be the maximum sentence in all cases . . . .*" MCL 769.8(1) (emphasis added). Although each mandate is modified by "except as otherwise provided in this chapter" or "except as provided in this chapter," respectively, this or similar language has been included in the statute since it was enacted in 1927.[46] Accordingly, this language creating an exception to the rule that "[t]he maximum penalty provided by law shall be the maximum sentence" was not originally aimed at intermediate sanction cells; intermediate sanction cells were first suggested in the sentencing scheme in 1994 and are a mandatory component of sentencing only for crimes committed after January 1, 1999.[47] Therefore, it takes further examination of the statutory scheme to discern whether intermediate sanctions are meant to be exceptions to the rule.

The Legislature explicitly described exceptions to indeterminate sentencing in our sentencing scheme. For example, MCL 769.9(1) provides: "The provisions of this chapter relative to indeterminate sentences shall not apply to a person convicted for the commission of an offense for which the only punishment prescribed by

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[46] 1927 PA 175. The language originally read "except as hereinafter provided" and "except as herein provided." It was modified to its current form by 1978 PA 77.

[47] 1994 PA 445; MCL 769.34(2), as amended by 1998 PA 317.

law is imprisonment for life." Similarly, MCL 769.9(2) addresses cases in which the sentencing judge has the option to impose a sentence of either life imprisonment or a term of years. If the judge imposes a sentence of life imprisonment, the judge may not also impose a separate minimum sentence. MCL 769.9(2). As we noted previously, the Legislature also explicitly provided for determinate sentences for a limited number of particular offenses, such as possession of a firearm during the commission of a felony, MCL 750.227b. In contrast, nowhere did the Legislature state that intermediate sanctions are an exception to indeterminate sentencing.

To the contrary, intermediate sanctions are an explicit component of the statutory scheme for setting a defendant's *minimum* sentence. A sentencing court calculates a defendant's PRVs and OVs in order to determine "the recommended *minimum* sentence range." MCL 777.21(1) (emphasis added). MCL 769.34 governs the courts' application of the guidelines and consistently addresses the *minimum* sentence range. For instance, MCL 769.34(2) provides:

> Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.

Subsection 4 defines intermediate sanction cells on the basis of the upper and lower limits of the "recommended *minimum* sentence range." MCL 769.34(4)(a) and (c) (emphasis added). The statutory maximum for the relevant offense—which is the maximum

authorized by the conviction and therefore the relevant maximum for *Blakely* purposes—has never changed.

That the statutory maximum is not altered by an intermediate sanction cell becomes particularly evident when we consider the range of intermediate sanctions available to the sentencing judge. Most significantly, judges commonly impose a term of probation, which may also be combined with other sanctions such as jail or substance abuse treatment.[48] Accordingly, the nature of a probationary sentence aids our understanding of whether the Legislature intended intermediate sanctions to constitute maximum terms for *Blakely* purposes.

MCL 771.1(1), originally enacted in 1927,[49] authorizes a sentencing judge to impose probation in lieu of prison for most crimes if the judge "determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law."[50] Thus, the imposition of probation is a

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[48] See MCL 769.31(b)(*i*), (*ii*), and (*iv*), concerning drug treatment, probation with any conditions required or authorized by law, and probation with jail, respectively.

[49] 1927 PA 175.

[50] MCL 771.1(1) provides in full:

> In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

permissive matter left to the discretion of the sentencing judge. The Legislature provided a detailed definition of probationary sentences in MCL 771.4:

> It is the intent of the legislature that *the granting of probation is a matter of grace conferring no vested right to its continuance*. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. *All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest*. Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest. *If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made*. [Emphasis added.]

Thus, probation is, by definition, "a matter of grace conferring no vested right to its continuance." When a judge imposes a sentence of probation, the Legislature intended that probation be revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion. Indeed, a judge may

revoke probation for "antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest." *Id*.

In accord, the United States Supreme Court has recently reaffirmed that probation revocation hearings may be " 'proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.' " *Samson v California*, 547 US 843, ___; 126 S Ct 2193, 2198; 165 L Ed 2d 250 (2006), quoting *United States v Knights*, 534 US 112, 120; 122 S Ct 587; 151 L Ed 2d 497 (2001). "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' " *Knights, supra* at 119 (citations omitted). Cf. *United States v Cranley,* 350 F3d 617, 621 (CA 7, 2003) ("[I]t has long been understood that a fundamental and unchallenged condition of probation is that the probationer surrender his right to trial by jury should the government seek revocation, and thus imprisonment.").

Moreover, for this reason, federal courts observe that the rule of *Blakely* and *Apprendi* does not apply to probation revocation hearings. In the words of the Court of Appeals for the Second Circuit,

> a sentence of supervised release by its terms involves a surrender of certain constitutional rights and this includes surrender of the due process rights articulated in *Apprendi*
> . . . .
>
> . . . Given a prior conviction and the proper imposition of conditions on the term of supervised release, when a defendant fails to abide by those conditions the government is not then put to the burden of an adversarial criminal trial. [*United States v Carlton,* 442 F3d 802, 809 (CA 2, 2006), quoted with approval by *United States v Cordova*, 461 F3d 1184, 1187 (CA 10, 2006).]

The Court of Appeals for the Ninth Circuit recently reached the same conclusion when addressing arguments similar to those advanced by defendant Burns. In *United States v Ray,* 484 F3d 1168, 1169 (CA 9, 2007), the defendant was initially sentenced to a short prison term, followed by a three-year term of supervised release. She later admitted that she had violated certain conditions of the release, and the court revoked her supervised release. *Id.* She argued that her maximum term of imprisonment for purposes of resentencing was the high end of her federal sentencing guidelines range, rather than the statutory maximum imposed by the United States Code. *Id.* at 1170. The court observed that the courts of appeals in the First, Second, and Fifth circuits had already rejected this argument in the supervised release context. *Id.* at 1171-1172. Further, the federal circuits had unanimously rejected the same argument in the analogous context of resentencing after revocation of probation. See *id.* at 1172. The Ninth Circuit held:

> We now join our sister circuits in holding that [*United States v Booker,* 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the counterpart to *Blakely* in the federal sentencing context,] does not define the "statutory maximum" as the high end of the Guidelines range for sentences imposed for violations of supervised release. Instead, the definition of "statutory maximum" continues to come from the United States Code. We may not modify Congress' clear intent that the *statutory* maximum determines the allowable period of imprisonment after the revocation of supervised release, even if the Guidelines prescribed a lower maximum sentence for the particular defendant. [*Id.* at 1171.][51]

[51] Justice KELLY contends that differences between Michigan's sentencing scheme and the federal sentencing scheme preclude any comparison in this context. She observes that, under the federal scheme, a judge need not adhere to the originally established guidelines range when resentencing a defendant after he violates the conditions of probation. *Post* at 659-660, citing *United States v Goffi,* 446 F3d 319, 322 (CA 2, 2006).

Perhaps most significantly, the Michigan Legislature did not modify or repeal the probation statutes when it enacted the mandatory sentencing guidelines. Rather, the statutes inform each other. The limits of a sentence that includes probation are defined in MCL 771.1 *et seq.,* which provide, for instance, time limits for probationary sentences on the basis of the crime committed. See, e.g., MCL 771.2; MCL 771.2a. Indeed, the statute defining intermediate sanction cells, MCL 769.34(4)(a), does not define or limit available intermediate sanctions; it merely relies on and reiterates definitions of intermediate sanctions provided by other statutes. Crucially, the mandate in MCL 769.34(4)(a) that a jail term imposed as part of an intermediate sanction may not "exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less," reit-

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Rather, upon resentencing, a federal judge consults relevant guidelines or policy statements issued by the United States Sentencing Commission. *Id.*; 18 USC 3553(a)(4)(B). The judge is free to exceed the initial guidelines range *as long as the sentence is still within the absolute statutory maximum for the underlying conviction*. *Goffi, supra* at 322-323. For comparison, in Michigan the sentencing guidelines continue to apply in this context and, as usual, a judge must sentence the defendant within the guidelines or state substantial and compelling reasons for departure. *People v Hendrick,* 472 Mich 555, 560, 562-563; 697 NW2d 511 (2005). Moreover, "it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure." *Id.* at 562-563.

We fail to see how the differences between the two schemes "completely undermine[] [our] argument." *Post* at 660-661. The federal system affords a judge general discretion to exceed the original guidelines range when sentencing a defendant who has violated probation as long as the judge consults relevant guidelines or policy statements. The Michigan system affords such discretion as long as the judge gives legally sufficient substantial and compelling reasons for departure. *In both systems, the statutory maximum authorized by jury verdict or the defendant's guilty plea has not changed and may not be exceeded*. Neither system grants a defendant a special right to a sentence limited to the initial guidelines range merely because he was initially afforded probation and chose to violate the probationary conditions.

erates a mandate from the probation statutes that long preceded the enactment of MCL 769.34.[52] MCL 771.3(2) provides, in part:

> As a condition of probation, the court may require the probationer to do 1 or more of the following:
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> (a) *Be imprisoned in the county jail for not more than 12 months*, at the time or intervals, which may be consecutive or nonconsecutive, within the probation as the court determines. *However, the period of confinement shall not exceed the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months*. [Emphasis added.]

Thus, first, the 12-month limitation, as restated in MCL 769.34(4)(a), is not a new, independent limit on jail time established by the sentencing guidelines in the intermediate sanction cell context. Second, the nature of a probationary sentence clearly reveals the Legislature's intent that the 12-month limit on incarceration may be exceeded, even when jail time is imposed pursuant MCL 769.34(4)(a). "Probation with jail" is explicitly listed as an intermediate sanction in MCL 769.31(b)(*iv*). Yet if a judge imposes an initial jail term of 12 months or less with a term of probation, the term of probation effectively becomes meaningless.[53] For if a judge may never impose additional imprisonment, he is unable to revoke probation. This is because, when revoking probation, "the court may sentence the probationer in the same manner and to the same penalty as

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[52] The 12-month limit placed on jail time by MCL 771.3(2)(a) has been effective since 1981, when it was increased from six months by 1980 PA 514.

[53] Justice KELLY contrasts a situation in which a defendant is sentenced *only* to 12 months or less of jail time without a period of probation. *Post* at 660 n 12. A judge *may* simply sentence a defendant to jail with no further monitoring or evaluation. But the statute *also* empowers the judge to impose both jail and probation. It is this latter option that Justice KELLY's analysis would render impossible to exercise.

the court might have done if the probation order had never been made." MCL 771.4. But to avoid placing a defendant in double jeopardy by punishing him twice for the same offense, a judge must subtract the initial jail term from any term of incarceration he imposes upon revocation and resentencing.[54] If the judge could not depart upward by considering postprobation factors, such as the defendant's probation-violating behavior, the judge would be effectively unable to revoke probation or resentence the defendant because the judge would have exhausted his ability to impose jail time. The same problem would occur even when a judge initially sentenced a defendant only to probation; if the defendant continually violated probation after multiple revocations and one or more short jail sentences, the judge would quickly lose the ability to revoke probation by exhausting the 12 months of available jail time. The overall result would be essentially to make 12 months of jail or less the *only* sanction truly available to judges in the intermediate sanction cell context; after a defendant had served 12 months in jail, a judge would have no means to enforce the conditions of other sanctions such as probation.[55]

In sum, we find no basis for the conclusion that the Legislature intended an intermediate sanction to become a new statutory maximum for *Blakely* purposes

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[54] *People v Sturdivant*, 412 Mich 92; 312 NW2d 622 (1981), mod *People v Whiteside*, 437 Mich 188 (1991); see also *North Carolina v Pearce,* 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 US 794 (1989).

[55] Justice KELLY essentially treats the 12-month jail term as the only meaningful measure of an intermediate sanction, saying that the term "defines the upper limit of an intermediate sanction cell sentence[.]" *Post* at 658. But because intermediate sanctions can include a jail term *added to* other sanctions, any characterization of the "upper limit" of an intermediate sanction must take into account the nature and effect of additional sanctions such as probation.

when a defendant's minimum sentence range is in an intermediate sanction cell.[56] To hold otherwise ignores the definition and function of intermediate sanctions such as probation and deprives them of their intended effect. Further, imposition of an intermediate sanction never affects the *maximum* sentence "provided by law," MCL 769.8(1), as listed in MCL 777.11 *et seq.,* for the crime of which the defendant has been convicted. When statutes, such as those listed in MCL 777.11 *et seq.*, establish absolute maximum sentences on the basis of the elements of the offense, it is entirely within a legislature's province to authorize judges to exercise their discretion and expertise when sentencing defendants below those maximum limits, as they do by sentencing and monitoring probationers, as well as by subsequently revoking a probationary sentence, if appropriate. As Justice Kennedy lucidly explained in his plurality opinion in *Harris v United States,* 536 US 545, 567; 122 S Ct 2406; 153 L Ed 2d 524 (2002) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.):

> Read together, *McMillan* [*v Pennsylvania,* 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986)] and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the

[56] Moreover, we disagree with Justice KELLY that, "[e]ven if the Legislature intended [that probation violators be punished with more than 12 months in jail], it is irrelevant." *Post* at 663. As we have explained, the Legislature has successfully conveyed its intent—and therefore has also put potential offenders on notice—that no defendant is guaranteed a sentence of only 12 months' jail time merely because his minimum sentence range under the guidelines falls into an intermediate sanction cell. Thus, even under Justice KELLY's theory that the legislative scheme appears to improperly shift sentencing discretion to judges under limited circumstances, the Legislature's clear intent in this area would require a result like the one employed in *Booker*. There the United States Supreme Court rendered the offending portions of the federal sentencing guidelines advisory in order to best effectuate Congress's intent in enacting them. *Booker, supra* at 245, 265.

> crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.

Our Legislature clearly limits sentencing judges' exercise of discretion when it sees fit to do so, as exemplified by the crimes for which judges must impose statutorily mandated terms, such as life in prison, MCL 769.9(1), or a determinate number of years, MCL 750.227b. *Blakely* does not foreclose the Legislature's concomitant ability to define circumstances under which a judge may exercise sentencing discretion within the outer limit authorized by the jury verdict, as in the intermediate sanction context.

In Michigan, every offender is on notice of the maximum sentence to which he is subject on the basis of the elements of the crime when he is convicted either by a jury or as the result of a plea, as is exemplified by these cases. In *Harper*, for instance, before Harper pleaded guilty of larceny in a building the judge informed him, as required by MCR 6.302(B)(2), that the maximum penalty for the crime is four years in prison.[57] The judge also specifically responded when Harper stated that he had heard that the judge "was a fair judge and wouldn't go over the guidelines . . . ." The judge explained, first, that lawyers' initial guidelines estimations are often wrong. The judge added:

> . . . I don't know what your history is, I might wanna drop a big hammer on you or I might just decide to give you a feather and tell you to walk out of the door, I don't know what I'm going to do and I'm not making any predictions today . . . .

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[57] See MCL 777.16r.

When asked if he understood this, Harper responded: "Yes, sir, your Honor." When asked if anyone had told him that the judge would "go easy on" him, Harper answered: "No, sir." The judge continued:

> Now, I've asked you all those kinds of questions because you could file an appeal later on and you could say that there was something else going on, for example, like Mr. Harper could say that his lawyer promised him that he would get no worse than jail or probation and I decide to send him off to prison . . . .

Finally, just before Harper established the factual basis for his plea, the judge explained:

> . . . I could sentence you to go to jail, or I could sentence you to probation, or I could fine you up to 5,000 dollars, I can make you pay a bunch of court cost[s], I could even send you off to prison as long as four years, do you understand?

Harper responded: "Yes, sir."[58]

In contrast, the defendant in *Cunningham* did not have the same expectation under California's DSL. California's determinate scheme was premised on a defendant's right to a fixed, middle term sentence. The DSL then permitted the judge, *after* conviction, to sentence a defendant to a higher or lower term based on judicial fact-finding.[59] Thus, upon conviction of continuous sexual abuse of a child, the *Cunningham* defendant had a legal entitlement to the statutory middle term of 12 years' imprisonment. The sentencing judge violated *Blakely* by sentencing him to 16 years on the basis of

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[58] The record in *Burns* does not contain a transcript of the plea hearing, but Burns does not contend that the trial judge failed to advise him of the five-year maximum prison sentence for attempted breaking and entering, as the judge was required to do under MCR 6.302(B)(2).

[59] *Cunningham, supra,* 127 S Ct at 861-862.

the judge's own findings.[60] Significantly, the Supreme Court of California attempted to justify its scheme based on its conclusion that, " 'in operation and effect,' . . . the DSL 'simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range.' " *Cunningham, supra,* 127 S Ct at 868, quoting *People v Black,* 35 Cal 4th 1238, 1254; 29 Cal Rptr 3d 740; 113 P3d 534 (2005), vacated sub nom *Black v California* ___ US ___; 127 S Ct 1210 (2007). The *Cunningham* Court rejected this reasoning, stating: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham, supra,* 127 S Ct at 869.

Michigan's scheme is inherently different from California's DSL, however, as we have explained. We need not attempt to invoke sentencing judges' traditional discretion in order to avoid the plain language of our statute. Under the plain language of the DSL, the elements of the crime entitled a defendant to a presumptive middle term. Therefore, the DSL is like the hypothetical determinate system described in *Blakely* "that punishes burglary with a 10-year sentence, with another 30 added for use of a gun . . . ."[61] In such a system, "the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence . . . ."[62] Under the plain language of our sentencing scheme, on the other hand, Harper was entitled to the statutory maximum of four years' imprisonment when he pleaded

[60] *Id.,* 127 S Ct at 868.

[61] *Blakely*, *supra* at 309.

[62] *Id.*

guilty of larceny in a building, as he agreed he was fully aware, and Burns was entitled to the statutory maximum of five years' imprisonment when he pleaded guilty of attempted breaking and entering of a building. Thus, our system mirrors the *Blakely* Court's hypothetical indeterminate system "that says the judge may punish burglary with 10 to 40 years," and, therefore, under which "every burglar knows he is risking 40 years in jail."[63]

Our statutes clearly describe the range of intermediate options available to the sentencing judge, and the nature and effect of those options, when a defendant's minimum sentence range under the guidelines is in an intermediate sanction cell. A defendant is not entitled to a circumscribed term of prison when he qualifies for an intermediate sanction, as was the case with the middle term prescribed by California's DSL. Rather, a Michigan defendant expects a range of possible sanctions, including jail and probation. He is also clearly aware that probation may be revoked—and that additional incarceration may therefore be imposed—at a hearing subject to a lower standard of proof than that required at trial. These clear expectations on the part of defendants are what cause us to reject Justice KELLY's contention that "[t]here is no meaningful difference between a Michigan court departing from an intermediate sanction cell and a California court imposing the upper term available under [the DSL]." *Post* at 657. A Michigan defendant is fully on notice that he *never* gains an entitlement to a mere 12 months in jail.

In sum, as is exemplified by these cases, Michigan's intermediate sanction cells are part of the legislative scheme for setting a minimum sentence that is tailored to the offender's history and the circumstances of the

[63] *Id.*

offense. The statutes governing a sentencing court's imposition of a minimum sentence never allow a judge to exceed the maximum sentence authorized by a jury verdict or a guilty plea. Even when a defendant's minimum sentence range is in an intermediate sanction cell, the Legislature made clear its intent that the sentencing judge retain the discretion to exceed the list of intermediate sanctions, and to impose a minimum sentence of up to 2/3 of the statutory maximum, if an intermediate sanction is inappropriate in a given case.

When a defendant's minimum sentence range under the guidelines is in an intermediate sanction cell, the defendant has a *statutory right* to an intermediate sanction, *conditioned on the absence of substantial and compelling reasons to depart upward*. Therefore, a defendant may appeal an upward departure on the basis of an alleged violation of this statutory right by arguing that the sentencing judge did not state on the record a legally sufficient substantial and compelling reason to depart. But the defendant does not gain a *constitutional* right to an intermediate sanction under *Blakely*. Indeed, the essence of defendants' arguments here is that *Blakely* entitles them to a sentence that is *less than* the maximum authorized by the jury verdict or the guilty plea. But *Blakely*, which prohibits a judge from *exceeding* the maximum authorized by the jury verdict or the guilty plea, does not require this result. Allowing judges to impose any sentence that is less than the authorized maximum does not implicate a defendant's Sixth Amendment rights because it does not usurp the jury's task of finding the facts that set the maximum sentence. Thus, in the intermediate sanction cell context, because the defendant's sentence never exceeds the maximum sentence authorized by the jury verdict or the guilty plea, the sentencing judge may

exercise his statutorily granted discretion to depart upward on the basis of facts not found by a jury.

In *Harper*, faced with intermediate options such as jail and probation, the sentencing judge observed several factors, including, most significantly, Harper's record of bench warrants, his three parole revocations, and his history of absconding from parole. These factors were not included in Harper's PRV score, and they certainly cast doubt on the appropriateness of a sentence that would again include probation. As a result, these factors alone constituted substantial and compelling reasons to sentence Harper to the jurisdiction of the Department of Corrections. Accordingly, we affirm Harper's sentence.

In *Burns*, the judge found substantial and compelling reasons to exceed the guidelines on the basis of Burns's admission to the officer that he had touched a young woman's buttocks and the uncontroverted testimony of two young women that Burns had harassed and intimidated them. This evidence was not considered in scoring the guidelines for Burns originally because it occurred after the judge had originally sentenced Burns to three years of probation. Burns's objective and verifiable behavior while on probation certainly provided substantial and compelling reasons to sentence Burns to the jurisdiction of the department of corrections rather than impose an intermediate sanction. Accordingly, we affirm Burns's sentence.

C. HARMLESS ERROR UNDER *BLAKELY*

Finally, we find it important to note that *Blakely* errors are reviewed for harmless error. Accordingly, we add that even if an intermediate sanction is construed as a maximum sentence for *Blakely* purposes, in each of these cases, if an error occurred, it was harmless beyond a reasonable doubt.

In *Washington v Recuenco,* ___ US ___; 126 S Ct 2546, 2553; 165 L Ed 2d 466 (2006), the United States Supreme Court ruled that *Blakely* errors are not structural, but are subject to harmless error analysis. The Court had already rejected the argument that failure to submit aggravating facts to a jury offends a "watershed" rule of criminal procedure, such that it undermines the fairness and accuracy of the overall proceeding, in *Schriro v Summerlin,* 542 US 348, 355-356; 124 S Ct 2519; 159 L Ed 2d 442 (2004) (holding that such errors do not offend any "watershed" rule of criminal procedure to the extent of requiring retroactive application). In *Schriro,* the Court explained that it could not "confidently say that judicial factfinding *seriously* diminishes accuracy." *Id.* at 356.

Recuenco compared *Blakely* errors to the error analyzed in *Neder v United States,* 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999). *Neder* involved a jury trial for charges that included tax fraud.[64] One element of the offenses was the materiality of the fraudulent representation on the defendant's tax form. The trial court constitutionally erred when it failed to submit the question of materiality—as an element of the offense—to the jury and, instead, decided the issue itself.[65] The error was harmless, however, because uncontested facts presented at trial showed that the misrepresentation—which consisted of the defendant's failure to report $5 million of income—was material. Indeed, the defendant did not suggest that he could introduce any contrary evidence, and he did not argue to the jury, or to the courts on appeal, that his false statements could be found immaterial.[66] Accordingly,

[64] *Neder, supra* at 4.

[65] *Id.*

[66] *Id.* at 15-16.

the judge's conclusion that the element of materiality was proved was harmless beyond a reasonable doubt because no jury could reasonably find otherwise.[67] The Court summarized the analysis as follows: "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17.

Recuenco, in turn, concluded that a similar analysis is appropriate if a trial court fails to submit sentencing factors to a jury, because there is no distinction, for Sixth Amendment purposes, between an element of an offense and a sentencing factor that increases a sentence beyond the sentence authorized by the elements of the offense.[68] The Washington Supreme Court had previously held that *Blakely* errors are structural.[69] The *Recuenco* Court disagreed and remanded the case, directing the Washington courts to analyze whether the error was harmless.[70]

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[67] *Id.* at 16.

[68] *Recuenco, supra,* 126 S Ct at 2552-2553.

[69] *Id.,* 126 S Ct at 2550.

[70] *Id.,* 126 S Ct at 2553. Justice KELLY's position would ultimately render *Blakely* errors in Michigan harmful per se because Michigan "has no process for criminal juries to make special findings of fact." She states that "the procedural discussion in *Recuenco* suggests that the prosecution could not carry its burden in this case to prove the *Blakely* error harmless beyond a reasonable doubt." *Post* at 667-668. When the defendant posed this argument in *Recuenco,* the United States Supreme Court did not need to resolve the question. Rather, the question before the Court was "whether *Blakely* error can ever be deemed harmless." *Recuenco, supra,* 126 S Ct at 2550-2551. Contrary to Justice KELLY's contention, it was unclear whether Washington "state law specifically allowed juries to make findings of fact." *Post* at 668. The high court left this question to the Washington courts on remand. *Recuenco, supra,* 126

S Ct at 2550-2551. In any event, the *Recuenco* Court questioned the defendant's interpretation of Washington law, observing that the Washington Court of Appeals had allowed juries to issue special verdicts on aggravating factors and the Washington Supreme Court had explicitly chosen not to establish a contrary rule in a case that did not squarely present the question. *Id.,* 126 S Ct at 2550.

Similarly, Michigan law is not perfectly clear on this point. Justice KELLY points to two nineteenth century cases in which this Court refused to allow the use of special questions in criminal cases because such questions "limit[] . . . the right of the jury to find a general verdict," *People v Roat,* 117 Mich 578, 583; 76 NW 91 (1898), and because the then-governing statutes did not clearly permit it, *People v Marion,* 29 Mich 31, 40-41 (1874). We note that, more recently, Justice LEVIN observed, in his dissent in *People v Ramsey,* 422 Mich 500, 536; 375 NW2d 297 (1985), that many jurisdictions have concluded that not all use of special verdicts is error per se because specific findings of fact may be necessary to determine the nature of the conviction or the sentence. Indeed, the Michigan Court of Appeals has implicitly condoned the use of special verdict forms enabling a jury to find a particular fact under some circumstances. See *People v Matuszak,* 263 Mich App 42, 51; 687 NW2d 342 (2004); *People v Kiczenski*, 118 Mich App 341, 345; 324 NW2d 614 (1982).

Most significantly, the *Recuenco* Court did not reach the question whether the unavailability of a particular procedure in the trial court necessarily renders all errors harmful, in essence transforming *Blakely* errors into structural errors for all defendants in a given state. As Justice KELLY ultimately concedes, at most *Recuenco* "advises [that] the lack of a procedure for special findings will increase the difficulty of the prosecution's burden to prove any error harmless beyond a reasonable doubt." *Post* at 668 n 18. Moreover, any conclusion on our part—based on dicta in *Recuenco*—that the lack of a procedure is alone dispositive would run counter to the crux of the harmless error analysis that forms the basis of the *Recuenco* Court's holding. The central question remains whether the facts used by a sentencing judge to support a sentence were "uncontested and supported by overwhelming evidence," such that a jury would have reached the same result. *Neder, supra* at 17. To illustrate, as we will explain further in parts III(C)(1) and (2) of this opinion, neither defendant in the cases before us seriously contends that a jury would have returned findings different from those of the sentencing judge, given the overwhelming evidence presented at each proceeding. Thus, even if the sentencing judges erred under *Blakely,* the errors in these cases would be precisely the sort of technical errors that do not require reversal under a harmless error analysis because they do not affect the substance or outcome of the proceedings.

1. HARPER

In *Harper*, defendant preserved the constitutional challenge to his sentence by raising this issue in a motion for resentencing before the circuit court. Thus, as in *Neder,* our review must consider whether the alleged error is harmless beyond a reasonable doubt.[71]

The sentencing judge here exceeded the list of intermediate sanctions, and imposed a prison sentence on the basis of facts contained in the presentence investigation report (PSIR). Contrary to Justice KELLY's contention that "Harper had no opportunity to present contrary evidence," *post* at 669, the judge permitted Harper and his attorney to review the PSIR and to challenge the accuracy of its contents, as required by MCL 771.14(5) and (6). The judge also specifically explained to Harper the importance of noting inaccuracies, saying: "Now, sometimes they make mistakes on those reports and if they do it's important that you catch them, Mr. Harper, because we keep these reports for years and if there is a mistake now it could be used against you next year . . . ." Harper stated that he had read the PSIR. When asked if he saw any mistakes, he pointed out that a prior felony conviction had not been included, previously, when his attorney estimated his PRV score. He agreed that he understood that the felony was properly added, however, and stated: "I'm not contesting anything . . . ." Defense counsel also specifically indicated that "we ha[ve] reviewed this report, I have no additions, corrections or deletions to the report."[72]

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[71] *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967); *People v Shepherd,* 472 Mich 343; 697 NW2d 144 (2005).

[72] We also note, first, that Michigan courts have long held that a sentencing court may presume that unchallenged facts contained in a PSIR are accurate. *People v Grant,* 455 Mich 221, 233-234; 565 NW2d 389 (1997). Second, we do not need to reach the question whether Harper effectively admitted the facts contained in the PSIR or waived his rights

Now, on appeal, Harper makes no claim that his record—of parole revocations, absconding from parole, bench warrants for failures to appear, and run-ins with law enforcement in other states—is inaccurate. During his oral argument before this Court, he mounted a slight challenge to the sentencing judge's conclusion that he had "ripped off a charity that was trying to do good for cold children." He claimed that "[n]othing at the plea talked about stealing coats from children," adding that, although Old News Boys is a "charity that served needy people . . . , there's lots of different needy people adult and children . . . ." On this point, we simply note that, at the sentencing hearing, the president of Old News Boys explained that the organization served "needy children and families who are less fortunate."

Therefore, we conclude beyond a reasonable doubt that the facts used by the sentencing judge to support Harper's sentence were "uncontested and supported by overwhelming evidence," such that a jury would have reached the same result.[73] Indeed, like the defendant in *Neder,* Harper does not suggest that he would offer contrary evidence, particularly concerning the facts contained in his court records, if given the opportunity to do so.[74] Accordingly, if the judge is found to have violated *Blakely* at sentencing, any error is harmless beyond a reasonable doubt and does not require reversal.

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under *Blakely,* as is expressly permitted by the *Blakely* Court when a defendant pleads guilty. *Blakely, supra* at 310. In light of Harper's express agreement that no corrections to the PSIR were necessary, however, we note that, under many circumstances, a defendant waives a right—and, for purposes of review, *extinguishes* rather than merely forfeits error—when the defendant affirmatively agrees to a course of action in the trial court. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000).

[73] *Neder, supra* at 17.

[74] *Id.* at 15-16.

2. *BURNS*

Similarly, in *Burns*, we conclude that if any *Blakely* error is found to have occurred, it would be harmless beyond a reasonable doubt.[75] At sentencing on the probation violation, the judge relied on evidence presented at the probation violation hearing to conclude that substantial and compelling reasons existed to depart from the original guidelines sentence. At the hearing, defense counsel did not contest that his client had touched the young woman's buttocks, nor did he contest that his client had used alcohol in violation of his probation order. Burns himself admitted to the officer that the sexual touching had occurred and that he had consumed six beers. The defense presented no evidence and called no witnesses to contest these facts, despite having an opportunity to do so. We thus conclude beyond a reasonable doubt that the facts used by the sentencing judge to support Burns's sentence were "uncontested and supported by overwhelming evidence," such that a jury would have reached the same result.[76]

IV. CONCLUSION

For these reasons, we reaffirm our holding in *Drohan* that Michigan has a true indeterminate sentencing system in which the statutory maximum is prescribed by law and in which the sentencing guidelines are used only to determine a defendant's minimum sentence. An intermediate sanction does not constitute a maximum sentence under *Blakely*; it bears no relation to the

[75] As in *Harper*, the defendant in *Burns* preserved the *Blakely* issue by raising it in a motion for resentencing. Thus, we review whether the alleged error is harmless beyond a reasonable doubt.

[76] *Neder, supra* at 17.

maximum sentence authorized by the jury verdict or the guilty plea. Rather, it establishes a statutory right to a cap on the defendant's period of incarceration, conditioned on the absence of substantial and compelling reasons to depart upward. Significantly, accepting defendants' arguments in these cases would require us to conclude that *Blakely* guarantees them a right to sentences that are *less than* those authorized by a jury verdict or guilty plea; to the contrary, *Blakely* prohibits a sentencing judge from *exceeding* the sentence authorized by the verdict or plea. Agreeing with defendants would also deprive intermediate sanctions such as probation of much of their intended effect. Finally, if any *Blakely* error is found to exist in either of these cases, we are convinced that any such errors were harmless beyond a reasonable doubt, given that the facts used by the sentencing judges were uncontested and supported by overwhelming evidence, such that a jury would have reached the same result. Accordingly, we affirm the defendants' convictions and sentences.

TAYLOR, C.J., and WEAVER, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the result reached by the majority in *People v Harper*. Facts admitted by a defendant may be used by a trial court to determine the relevant statutory maximum. See *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In light of the guidance and admonitions given by the trial court, I believe that defendant Harper admitted to the facts used by the trial court to sentence defendant when he pleaded guilty and stated that he did not contest the information in the presentence investigation report.

Moreover, I concur with the result advocated by Justice KELLY in her dissent in *People v Burns*. I agree that the trial court did not articulate substantial and compelling reasons to depart from the sentencing guidelines. See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Thus, this case should be remanded for resentencing. Because the trial court did not comply with the requirements for sentencing and this case can be decided on statutory grounds, it is improper to address the constitutional issue decided by the majority.

KELLY, J. (*dissenting*). The Court heard oral argument in these cases along with *People v McCuller*, which was on remand to us from the United States Supreme Court. *Michigan v McCuller*, __ US ___; 127 S Ct 1247 (2007). My dissenting opinion in *McCuller* contains my most thorough analysis of the application of the Sixth Amendment[1] to the Michigan sentencing guidelines.[2] *People v McCuller*, 479 Mich 672; 739 NW2d 563 (Docket No. 128161, decided July 26, 2007). For a full understanding of the issues involved, I urge the reader to turn to my dissent in that case.

With respect to *Burns*, this Court should not even reach the constitutional issue. The trial court failed to articulate substantial and compelling reasons to exceed

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[1] The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI.]

[2] MCL 777.1 *et seq.*

the range set by the sentencing guidelines. Because of this, defendant Jesse Burns is entitled to resentencing, irrespective of the constitutional issue.

In *Harper*, the majority continues to exempt Michigan from the Sixth Amendment precedent set by the United States Supreme Court in *Jones v United States*[3] and its progeny. However, it is clear to me that the judicial fact-finding that took place in *Harper* violated Bernard Harper's Sixth Amendment right to a trial by jury. In fact, the violation is even clearer than the violation in *McCuller*. Michigan's sentencing guidelines are unconstitutional as applied. I would vacate the sentence and remand the case to the trial court for resentencing in a manner that conforms to the Sixth Amendment.

I. *PEOPLE v BURNS*

A. PROCEDURAL FACTS

In July 2002, Burns pleaded guilty of attempted breaking and entering. MCL 750.110; MCL 750.92. It is undisputed that the guidelines range for his minimum sentence was zero to 11 months. This range falls in what is properly referred to as an intermediate sanction cell. MCL 769.34(4)(a) creates these cells. It provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

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[3] 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999).

Pursuant to MCL 769.31(b), one possible intermediate sanction is probation. The trial court in this case chose that option and sentenced Burns to three years' probation.

In 2005, the court found, by a preponderance of the evidence, that Burns had violated his probation. At sentencing, the court noted that the original range had been zero to 11 months.[4] But it decided to exceed the range given in the intermediate sanction cell and not impose an intermediate sanction. It sentenced Burns to $1\frac{1}{2}$ to 5 years in prison.

Because the court did not impose an intermediate sanction as a sentence, it had to articulate a substantial and compelling reason for the departure. MCL 769.34(4)(a). The court completed a sentencing information report departure evaluation form stating its reason:

> The original SGL of 0-11months [sic] fails to consider his violation behavior—which constitutes a substantial and compelling reason for a moderate departure from this range.

No additional reasons were given.

B. SUBSTANTIAL AND COMPELLING REASONS FOR THE GUIDELINES DEPARTURE

The trial court's statement in support of its departure does not constitute a substantial and compelling reason to exceed the sentencing guidelines range.

> The phrase "substantial and compelling reason" has, in our judgment, acquired a peculiar and appropriate meaning in the law and, thus, it must be construed according to

[4] The sentencing court is required to apply the sentencing guidelines when sentencing after a probation violation. *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005).

> such meaning. That is, a "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that " 'keenly' or 'irresistibly' grabs our attention"; is "of 'considerable worth' in deciding the length of a sentence"; and "exists only in exceptional cases." [*People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995).]

Whether a reason for departure is objective and verifiable is a question of law subject to review de novo. *Babcock*, 469 Mich at 265.

In this case, the court relied solely on Burns's postprobation conduct to exceed the guidelines range. A sentencing court may consider postprobation conduct when determining whether substantial and compelling reasons exist to depart upward. But the fact that probation was violated does not automatically constitute a substantial and compelling reason. *People v Hendrick*, 472 Mich 555, 562-563; 697 NW2d 511 (2005). The trial court's statement on the departure evaluation form does not satisfy *Hendrick*'s requirement.

By simply referring to Burns's "violation behavior," the court did nothing more than repeat the fact that Burns had violated the terms of his probation. The statement did not explain why his behavior separated Burns from the typical probation violator. It did not explain why this particular departure was warranted, or why this is an "exceptional case[]" warranting a departure. *Babcock*, 469 Mich at 258. And it said nothing about why this case should "keenly or irresistibly" seize our attention. *Id*. Without such detail, the stated reason for departure is insufficient. *Id*.; *Hendrick*, 472 Mich at 563. And *Burns* must be remanded to the trial court for resentencing. MCL 769.34(11).

The majority turns to the sentencing transcript to bolster the trial court's stated reason for departure.

This is inappropriate. A reviewing court may not search the record to find its own substantial and compelling reason to depart. Instead, it must rely on the reasons stated by the trial court. If they are insufficient, the review must end there, and the case must be remanded for resentencing. *Babcock*, 469 Mich at 273 (appendix to majority opinion).

But even if we were to refer to the sentencing transcript, a substantial and compelling reason justifying the departure cannot be found. The only statement in the record that might constitute a reason for departure is the following statement by the court:

> I seldom ever exceed guidelines, in fact I can't recall a time that I have, but I'm going to in your case. The behavior that you exhibited here certainly is not or was not contemplated in arriving at your original guidelines. It was gross, it was abusive, and I believe there's a compelling reason to exceed guidelines.

One could infer from this that the court intended to depart because Burns's behavior was "gross" and "abusive."

These are subjective words. Whether conduct is "gross" and "abusive" is a determination that changes depending on who is reviewing it. It could vary drastically according to a person's culture, upbringing, religion, and education. Because of its subjective nature, a finding that actions were "gross" and "abusive" cannot be a substantial and compelling reason to depart from the sentencing guidelines. *Babcock*, 469 Mich at 257-258. Burns must be resentenced. MCL 769.34(11).[5]

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[5] The Michigan Department of Corrections paroled Burns on November 14, 2006. But the parole does not render moot the discussion of his sentence. Burns remains under supervision until November 14, 2007. See Offender Tracking Information System, available at <http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=414793> (accessed

Therefore, no need exists to reach the Sixth Amendment question in this case. It is a well-accepted rule that an appellate court will not grapple with a constitutional issue if a case can be decided on other grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). The majority disregards this rule without providing its reason. At the very least, the majority should have addressed the *Babcock* issue before undertaking the application of *Blakely v Washington*[6] here. If it had done so, the constitutional issue could have been avoided entirely.[7]

II. *PEOPLE v HARPER*

A. PROCEDURAL FACTS

Harper pleaded guilty of larceny in a building under MCL 750.360, which provides:

> Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store,

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June 28, 2007). Until that date, he faces the potential of parole revocation and could be returned to prison for the remainder of his five-year maximum sentence. Were the Court to order him resentenced, however, and were the trial court to impose the intermediate sanction cell maximum sentence of 11 months in jail, Burns would be released from supervision. And he would not face the potential of returning to prison.

[6] 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[7] Because I find that no substantial and compelling reason to depart was articulated in this case, I need not address whether the court's departure violated the Sixth Amendment. But I note that my analysis from *McCuller*, 479 Mich at 702-751, and my discussion of *Harper* here would apply equally to *Burns* had the trial court found appropriate reasons to depart. Therefore, if the reasons stated to depart had been objective and verifiable, I would have remanded the case for resentencing because of the *Blakely* violation.

> gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

This is a class G offense with an absolute maximum sentence of four years in prison. MCL 750.503; MCL 777.16r.

Before imposing sentence, the trial court calculated a score for both the prior record variables (PRVs) and the offense variables (OVs). It scored 50 points for PRV 1 because of defendant's two prior high-severity felony convictions. MCL 777.51(1)(b). It scored 20 points for PRV 2 because of defendant's three prior low-severity felony convictions. MCL 777.52(1)(b). And it scored 2 points for PRV 5 because of defendant's prior misdemeanor conviction. MCL 777.55(1)(e). The court also scored 5 points for OV 16. To do so, it made a finding of fact using a preponderance of the evidence standard. It found that the stolen property in question "had a value of $1,000.00 or more but not more than $20,000.00." MCL 777.46(1)(c). Harper did not admit the value of the stolen property.

MCL 777.68 sets forth the class G sentencing grid. On this grid, a PRV level of 72 points and an OV level of 5 points converge in cell E-I. This cell provides a minimum sentence range of zero to 17 months. MCL 777.68. Had the trial court not scored 5 points for OV 16, Harper's OV level would have been zero points. This would not have changed his minimum sentence range under the guidelines. A PRV level of 72 points and an OV level of zero points still converge in cell E-I. MCL 777.68. Because the judicial findings necessary to score OV 16 did not change the range, they are immaterial to this case.

In light of the fact that the top end of the guidelines range is less than 18 months, Harper's minimum sentence range is in an intermediate sanction cell. This means that his sentence must not exceed 12 months in jail, absent substantial and compelling reasons to depart. MCL 769.34(4)(a). The trial court imposed a sentence of 24 to 48 months in prison.[8] It prepared a sentencing information report departure evaluation form stating its reasons for the upward departure:

> Guidelines do not include at least 3 parole revocations, abscondings from probation, Bench warrants from various courts and stealing from a charity that serves freezing children[.]

B. SUBSTANTIAL AND COMPELLING REASONS FOR THE UPWARD DEPARTURE

In this case, the reasons stated for departure survive review under *Babcock*. The parole revocations, the abscondings from probation, and the bench warrants could be objectively verified using court files and the records of the Department of Corrections. These facts were of "considerable worth" in determining Harper's sentence because they demonstrated a pattern of failing to meet legally imposed expectations and minimum societal behavioral requirements. Therefore, they provided substantial and compelling reasons to exceed an intermediate sanction at sentencing. *Babcock*, 469 Mich at 257-258.

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[8] The Michigan Department of Corrections paroled Harper on February 14, 2007. The parole does not make discussion of his sentence moot. He remains under supervision until August 14, 2008. See Offender Tracking Information System, available at <http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=358848> (accessed June 28, 2007). On resentencing, were the trial court to impose the intermediate sanction cell maximum sentence of 12 months in jail, Harper would be released from supervision immediately, with no potential of returning to prison.

The final stated reason, "stealing from a charity that serves freezing children," was also substantial and compelling. It is undisputed that Harper stole from the Old Newsboys, a charity associated with Goodfellows. While the "freezing children" comment could be viewed as hyperbole, it is undisputed that the charity is dedicated to helping needy families and children. One of its missions is to provide winter coats. Because of this, I would find that the final reason for departure was objective and verifiable. The fact that Harper stole from a charity was of considerable importance at sentencing, given that it distinguished him from the typical defendant. Because of this, it also satisfied the requirements of *Babcock*. *Id*.

The trial court complied with the sentencing guidelines requirements and stated substantial and compelling reasons to depart from an intermediate sanction. The discussion now must turn to the constitutionality of doing so.

C. *BLAKELY*'S BRIGHT-LINE RULE

As I explain in *McCuller*,[9] the United States Supreme Court has articulated a bright-line rule for Sixth Amendment analysis:

> Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [*Cunningham v California*, 549 US __; 127 S Ct 856, 868; 166 L Ed 2d 856 (2007), quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000).]

The "statutory maximum" sentence is not always the absolute maximum sentence set by statute.

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[9] 479 Mich at 715-718 (KELLY, J., dissenting).

> The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [*Ring v Arizona*, 536 US 584, 602; 122 S Ct 2428; 153 L Ed 2d 556 (2002), quoting *Apprendi*, 530 US at 483, 494 (citations omitted; emphasis in *Apprendi*).]

Therefore, the statutory maximum sentence for Sixth Amendment purposes is the maximum sentence permissible based on the jury's verdict, the defendant's prior criminal record, and any admissions that the defendant made. It is irrelevant that the trial court could have found additional facts that could have increased the sentence. *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This rule is necessary to properly protect the people's control of the judiciary, as intended by the Framers of the United States Constitution. *Id*. at 313.

When a defendant is entitled to a sentence that is within the range specified in an intermediate sanction cell, MCL 769.34(4)(a) sets his or her maximum sentence. That maximum sentence is a jail term of either the upper limit of the recommended minimum sentence range or 12 months, whichever is shorter. Under the guidelines statutes, the court may not exceed this maximum sentence, unless it can state substantial and compelling reasons to do so. MCL 769.34(4)(a). Therefore, unlike a typical sentencing in Michigan, the process no longer is concerned with the defendant's minimum sentence. Under the Supreme Court's bright-line rule, this alteration in focus changes what has become known as the defendant's "statutory maximum."

The new maximum sentence established under MCL 769.34(4)(a) is the defendant's "statutory maximum." This is true because it is the longest sentence that the court can give a defendant solely on the basis of the defendant's criminal record and admissions and the jury's verdict. *Cunningham*, 127 S Ct at 868; *United States v Booker*, 543 US 220, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005); *Blakely*, 542 US at 301; *Apprendi*, 530 US at 490; *Jones*, 526 US at 251-252. The effect of making findings of fact that move the sentence to a higher statutory maximum is that the defendant faces either (1) a different criminal charge or (2) the increased stigma of an extended sentence. This is specifically what the Supreme Court sought to avoid. *Apprendi*, 530 US at 484. Any judicial fact-finding that lifts the defendant's sentence above the statutory maximum is unconstitutional and violates *Jones* and its progeny.

D. WHY HARPER'S SENTENCE VIOLATES THE SIXTH AMENDMENT

As I explain in *McCuller*,[10] scoring the OVs can violate *Blakely*'s bright-line rule. The violation in *Harper* is particularly clear. Harper's case closely mirrors the situation in *Cunningham*. California's determinate sentencing law (DSL) created a three-tiered sentencing system for most crimes. The statute defining Cunningham's offense provided a lower, a middle, and an upper sentence. The California Penal Code mandated that the trial court impose the middle term, unless circumstances existed that mitigated or aggravated the offense. *Cunningham*, 127 S Ct at 861-863. The Supreme Court paid special attention to the fact that a defendant in California was entitled to the middle sentence unless the sentencing court made additional findings of fact:

[10] 479 Mich at 719-726 (KELLY, J., dissenting).

> California's DSL, we note in this context, resembles pre-*Booker* federal sentencing in the same ways Washington's sentencing system did: The key California Penal Code provision states that the sentencing court "*shall order* imposition of the middle term" absent "circumstances in aggravation or mitigation of the crime," [Cal Penal Code] 1170(b) (emphasis added), and any move to the upper or lower term must be justified by "a concise statement of *the ultimate facts*" on which the departure rests, [Cal Ct R] 4.420(e) (emphasis added). [*Cunningham*, 127 S Ct at 866 n 10 (emphasis in original).]

MCL 769.34(4)(a) contains similar mandatory language: "[T]he court *shall impose* an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." (Emphasis added.) Therefore, just like a defendant in California, a defendant in Michigan is entitled to an intermediate sanction cell sentence. And the court is authorized to depart from the sentence only through judicial fact-finding after the jury verdict. As in California, these findings of fact need be based only on a preponderance of the evidence.

Hence, as in the California scheme, a sentence resulting from an intermediate sanction cell in Michigan constitutes a "statutory maximum" for purposes of *Apprendi*. *Cunningham*, 127 S Ct at 868. There is no meaningful difference between a Michigan court departing from an intermediate sanction cell and a California court imposing the upper term available under that state's penal code. It follows that reversal is mandated in this case.

The majority effectively attempts to rewrite MCL 769.34(4)(a) to make it provide for no more than a minimum sentence. As I explain in *McCuller,* the attempt falls short of its goal. The language of the statute

is not ambiguous. "An intermediate sanction may include a jail term that *does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less*." MCL 769.34(4)(a) (emphasis added). The statute mandates that the sentencing court impose an intermediate sanction when a defendant falls into an appropriate cell, unless the court makes judicial findings of fact to support a departure. MCL 769.34(4)(a). It also defines the upper limit of an intermediate sanction cell sentence: 12 months in jail. Because this is the highest sentence a defendant may face, it is, in every sense, a maximum sentence. Absent judicial fact-finding, the trial court has no power to impose even a 13-month sentence. At most, Harper should have faced 12 months in jail. MCL 769.34(4)(a).[11]

The majority tries to change this fact by turning to MCL 769.8(1). MCL 769.8(1) states that there are cases in which the sentencing court will not fix the minimum sentence and in which the absolute maximum sentence will not apply. It notes that other provisions in that chapter of the Code of Criminal Procedure state the exceptions to the general rule. MCL 769.34 is in the same chapter. And MCL 769.34(4)(a) provides that the sentencing court sets the maximum sentence. Therefore, these statutes, read together, show that intermediate sanction cells do not merely set minimum sentences. The Legislature intended that intermediate sanction cells set maximum sentences. MCL 769.34(4)(a); MCL 769.8(1). This Court has no right to change this fact.

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[11] The majority claims that a Michigan defendant is liable to serve the absolute maximum sentence in every case. See *ante* at 614 n 25. MCL 769.34(4)(a) shows the fallacy of this point. Some Michigan defendants face no higher maximum than 12 months in jail, even though a second, higher statutory maximum sentence exists for their crime. This undeniable fact destroys the majority's premise that Michigan has only one maximum sentence for each crime.

Hence, there are two possible maximum sentences for the offense in question, the absolute statutory maximum and the intermediate sanction cell statutory maximum. A defendant is entitled to whichever one is supported by his or her conviction, admissions, and criminal record. "[A]nd by reason of the Sixth Amendment [any additional] facts bearing upon that entitlement must be found by a jury." *Blakely*, 542 US at 309. Therefore, if other facts are used to move the defendant to the higher of the two maximum sentences, they must be proved to the jury beyond a reasonable doubt.

E. MICHIGAN'S MIXED DETERMINATE/INDETERMINATE SENTENCING SCHEME

The majority attempts to justify its conclusion in this case by claiming that Michigan has a traditional indeterminate sentencing scheme. See *id*. at 308-309. The United States Supreme Court has noted that such schemes do not violate the Sixth Amendment. But because intermediate sanction cells set maximum sentences, Michigan's sentencing scheme is distinct from the traditional indeterminate scheme. For Sixth Amendment purposes, it is properly viewed as a mixed determinate/indeterminate sentencing scheme. This is because, as discussed in *Blakely*, a traditional indeterminate scheme can have only one maximum sentence. *Id*. at 308-309. The fact that Michigan's scheme is different in this way mandates that it be treated differently. Again, this makes Michigan's system strikingly similar to California's system, which the Supreme Court found unconstitutional in *Cunningham*.

As I discuss in *McCuller*, the majority also attempts to distinguish the Michigan system from a wholly determinate scheme by noting that one possible intermediate sanction is probation. MCL 769.31(b). To sup-

port its argument, the majority relies on the federal probation system. But Michigan's probation system differs greatly from the federal system. Whereas the federal system imposes a new sentence after a probation violation, the Michigan system merely directs resentencing using the original sentencing guidelines. See *United States v Goffi*, 446 F3d 319, 322 (CA 2, 2006), and *Hendrick*, 472 Mich at 560. Because the same guidelines apply before and after a probation violation in this state, *Blakely* continues to apply after a probation revocation. This completely undermines the majority's argument that intermediate sanction cells set only minimum sanctions.[12]

The Court of Appeals for the Second Circuit explained why *Blakely* does not apply to sentencing after a federal probation violation:

> The statutory scheme thus requires a sentencing court to consider a variety of factors, including the non-binding policy statements applicable to probation violations, in determining an appropriate sentence. *Nowhere, however, does it require a court to sentence within the Guidelines range for the underlying conviction in determining punishment for separate and distinct malfeasance by the defendant —violation of probation*. . . . *United States v. Pena*, 125 F.3d 285, 287 (5th Cir.1997). ("Because there are no guidelines for sentencing on revocation of probation, and because the district court was not limited to the sentencing range available at the time of the initial sentence, we find no error in the trial court's failure to employ the analysis normally required in departure case[s].") . . . . [*Goffi*, 446 F3d at 322-323 (emphasis added).]

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[12] Further undermining the majority's theory is the fact that intermediate sanction cell sentences are treated as maximum sentences in Michigan. When a defendant receives only an intermediate sanction jail sentence, he or she faces that sentence and nothing more. The defendant is not reevaluated after completing the sentence to see if prison time is required. Rather, the defendant is set free.

The exact opposite is true in Michigan. The guidelines continue to apply to a Michigan defendant. *Hendrick*, 472 Mich at 560. The sentencing court is limited to the sentence range available at the time of the initial sentence. And the probation violation is not treated as a separate malfeasance in Michigan. *People v Kaczmarek*, 464 Mich 478, 483-484; 628 NW2d 484 (2001).

These fundamental differences between the Michigan system and the federal system mandate different results when *Blakely*'s bright-line rule is applied. Because none of the factors relied on by the federal courts exists in Michigan, *Blakely* continues to apply after probation revocation in Michigan. This completely undermines the majority's argument that, because of the possibility of probation as an intermediate sanction, intermediate sanction cells produce a minimum sentence rather than a maximum sentence.[13]

The majority further argues that intermediate sanctions must be minimum sentences because a defendant subject to them can be given a sentence of probation with jail. It argues that recognizing that intermediate sanction cell sentences are statutory maximum sentences will limit the effectiveness of imposing such sentences. Although it is true that MCL 769.31(b)(*iv*) allows

[13] The majority simply disregards the reasoning of *Goffi* and *Pena*. And in doing so, it disregards the distinctions between the two systems. In fact, the two systems differ greatly. In the federal system, a court no longer sentences under the guidelines, probation is viewed as a distinct malfeasance, and the former statutory maximum no longer applies. *Goffi,* 446 F3d at 322-323; *Pena*, 125 F3d at 287. In Michigan, probation is not a separate offense, the guidelines still apply, and the defendant remains subject to the statutory maximum sentence created by MCL 769.34(4)(a). Therefore, unlike the federal system, the Michigan system is still subject to the *Blakely* bright-line rule after a defendant violates probation.

for intermediate sanction cell sentences that include both probation and jail, the majority's reliance on this point is irrelevant.

The Legislature has determined that a sentence of 12 months in jail is an appropriate statutory maximum sentence for defendants who merit an intermediate sanction.[14] Our constitution vests the Legislature with the ultimate authority to set criminal penalties. Const 1963, art 4, § 45; *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The Legislature inserted the 12-month limit on jail sentences in MCL 769.34(4)(a). Only the Legislature, not this Court, may increase this limit. Someone who believes that the 12-month cap is insufficient can petition the Legislature to amend the statute. But the Court cannot ignore the statutory maximum sentence and a defendant's Sixth Amendment rights because it finds the statutory penalty insufficient.

For example, those who believe that 12 months is insufficient incarceration to punish probation violators could petition the Legislature to change Michigan's probation system to mimic the federal system. The Legislature could follow the lead of *Goffi* and treat a probation violation as a separate malfeasance. It could make probation violation subject, not to the guidelines for the underlying offense, but to independent punishment. See *Goffi,* 446 F3d at 322-323; *Pena*, 125 F3d at 287. If the Legislature effected such a change, it could eliminate the Sixth Amendment violation now lurking in the Michigan system. But, again, this decision must be left to the Legislature.

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[14] "An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." MCL 769.34(4)(a).

Ultimately, and most importantly, the majority cannot disregard the Sixth Amendment simply because it is convenient for purposes of the status quo or because it comports with legislative intent. *Blakely* specifically rejected any such approach:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. [*Blakely*, 542 US at 313 (emphasis in original).]

It might be easier to continue the current modus operandi: to punish probation violators by allowing judges to increase their statutory maximum sentence by using findings of fact not supported by the violators' prior record or admissions or the jury's verdict. But the Sixth Amendment does not allow courts to disregard defendants' rights just because to make a correction would require the judicial system to undergo change. *Id*.

The majority is also incorrect in relying on its belief that the Legislature intended that probation violators be punished with more than 12 months in jail. Even if the Legislature intended that punishment, it is irrelevant. This fact is made obvious by the decision in *Ring*. The Arizona legislature intended that a sentence of death should be imposed in first-degree murder cases in

which aggravating factors existed. *Ring*, 536 US at 592-593. But the Supreme Court found that this intent could not be effectuated in light of the Sixth Amendment. Notwithstanding the Arizona legislature's intent, the judicial fact-finding that increased Ring's maximum sentence to the death penalty violated *Blakely*'s bright-line rule: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602.

Moreover, the proper application of the Sixth Amendment to Michigan's intermediate sanction cells need not weaken an intermediate sanction cell sentence of probation with jail. The system easily could be made to comply with *Blakely*. For example, this Court could amend our court rules to provide for a jury to be impaneled after a court found a probation violation. If the jury then found beyond a reasonable doubt the facts necessary to move the defendant from an intermediate sanction cell, there would be no Sixth Amendment violation. Therefore, Michigan could both retain its current probation system and protect a defendant's constitutional rights.[15]

The majority contends that the imposition of an intermediate sanction cell sentence does not affect the absolute maximum statutory sentence. It reasons that a defendant is not entitled to an intermediate sanction cell sentence until after the court decides that substantial and compelling reasons to depart from it do not exist. Therefore, it reasons, there is only one statutory

[15] For a complete discussion of the appropriate remedy for the constitutional violation occurring in these cases, please see my dissenting opinion in *People v McCuller*, 475 Mich 176, 208-213; 715 NW2d 798 (2006).

maximum sentence. But the Supreme Court heard and rejected a similar argument in *Ring*. There the pertinent statute directed the judge to conduct a separate sentencing hearing. The purpose of the hearing was to enable the judge to determine the existence of specified circumstances in order to decide which to impose, the death penalty or life imprisonment. *Ring*, 536 US at 592-593. But the Supreme Court concluded that the fact that the judge could impose a higher sentence under the sentencing scheme is not relevant. A defendant is *entitled* to a sentence based solely on the jury's verdict and the defendant's admissions and criminal history. The Supreme Court explained:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid*.; see 200 Ariz., at 279, 25 P. 3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," *Apprendi*, 530 U.S., at 541 (O'Connor, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See [Ariz Rev Stat Ann] 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment *as provided by* [Ariz Rev Stat Ann] *13-703*." (emphasis added)). If Arizona prevailed on its opening argument,

> *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. [*Id*. at 603-604.]

The Supreme Court made clear that the majority's argument in this case must fail. The Arizona court in *Ring* was imposing a statutory maximum sentence by sentencing the defendant to a life sentence rather than the death penalty. Similarly, a Michigan court imposes a statutory maximum sentence when sentencing a defendant to an intermediate sanction cell sentence rather than to the absolute maximum sentence. Both systems set statutory maximum sentences. And, in both situations, judicial fact-finding by the sentencing court increasing this sentence violates the Sixth Amendment, no matter what formalistic gloss is placed on the fact-finding.[16]

In summary, Michigan's intermediate sanction cells set maximum sentences. They can be increased only through judicial fact-finding after the jury's verdict. Because of this fact, intermediate sanction cell sentences equate to the middle term of California's DSL system. *Cunningham*, 127 S Ct at 868. Both constitute a statutory maximum sentence for *Apprendi* purposes.

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[16] The majority attempts to distinguish *Ring* by focusing on the fact that the sentence of death in that case could be imposed only if the judge found aggravating circumstances. *Ante* at 614 n 25. It concludes that this distinguishes Arizona's sentencing scheme from Michigan's sentencing guidelines because, it postulates, only one maximum sentence exists in Michigan. As I explain both here and in *McCuller*, this is simply inaccurate. Just as in *Ring*, a defendant in Michigan who falls in an intermediate sanction cell faces one maximum sentence (12 months in jail) unless the court makes findings of fact that move him or her out of that cell. Whether these findings are called an identification of aggravating circumstances, a scoring of OVs, or a departure from the guidelines, one fact remains the same: the trial court is engaging in activity that increases the defendant's sentence by making findings not supported by the jury's verdict, the defendant's admissions, or the defendant's past convictions. This violates *Blakely*'s bright-line rule.

In this case, but for the trial court's findings of fact made using a preponderance of the evidence standard, Harper would have received an intermediate sanction. The highest valid sentence he would have faced was 12 months in jail. MCL 769.34(4)(a). The sentence he received was four years in prison. This violated the Sixth Amendment, and the violation requires resentencing.

F. HARMLESS ERROR

The Supreme Court concluded that *Blakely* errors are not structural errors requiring automatic reversal. *Washington v Recuenco*, __ US __; 126 S Ct 2546, 2553; 165 L Ed 2d 466 (2006). The Court reasoned that sentencing factors were equivalent to the elements of the crime. Both must be proved to a jury beyond a reasonable doubt. *Id*. at 2552. The appropriate standard of review for this constitutional issue is whether the omission of an element of the offense was harmless beyond a reasonable doubt. *Neder v United States*, 527 US 1, 18-19; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

Michigan has no process for criminal juries to make special findings of fact. See MCR 6.420. This procedural problem is no small issue. In *Recuenco,* the United States Supreme Court considered the consequences of there being no procedure by which a jury could have made a finding. It suggested that a defendant would be more likely to demonstrate successfully that the *Blakely* violation was not harmless in such a situation. *Recuenco*, 126 S Ct at 2550. This case evidences the procedural problem noted in *Recuenco*.

The jury convicted Recuenco of second-degree assault on the basis of its finding that he had assaulted his wife with a deadly weapon. *Id*. at 2549. He objected to the judicial finding that was made after the verdict that the deadly weapon was a firearm. *Id*. Thus, in *Recuenco*,

state law specifically allowed juries to make findings of fact. And the fact used by the judge in sentencing closely related to the fact found by the jury.

In this case, no procedure was available for the jury to make special findings. The United States Supreme Court has not addressed the application of a harmless error analysis to *Blakely* questions in such situations. But the procedural discussion in *Recuenco* suggests that the prosecution could not carry its burden in this case to prove the *Blakely* error harmless beyond a reasonable doubt. See *id*. at 2550.[17] At the very least, it is not clear that the jury's verdict would have been the same as the trial court's findings. Therefore, the error was not harmless. *Neder*, 527 US at 18-19.[18]

Even if procedures for special jury findings existed here, the prosecution could not prove that the failure to submit these issues to the jury was harmless beyond a reasonable doubt.

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[17] The majority apparently misses the point of why the Supreme Court indicated that the lack of procedure would increase the difficulty in proving the error harmless. Simply, if the jury has no means of making the finding, how can a reviewing court presume that the jury would have made that finding regardless of the prohibition against it?

[18] The majority accuses me of effectively concluding that all *Blakely* errors are "harmful per se." *Ante* at 640 n 70. This is inaccurate. I acknowledge that the Blakely error in *Recuenco* was not harmful per se. But when I apply the words of the United States Supreme Court, it is not clear to me that *Blakely* errors in Michigan may be harmless beyond a reasonable doubt. This is because, as the Supreme Court advises, the lack of a procedure for special findings will increase the difficulty of the prosecution's burden to prove any error harmless beyond a reasonable doubt. And Michigan lacks a procedure.

As I discuss at length in *McCuller*, 479 Mich at 746-748 (KELLY, J., dissenting), the majority also misstates the law regarding the ability of a jury to make special findings in a criminal proceeding. This Court specifically rejected such procedures long ago in *People v Marion*, 29 Mich 31, 40-41 (1874). And the court rules do not permit our breaking with this longstanding precedent in this case.

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless. [*Id*. at 19.]

In this case, Harper had no opportunity to present contrary evidence. The majority relies on the fact that he did not object to the presentence investigation report (PSIR). But this reliance is misplaced.

"[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle v McGuire*, 502 US 62, 69; 112 S Ct 475; 116 L Ed 2d 385 (1991). The right to trial by jury is a basic right that cannot be waived, unless the waiver is fully informed and publicly acknowledged. *Taylor v Illinois*, 484 US 400, 418 n 24; 108 S Ct 646; 98 L Ed 2d 798 (1988). Harper decided not to object at sentencing to the information in his PSIR. When he did that, he could not have known that he was entitled to have the prosecution prove the statements contained in the PSIR beyond a reasonable doubt. Had he known that, and had he known that this Court would treat his failure to object as a waiver, he likely would have put the prosecution to its proofs. And it is not certain that the prosecution could have proved the information in the PSIR beyond a reasonable doubt.

In any event, the information in the PSIR does not support the judicial findings in this case beyond a reasonable doubt. The trial court's reasons for departure were:

> Guidelines do not include at least 3 parole revocations, abscondings from probation, Bench warrants from various courts and stealing from a charity that serves freezing children[.]

The PSIR only briefly mentions a bench warrant in the investigating agent's evaluation. Nothing in the PSIR talks of freezing children. In fact, the prosecution has presented no evidence to this Court to support either finding on these matters beyond a reasonable doubt. It is unknown if children were harmed by Harper's actions. And it is unclear what defenses Harper may have had against the unknown bench warrants. Therefore, the prosecution has not proved beyond a reasonable doubt that the error in this case was harmless. *Neder*, 527 US at 19. Resentencing is mandated.[19]

III. CONCLUSION

There was no need for the majority to reach the Sixth Amendment issue in *Burns*. The trial court failed to

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[19] I disagree with Justice CAVANAGH's assessment that Harper's guilty plea and his statement that he did not contest the PSIR constituted an admission for Sixth Amendment analysis purposes. A waiver "consists of (1) specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Courts should indulge every reasonable presumption against waiver of a fundamental right. *Id*. at 260. This Court has set an even higher standard for an admission:

> [A] statement made by a party or his counsel, in the course of trial, is considered a binding judicial admission if it is a distinct, formal, solemn admission made for the express purpose of, *inter alia,* dispensing with the formal proof of some fact at trial. [*Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969).]

This case meets neither standard. Harper did not know that he was addressing his Sixth Amendment rights when he reviewed the PSIR at sentencing. And his plea did not address the facts used to depart from the sentence required by the intermediate sanction cell. Thus, his statements could not constitute a waiver, let alone an admission.

articulate substantial and compelling reasons to depart upward from the sentencing guidelines range. Burns must be resentenced without regard to the *Blakely* issue. Because he was not properly sentenced under existing law, the Sixth Amendment issue is not ripe for review.

Harper's sentence does violate the Sixth Amendment. The trial court based its departure sentence on facts that a jury never decided were true and that Harper never admitted. But for those findings, Harper would have received an intermediate sanction cell sentence, which could not have exceeded 12 months in jail. MCL 769.34(4)(a). But his sentence was four years in prison. This violated the Sixth Amendment, and it requires resentencing.

The *Harper* case illustrates that a grave constitutional problem arises in this state when *Blakely* is correctly applied. In its effort to save the Michigan sentencing guidelines, the majority fails to pay respect to the United States Supreme Court's Sixth Amendment precedent. When this precedent is properly applied, it becomes apparent that a major restructuring of Michigan's sentencing guidelines is in order.

PEOPLE v McCULLER

Docket No. 128161. Decided July 26, 2007.

Raymond A. McCuller was convicted by a jury in the Oakland Circuit Court of assault with intent to do great bodily harm less than murder. The court, Richard D. Kuhn, J., sentenced the defendant as a second-offense habitual offender within the sentencing guidelines range to 2 to 15 years in prison. The defendant appealed, contending that, because his prior record variable (PRV) score alone produced a recommended minimum sentence range of zero to 11 months, he was entitled under MCL 769.34(4)(a) to an intermediate sanction that did not include a prison term. The defendant argued that the sentencing court violated *Blakely v Washington*, 542 US 296 (2004), by engaging in judicial fact-finding to score his offense variables (OVs), thereby producing a minimum sentence range that gave the sentencing court the option of imposing either an intermediate sanction or a prison term. The Court of Appeals, TALBOT, P.J., and GRIFFIN and WILDER, JJ., affirmed in an unpublished opinion per curiam, issued January 11, 2005 (Docket No. 250000). The Michigan Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the defendant's application for leave to appeal. 474 Mich 925 (2005). Following oral argument, the Michigan Supreme Court, in a memorandum opinion (KELLY and CAVANAGH, JJ., dissenting), affirmed the judgment of the Court of Appeals with regard to the defendant's sentence and denied leave to appeal in all other respects. The Supreme Court held that judicial fact-finding to determine the minimum term of a defendant's indeterminate sentence does not violate *Blakely* unless the fact-finding increases the statutory maximum to which the defendant had a legal right. The Court held that under MCL 769.34(4)(a), however, a defendant is not legally entitled to an intermediate sanction until after the OVs have been scored and the resulting OV score, in conjunction with the PRV score and the offense class, indicates that the upper limit of the defendant's recommended minimum sentence range is 18 months or less. Therefore, the Court held, a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs, and

the properly determined guidelines range in this case did not entitle the defendant to an intermediate sanction. 475 Mich 176 (2006). The United States Supreme Court vacated the Michigan Supreme Court's judgment and remanded the case to that Court for further consideration in light of *Cunningham v California*, 549 US ___; 127 S Ct 856 (2007). *McCuller v Michigan*, ___ US ___; 127 S Ct 1247 (2007).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices WEAVER, YOUNG, and MARKMAN, the Supreme Court *held*:

The sentencing court did not violate *Blakely* when it engaged in judicial fact-finding to score the OVs and then used those scores in determining the defendant's minimum sentence.

1. A defendant does not even qualify for an intermediate sanction until after the OVs are scored and considered along with the PRV score and the offense class. The sentencing court's fact-finding in scoring the OV's does not increase the defendant's statutory maximum under *Blakely*. A defendant has no right to have his or her minimum sentence calculated using only a portion of the statutorily enumerated factors. Upon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved and has no legal right to expect any lesser maximum sentence. Because the defendant's OV score, PRV score, and offense class did not place him in an intermediate sanction cell, he never qualified for an intermediate sanction. The properly scored guidelines placed the defendant in a straddle cell, and the sentencing court exercised its discretion to sentence him to a prison sentence within the statutory maximum of 15 years. *Cunningham* does not alter this result, given that it involved a California determinate sentencing law that is clearly different from Michigan's indeterminate sentencing scheme.

2. Even if the defendant was entitled to be sentenced on the basis of his PRV score only, under *People v Harper*, 479 Mich 599 (2007), the conditional limit on incarceration provided by an intermediate sanction does not establish a defendant's statutorily required maximum sentence authorized by the jury's verdict or the guilty plea. Rather, it is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is less than that authorized by the jury's verdict or the guilty plea. Thus, even if the defendant's recommended minimum sentence was in an intermediate sanction cell, his statutory maximum sentence would remain 15 years. The sentencing court did not violate *Blakely* by sentencing the defendant to the statutory maximum of 15 years in prison.

3. Even if the sentencing court violated *Blakely*, the error was harmless. The factors underlying the offense variable scores were uncontested and supported by overwhelming evidence. A jury scoring the offense variables would unquestionably have reached the same result as the sentencing court.

Affirmed.

Justice KELLY, dissenting, concluded that the judicial fact-finding in this case violated the defendant's Sixth Amendment right to a trial by jury, and would hold that the sentencing guidelines are unconstitutional as applied in this case. As the United States Supreme Court most recently reaffirmed in *Cunningham*, a defendant is entitled to a maximum sentence that is based solely on the defendant's prior convictions and any facts admitted by the defendant or proved to the jury beyond a reasonable doubt. This is a bright-line rule. When a defendant, on the basis of his or her PRV score alone, is entitled to a sentence that is within the range specified in an intermediate sanction cell, MCL 769.34(4)(a) sets the defendant's maximum sentence, which cannot exceed a jail term of either the upper limit of the recommended minimum sentence range or 12 months, whichever is shorter. Under *Cunningham* and the cases preceding it, this maximum sentence is the longest sentence the court can give the defendant on the basis of only the defendant's criminal record and admissions and the jury's verdict. Any judicial fact-finding using a preponderance of the evidence that increases this maximum sentence, such as the fact-finding necessary to score the offense variables or to state a substantial and compelling reason to depart and impose an indeterminate prison sentence, is unconstitutional. In this case the defendant's PRV level entitled him to a maximum sentence of an intermediate sanction that included no more than 11 months in jail. Thus, the sentencing court erred by scoring the defendant's OVs, which moved him into a straddle cell that allowed a prison sentence. Under *Cunningham*, a sentencing court may not score the OVs using judicial fact-finding unless the defendant's PRV level by itself is too high to place the defendant in an intermediate sanction cell. Moreover, it is clear from a plain reading of the sentencing statutes that the Legislature intended intermediate sanction cells to dictate maximum sentences. In Michigan, an intermediate sanction that includes a jail term is treated like any other maximum sentence: when a defendant finishes the term and is released from jail, there is no further supervision or any determination concerning the need for further incarceration. The error in this case was not harmless beyond a reasonable doubt because the trial court scored the OVs using facts

that were not supported by overwhelming evidence. The defendant's sentence should be vacated, and the case should be remanded to the trial court for resentencing.

Justice CAVANAGH, dissenting, agreed with the result advocated by Justice KELLY. The requirements set forth in *Blakely* and *Cunningham* must be followed when dealing with intermediate sanctions. Because the sentencing court improperly engaged in judicial fact-finding, the case should be remanded for resentencing.

SENTENCES — INTERMEDIATE SANCTIONS.

A defendant does not qualify for an intermediate sanction until after the offense variables have been scored and the resulting offense variable score, in conjunction with the prior record variable score and the offense class, indicates that the upper limit of the defendant's recommended minimum sentence range is 18 months or less; a sentencing court does not violate *Blakely v Washington*, 542 US 296 (2004), when it engages in judicial fact-finding to score the offense variables in calculating the recommended minimum sentence range even if that scoring results in a minimum sentence range that is in a straddle cell or a cell requiring a prison term in the appropriate sentencing grid rather than an intermediate sanction cell (MCL 769.34[4][a]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Appellate Division Chief, and *Robert C. Williams,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for the defendant.

Amici Curiae:

Kimberly Thomas for Criminal Defense Attorneys of Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, and *William E. Molner*, Assistant Attorneys General, for the Attorney General and the Prosecuting Attorneys Association of Michigan.

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the Wayne County Prosecuting Attorney.

CORRIGAN, J. This is one of three companion cases involving the application of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to Michigan's sentencing scheme. See also *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007). This case returns to us following a remand from the United States Supreme Court. In our previous opinion, we held that a sentencing court must score both the offense variables (OVs) and the prior record variables (PRVs) to arrive at a defendant's minimum sentence range. We reasoned that a sentencing court does not violate *Blakely* principles when it engages in judicial fact-finding to score the OVs in order to calculate a defendant's recommended minimum sentence range under the sentencing guidelines, even if the defendant's PRV score alone would place him in an "intermediate sanction cell."[1] *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006) (*McCuller I*). The Supreme Court subsequently vacated our judgment and remanded the case to us for further consideration in light of *Cunningham v California*, 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007). *McCuller v Michigan*, ___ US ___; 127 S Ct 1247 (2007) (*McCuller II*). Having now considered *Cunningham*, we reaffirm our original decision for three reasons.[2]

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[1] A defendant falling within an intermediate sanction cell must be sentenced, absent a substantial and compelling reason for departure, to an intermediate sanction that does not include a prison term. MCL 769.34(4)(a).

[2] In reaffirming our original decision, we do not, as Justice KELLY's dissent contends, imply that the Supreme Court "simply did not understand Michigan's sentencing laws." *Post* at 699. Justice KELLY seems to

First, *Cunningham* does not alter our view that Michigan's statutory scheme requires the sentencing court to score both the OVs and the PRVs before determining the defendant's minimum sentence. A defendant's qualification for an intermediate sanction is contingent on the sentencing court's calculation and application of these sentencing variables. A sentencing court's fact-finding in scoring the OVs does not increase the defendant's statutory maximum under *Blakely*.[3] Here, the proper scoring of both the OVs and the PRVs did not place defendant in an intermediate sanction cell. Instead, defendant's scores placed him in a "straddle cell" with a maximum sentence of 15 years in prison. Defendant was sentenced within this statutory maximum.

Second, as we explained in *Harper, supra* at 621-638, Michigan, unlike California, has a true indeterminate sentencing scheme. A sentencing court scores the OVs only to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute. The conditional limit on incarceration contained in MCL 769.34(4)(a)—an intermediate sanction —does not establish the defendant's statutorily required maximum sentence authorized by the jury's verdict or the guilty plea, but is instead a matter of legislative leniency, giving a defendant the opportunity

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read something into the Supreme Court's order that is simply not there. Justice KELLY is incorrect that the Supreme Court indicated in its order that "there is a Sixth Amendment problem with Michigan's sentencing guidelines." *Post* at 751. We take the Supreme Court's order for exactly what it is: a remand for us to consider the matter further in light of the Court's holding in *Cunningham*. The order does not direct us to decide the case differently from our previous decision.

[3] The Court of Appeals reached the same conclusion in *People v Uphaus*, 275 Mich App 158, 168-171; 737 NW2d 519 (2007).

to be incarcerated for a period that is *less* than that authorized by the jury's verdict or the guilty plea. *Harper, supra* at 603-604. Therefore, even if defendant were to be sentenced on the basis of his PRV score alone, the sentencing court would not violate *Blakely* by sentencing him to the statutory maximum of 15 years in prison.

Third, even if the sentencing court violated *Blakely* by sentencing defendant to a term of imprisonment based on its scoring of the OVs, the error was harmless under the plain error standard of *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The factors underlying the scoring of the OVs were uncontested and supported by overwhelming evidence. We are firmly convinced that a jury would have reached precisely the same result.

I. FACTS AND PROCEDURAL HISTORY

Defendant apparently harbored some resentment toward the victim, Larry Smith, because a woman who once lived with defendant had left him for Smith. Smith and the woman were imbibing at a local bar when Smith was told that a man outside in the parking lot was harassing Smith's dog. When Smith went outside, he heard someone behind him. He turned and saw defendant swinging a blunt object that looked like a bat, a pipe, or a club at his head. The next thing Smith remembered was regaining consciousness in the hospital. As a result of defendant's assault on Smith, he suffered a concussion, broken nose, broken cheek bone, broken eye socket, fractured skull, and collapsed right inner ear wall. He also lost teeth on the right side of his lower jawbone.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, which has a maximum penalty of 10 years in prison. Because defendant was a second-offense habitual offender,

however, the sentencing court had the discretion to enhance defendant's statutory maximum sentence to 15 years. MCL 769.10(1)(a).[4] In determining defendant's minimum sentence range, the sentencing court scored 10 points for OV 1 because the victim had been "touched by any other type of weapon," MCL 777.31(1)(c) (now MCL 777.31[1][d]); 1 point for OV 2 because defendant "possessed or used any other potentially lethal weapon," MCL 777.32(1)(d) (now MCL 777.32[1][e]); and 25 points for OV 3 because a "[l]ife threatening or permanent incapacitating injury occurred to a victim," MCL 777.33(1)(c). Defendant's total PRV score was 2 points because he had one prior misdemeanor conviction. These scores placed defendant in the B-IV cell for a class D offense. As a second-offense habitual offender, defendant's calculated minimum sentence range was 5 to 28 months, which is in a straddle cell.[5] Because the scoring of the OVs and the PRVs

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[4] MCL 769.10(1)(a) provides that a sentencing court may impose a sentence that is 1½ times longer than the maximum sentence on a second-offense habitual offender:

> (1) If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided in this section or section 1 of chapter XI, may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1½ times the longest term prescribed for a first conviction of that offense or for a lesser term.

[5] A defendant falls within a straddle cell when, after the sentencing variables have been scored, the upper limit of the recommended mini-

placed defendant in a straddle cell, the sentencing court had the option of sentencing defendant to either an intermediate sanction or a prison term with a minimum sentence within the guidelines range. MCL 769.34(4)(c). The court chose to sentence defendant within the guidelines range to a 2- to 15-year term of imprisonment.

On appeal, defendant contended that he was entitled to resentencing under *Blakely* because the jury had not found beyond a reasonable doubt the facts underlying the sentencing court's scoring of the OVs. Defendant argued that absent the sentencing court's scoring of the OVs, his minimum sentence range would have been zero to 11 months, which would have placed him in an intermediate sanction cell, entitling him to an intermediate sanction as a maximum sentence. The Court of Appeals affirmed defendant's conviction and sentence, rejecting defendant's argument because *Blakely* does not apply to Michigan's indeterminate sentencing system.

This Court also affirmed defendant's sentence.[6] We held that the sentencing court had not violated *Blakely* by engaging in judicial fact-finding to score the OVs necessary to calculate the recommended minimum sentence range. We explained that a defendant cannot be sentenced to an intermediate sanction by scoring the PRVs only—the OVs must also be scored. Thus, defendant was not entitled to resentencing, because his maximum sentence was the statutory maximum of 15 years, which the sentencing court had not exceeded. *McCuller I, supra* at 181-183.

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mum sentence exceeds 18 months, but the lower limit of the recommended minimum sentence is 12 months or less. MCL 769.34(4)(c).

[6] On appeal, defendant raised issues other than the *Blakely* issue, but this Court denied defendant's application for leave to appeal with respect to those issues. *McCuller I, supra* at 183.

The Supreme Court thereafter vacated our judgment and remanded this case to this Court "for further consideration in light of *Cunningham v California*, 549 U.S. ___; 127 S.Ct. 856; 166 L.Ed.2d 856 (2007)." *McCuller II, supra*, 127 S Ct at 1247.

II. STANDARD OF REVIEW

This case involves questions of statutory interpretation and constitutional questions, which are both reviewed de novo. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005); *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764.[7]

III. ANALYSIS

A. BACKGROUND

In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the Supreme Court held that under the Sixth and Fourteenth Amendments of the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely, supra* at 303, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis deleted.) In regard to indeterminate sentencing schemes, the *Blakely* Court stated:

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[7] Defendant agrees that his claim of constitutional error should be reviewed under the plain error standard.

> Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence —and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [*Id.* at 309 (emphasis in original).]

Thus, a sentencing court in an indeterminate sentencing scheme does not violate *Blakely* by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence unless the fact-finding increases the statutory maximum sentence to which the defendant had a legal right.[8]

> The constitutional rule of *Apprendi, Blakely,* and [*United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005)] can be summarized as follows: (1) a trial court may not impose a sentence greater than the statutory maximum unless it does so on the basis of a prior conviction or the fact at issue is "admitted by the defendant or proved to a jury beyond a reasonable doubt"; (2) where a defendant's maximum sentence is calculated through the use of mandatory sentencing guidelines, the statutory maximum is the maximum sentence that may be imposed

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[8] In *Harris v United States*, 536 US 545, 566; 122 S Ct 2406; 153 L Ed 2d 524 (2002), Justice Kennedy stated:

> The Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less" than that. *Apprendi*, *supra*, 530 US at 498 (Scalia, J., concurring). If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

> under those guidelines, based solely on the defendant's prior convictions and those facts proven beyond a reasonable doubt; and (3) a trial court *may* consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range. [*Drohan, supra* at 156 (citations omitted).]

In *Drohan, supra* at 160-161, this Court explained that Michigan has an indeterminate sentencing scheme.[9] "The maximum sentence is not determined by the trial court, but rather is set by law." *Id.* at 161. Michigan's sentencing guidelines create a range within which the sentencing court must set the *minimum* sentence, but the sentencing court may not impose a sentence greater than the statutory maximum. *Id.* "Thus, the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict." *Id.* at 162. Therefore, Michigan's indeterminate sentencing scheme is valid under *Blakely*. *Drohan, supra* at 162-164; *Harper, supra* at 615.

B. SCORING THE OVS TO DETERMINE THE MINIMUM SENTENCE

1. DISCUSSION

Despite our *Drohan* decision, defendant argues that one aspect of Michigan's indeterminate sentencing

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[9] The very limited number of offenses that require determinate sentences includes first-degree murder, MCL 750.316 (life in prison without the possibility of parole), and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b (two years in prison for the first conviction, five years for the second conviction, and ten years for a third or subsequent conviction). *Drohan, supra* at 161 n 12. When a defendant is sentenced for one of these crimes, the guidelines are not scored to determine the defendant's minimum sentence. The Legislature has singled out these crimes as rare instances in which the sentencing court retains no discretion in sentencing.

scheme nonetheless violates the Sixth Amendment of the United States Constitution. Defendant claims that because his PRV score alone placed him in an intermediate sanction cell, he was entitled to a maximum sentence that did not include prison time. Defendant contends that the sentencing court violated *Blakely* by engaging in judicial fact-finding to score the OVs, thereby allegedly increasing his maximum sentence from an intermediate sanction to a term of imprisonment. We again reject defendant's argument and affirm defendant's sentence.

Generally, when a defendant is sentenced in Michigan, "[t]he maximum penalty provided by law shall be the maximum sentence . . . ." MCL 769.8(1). Our sentencing guidelines set a range only for a defendant's minimum sentence. MCL 769.34(2). The sentencing court determines a defendant's minimum sentence range by considering together the OVs, the PRVs, and the offense class. MCL 777.21(1).[10] Generally, once the

[10] MCL 777.21(1) provides:

> Except as otherwise provided in this section, for an offense enumerated in part 2 of this chapter, determine the recommended minimum sentence range as follows:
>
> (a) Find the offense category for the offense from part 2 of this chapter. From section 22 of this chapter, determine the offense variables to be scored for that offense category and score only those offense variables for the offender as provided in part 4 of this chapter. Total those points to determine the offender's offense variable level.
>
> (b) Score all prior record variables for the offender as provided in part 5 of this chapter. Total those points to determine the offender's prior record variable level.
>
> (c) Find the offense class for the offense from part 2 of this chapter. Using the sentencing grid for that offense class in part 6 of this chapter, determine the recommended minimum sentence

sentencing court calculates the defendant's guidelines range, it must, absent substantial and compelling reasons, impose a minimum sentence within that range. MCL 769.34(2). There are, however, exceptions to this rule. One exception pertains when the upper limit of the recommended minimum sentence range is 18 months or less. In such cases, the court, unless it articulates substantial and compelling reasons, must impose an intermediate sanction:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

MCL 769.31(b) defines "intermediate sanction" as "probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of" several options, including up to one year in jail, probation with any conditions authorized by law, probation with jail, and other options such as house arrest and community service.[11]

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range from the intersection of the offender's offense variable level and prior record variable level. The recommended minimum sentence within a sentencing grid is shown as a range of months or life.

[11] The nonexhaustive list of intermediate sanction options includes:

> (*i*) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.

We hold that *Cunningham* does not require us to modify our previous decision. A sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs to calculate a defendant's recommended minimum sentence range, even when the defendant's PRV score alone would have placed him in an intermediate sanction cell. *Cunningham* involved the Supreme Court's examination of California's determinate sentencing law (DSL). In *Harper*, we described the facts and holding in *Cunningham*:

> In *Cunningham,* the defendant was tried and convicted of continuous sexual abuse of a child under the age of 14. The statute defining the offense prescribed three precise

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(*ii*) Probation with any probation conditions required or authorized by law.

(*iii*) Residential probation.

(*iv*) Probation with jail.

(*v*) Probation with special alternative incarceration.

(*vi*) Mental health treatment.

(*vii*) Mental health or substance abuse counseling.

(*viii*) Jail.

(*ix*) Jail with work or school release.

(*x*) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.

(*xi*) Participation in a community corrections program.

(*xii*) Community service.

(*xiii*) Payment of a fine.

(*xiv*) House arrest.

(*xv*) Electronic monitoring. [MCL 769.31(b).]

terms of imprisonment—lower, middle, and upper term sentences of 6, 12, and 16 years, respectively. The statute that controlled which term a sentencing judge should impose provided that " 'the court *shall* order imposition of the middle term, *unless* there are circumstances in aggravation or mitigation of the crime.' " Circumstances in aggravation or mitigation were to be determined by the court after considering the trial record, the probation officer's report, statements submitted by the parties, the victim, or the victim's family, and "any further evidence introduced at the sentencing hearing." The judge in *Cunningham* sentenced the defendant to the 16-year upper term, on the basis of the judge's findings of aggravating facts including the particular vulnerability of the victim and the defendant's violent conduct, which indicated a serious danger to the community [*Harper*, *supra*, at 619-620.]

The *Cunningham* Court concluded that the sentence violated the defendant's rights because

"an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. . . . Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U.S., at 303, 124 S.Ct. 2531 ('[T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.' (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

> reasonable doubt.' 530 U.S., at 490, 120 S.Ct. 2348." [*Harper, supra* at 620, quoting *Cunningham, supra*, 127 S Ct at 868.]

The Supreme Court reiterated its holding from *Blakely* that " '[t]he relevant "statutory maximum,"' . . . 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' " *Cunningham, supra*, 127 S Ct at 860, quoting *Blakely, supra* at 303-304. After holding that California's DSL violated *Blakely*, the Court advised California that "[o]ther states have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal." *Cunningham, supra*, 127 S Ct at 871, quoting *Booker, supra* at 233. The *Cunningham* decision did not modify *Blakely*.

Although California's DSL contains some language facially similar to MCL 769.34(4)(a), further examination of the two sentencing schemes reveals clear differences. Under California's DSL, the defendant was legally *entitled* to a maximum sentence of 12 years in prison. The DSL did not attach any conditions to the defendant's entitlement to the 12-year maximum sentence. The DSL violated *Blakely* by allowing the sentencing court to exceed that 12-year maximum sentence on the basis of facts not submitted to the jury and found beyond a reasonable doubt.

By contrast, Michigan's sentencing scheme does not entitle defendant to a maximum sentence of an intermediate sanction in the same way that the defendant in *Cunningham* was entitled to a 12-year maximum sentence. In Michigan, a defendant does not even qualify for an intermediate sanction until after the OVs are scored. MCL 769.34(4)(a) plainly prescribes that a de-

fendant qualifies for an intermediate sanction only "[i]f the upper limit of the recommended *minimum* sentence range for a defendant *determined under the sentencing guidelines* . . . is 18 months or less . . . ." (Emphasis added.) To determine a defendant's minimum sentence range under the guidelines, the sentencing court must first score the OVs and the PRVs and consider the offense class. MCL 777.21. Thus, under MCL 769.34(4)(a), a defendant does not even qualify for an intermediate sanction until after the court has scored all the sentencing variables, including the OVs, and those variables indicate that the upper limit of the defendant's *minimum* sentence range is 18 months or less. In other words, a defendant's qualification for an intermediate sanction is contingent on the sentencing court's calculation of all of the defendant's sentencing variables. A defendant has no legal right to have his minimum sentence calculated using only a portion of the statutorily enumerated factors.[12]

Upon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved. A defendant has no legal right to expect any lesser *maximum* sentence. As the *Blakely* Court stated, whether a defendant has a legal right to a lesser sentence "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely, supra* at 309. Thus, a sentencing court does not violate *Blakely* principles by engaging in

[12] Further, a defendant in Michigan cannot expect to fall into an intermediate sanction cell at the time he commits the offense because the defendant can never be certain how the OVs will be scored. Indeed, an offender may not even be aware of some facts attending the crime until he is brought before a court. To provide just two examples, a defendant may not know the extent of injury he ultimately caused a victim for purposes of OV 3, MCL 777.33, or the full value of property he has stolen for purposes of OV 16, MCL 777.46.

judicial fact-finding to score the OVs to calculate the recommended *minimum* sentence range, even when the scoring of the OVs places the defendant in a straddle cell or a cell requiring a prison term instead of an intermediate sanction cell. The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction.

In this case, the properly scored guidelines gave defendant a recommended minimum sentence range of 5 to 28 months in prison. This placed defendant in a straddle cell, for which the sentencing court had the discretion to impose a minimum sentence of either a prison term with a minimum term within the guidelines range or an intermediate sanction. MCL 769.34(4)(c).[13] Defendant also faced a statutory maximum sentence of 15 years in prison for his conviction of assault with intent to do great bodily harm less than murder as a second-offense habitual offender, MCL 750.84; see MCL 769.10. Even if Michigan's intermediate sanction cells are characterized as setting maximum sentences for *Blakely* purposes, defendant never gained a legal right to an intermediate sanction. Therefore, the sentencing court did not violate *Blakely* by scoring the OVs and

[13] MCL 769.34(4)(c) provides:

> If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
>
> (*i*) To imprisonment with a minimum term within that range.
>
> (*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

imposing a prison sentence within the guidelines, rather than imposing an intermediate sanction based on defendant's PRV scores alone. Accordingly, we affirm defendant's sentence.

2. RESPONSE TO JUSTICE KELLY'S DISSENT[14]

In concluding that the trial court's scoring of the OVs violated defendant's Sixth Amendment right to a trial by jury, Justice KELLY's dissent ignores the statutory language and relies on the faulty premise that defendant's jury verdict entitled him to an intermediate sanction. Justice KELLY repeatedly recites "*Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.' " *Cunningham, supra*, 127 S Ct at 868, quoting *Apprendi, supra* at 490 (emphasis added). Yet Justice KELLY woefully misapplies this rule by interpreting it as follows:

> Hence, a defendant is entitled to a sentence based solely on (1) the defendant's prior convictions and (2) any facts that he or she admitted and any facts that were specifically found by the jury.
>
> This requires a conclusion that, in order to determine a defendant's appropriate maximum sentence, a sentencing court should score only the PRVs. [*Post* at 721.]

This interpretation disregards the integral part of the *Apprendi* rule that only facts used to increase a sentence *beyond the statutory maximum* need be proved beyond a reasonable doubt.

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[14] Justice KELLY's dissent discusses issues we address in detail in *Harper*. *Post* at 726-745. Our response to her arguments regarding these issues can be found in the *Harper* opinion.

Justice KELLY's position demonstrates a fundamental misunderstanding of the function of the legislative sentencing guidelines and how intermediate sanctions work within the overall sentencing scheme. Once the jury convicted defendant of assault with intent to do great bodily harm less than murder and of being a second-offense habitual offender, the jury's verdict authorized a maximum prison sentence of 15 years. At that point, the sentencing court, relying on judicially found facts, had to score the various PRVs and OVs to determine the recommended range for the minimum portion of defendant's sentence. A defendant is only eligible for an intermediate sanction if, on the basis of those additional findings of fact, "the upper limit of the recommended minimum sentence range for a defendant *determined under the sentencing guidelines* set forth in chapter XVII is 18 months or less . . . ." MCL 769.34(4)(a) (emphasis added). In other words, whether a defendant is eligible for an intermediate sanction is wholly determined by additional findings of fact undertaken by the sentencing court in scoring the guidelines, including the OVs. Moreover, a defendant's entitlement to an intermediate sanction is itself conditioned on the absence of *other* judicially found facts, i.e., facts that demonstrate a "substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a); see *Harper, supra* at 620-638. Therefore, under *Cunningham*, an intermediate sanction does not constitute the equivalent of the 12-year presumptive maximum sentence set forth in California's DSL, but operates instead in a manner similar to the 6-year lower term that a California court may impose on the basis of its finding of certain mitigating facts at sentencing. A court's use of judicially found facts to determine

whether to impose a 6-year term or a 12-year term under California's DSL does not run afoul of *Blakely* because the court remains limited to imposing the maximum sentence authorized by the jury's verdict. Likewise, the use of judicially found facts to score the OVs in order to determine whether a defendant is eligible for an intermediate sanction does not run afoul of *Blakely* because a Michigan trial court may never exceed the maximum sentence authorized by the jury's verdict, i.e., the statutory maximum. See *Harper, supra* at 611. Justice KELLY studiously ignores the plain language of MCL 769.34(4)(a) and does not even attempt to explain why the statute entitles a defendant to an intermediate sanction as a maximum sentence before the OVs are scored. Under the plain statutory language, a defendant clearly is not eligible for an intermediate sanction until the recommended minimum sentence range under the sentencing guidelines has been determined by considering all the appropriate factors, including the OVs. Before that, a defendant can only expect the maximum sentence set by statute.[15] Thus, although Justice KELLY correctly asserts that a defendant is entitled to a statutory maximum

[15] Justice KELLY compares the instant case to *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), in which the United States Supreme Court rejected an Arizona sentencing law allowing a sentencing judge to conduct a posttrial hearing to determine whether aggravating circumstances existed to allow imposition of the death penalty, as opposed to life imprisonment. The instant case is distinguishable from *Ring*, however, for the reasons we have discussed—the jury's verdict alone never qualified defendant for an intermediate sanction, because an offender's qualification for an intermediate sanction is contingent on the scoring of the OVs. In *Ring*, on the other hand, the maximum sentence allowed by the jury's verdict—life imprisonment—was not subject to such contingencies. *Id.* at 597. Further, as we discussed in *Harper, supra* at 614 n 25, Michigan's indeterminate sentencing scheme imposes only one maximum sentence—the maximum sentence set forth in the statute applicable to the crime.

sentence on the basis of the jury's verdict, the maximum sentence authorized by the jury's verdict in this case is 15 years.

C. MICHIGAN'S INTERMEDIATE SANCTION CELLS

Even if defendant may qualify for an intermediate sanction before the OVs are scored, we nonetheless conclude that the sentencing court did not violate *Blakely* by sentencing him to a term of imprisonment. If the sentencing court had not scored the OVs and defendant had fallen into an intermediate sanction cell, he would still not have been entitled to an intermediate sanction as a statutory maximum sentence. As we held in *Harper, supra* at 603-604:

> Under Michigan law, the *maximum* portion of a defendant's indeterminate sentence is prescribed by MCL 769.8, which requires a sentencing judge to impose no less than the prescribed statutory maximum sentence as the maximum sentence for every felony conviction.[16] Michigan's unique law requiring the imposition of an intermediate sanction upon fulfillment of the conditions of MCL 769.34(4)(a) does not alter the maximum sentence that is required upon conviction and authorized by either the jury's verdict or the guilty plea. Rather, the conditional limit on incarceration contained in MCL 769.34(4)(a) is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period of time that is *less* than that authorized by the jury's verdict or guilty plea, a circumstance that does not implicate *Blakely*. [Emphasis in original.]

Thus, even if defendant fell into an intermediate sanction cell, his statutory maximum sentence would remain 15 years. The sentencing court did not violate

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[16] As we explained in *Harper, supra* at 612 n 21, the habitual-offender statutes are an exception to this rule.

Blakely by engaging in judicial fact-finding to score the OVs and impose a sentence within that statutory range.

D. HARMLESS ERROR

Finally, even if the sentencing court violated *Blakely* by scoring the OVs and sentencing defendant on the basis of those OV scores, the error was harmless. As we explained in *Harper, supra* at 638-640, *Blakely* errors are not structural, but are subject to harmless error analysis. See also *Washington v Recuenco*, ___ US ___; 126 S Ct 2546, 2551; 165 L Ed 2d 466 (2006).[17] Here, defendant did not raise any constitutional challenge during sentencing. Therefore, defendant must show plain error affecting substantial rights. *Carines, supra* at 763-764; see also *United States v Trujillo-Terrazas*, 405 F3d 814, 817-818 (CA 10, 2005) (applying the same plain error standard to an unpreserved claim of a *Blakely* violation). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." ' " *Carines, supra* at 763, quoting *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The important factor in this *Blakely* harmless error analysis is whether the facts supporting the sentencing court's OV scores were " 'uncontested and supported by overwhelming evidence.' " *Harper, supra* at 640, quoting *Neder v United States*, 527 US 1, 17; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

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[17] For the reasons we explained in *Harper, supra* at 640 n 70, Justice KELLY's interpretation of *Recuenco* would improperly render *Blakely* errors harmful per se. In short, any conclusion that the unavailability of a particular procedure in the trial court renders all errors harmful would run directly counter to the crux of the harmless error analysis that forms the basis of the United States Supreme Court's holding in *Recuenco*. See *id*.

At sentencing, the court scored 10 points for OV 1 because the victim was touched by a weapon other than a firearm or a cutting or stabbing weapon and 1 point for OV 2 because defendant possessed a potentially lethal weapon other than a cutting or stabbing weapon, a firearm, or an incendiary or explosive device. Defendant has not shown that any error in the sentencing court's scoring of these OVs affected the outcome of the proceedings. *Carines, supra* at 763. The jury found that defendant assaulted the victim with the intent to do great bodily harm less than murder, and, although the elements of that crime do not include the touching of a victim with a potentially lethal weapon, those facts were uncontested and supported by overwhelming evidence at trial. In regard to OV 1, the uncontroverted evidence showed that the victim was struck in the head with a bat, pipe, or club.[18] The type and severity of the victim's injuries corroborated the testimony that such a bludgeoning weapon was used. Defendant did not challenge the testimony that he was armed or the evidence regarding the type of weapon used in the assault. Rather, he claimed that he was misidentified as the perpetrator. Thus, the uncontroverted and overwhelming evidence showed beyond a reasonable doubt that the victim was touched by a weapon. In regard to OV 2, the uncontested and overwhelming evidence regarding the magnitude of the victim's injuries demonstrated that the weapon used to injure him was potentially lethal. The jury rejected defendant's claim of mistaken identity and

[18] Justice KELLY's dissent mischaracterizes the testimony by arguing that defendant's use of a weapon was contested by Gregory Thompson, a prosecution witness. First, Thompson did not witness the assault, but was merely told about it by defendant. Second, and more importantly, contrary to Justice KELLY's representation, Thompson did *not* testify that defendant did not use a weapon in beating Smith. Rather, Thompson actually testified during cross-examination that *he assumed that defendant was armed* because of the gestures defendant made while describing the beating.

convicted defendant as the perpetrator who inflicted the injuries. Therefore, the sentencing court's decision to score OVs 1 and 2 on the basis of its findings that defendant possessed a potentially lethal weapon and touched the victim with that weapon, if error at all, was harmless.

The sentencing court also scored 25 points for OV 3 because the victim suffered life threatening or permanent incapacitating injury. The uncontroverted evidence at trial showed that the victim was struck so violently that he immediately lost consciousness. He suffered a concussion, broken nose, broken cheek bone, broken eye socket, fractured skull, and collapsed right inner ear wall. He also lost teeth on the right side of his lower jawbone. The severity of these injuries required a ten-day hospital stay. Because the sentencing court's finding that the victim suffered a life threatening injury was based on uncontested factors and was supported by overwhelming evidence, any error in sentencing based on defendant's OV 3 score was harmless.[19]

If the jury had been asked to score the OVs, it unquestionably would have reached the same result as the sentencing court. Like the defendants in *Harper, supra* at 643-644, and *Neder, supra* at 15, defendant does not suggest that he would offer contrary evidence if given the opportunity to do so. Accordingly, even if the court violated *Blakely* at sentencing, defendant would not be entitled to resen-

[19] Justice KELLY's dissent incorrectly asserts that medical testimony was necessary to prove that the victim suffered life threatening injuries, especially because defendant did not contest the prosecution's evidence proving the victim's serious and extensive injuries. Contrary to Justice KELLY's assertion, we do not shift the burden of proof to the defendant, but merely note that the statute does not require the prosecution to specifically present medical testimony to prove a "[l]ife threatening or permanent incapacitating injury . . . ." MCL 777.33(1)(c).

tencing because he has not shown that that the error " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." ' " *Carines, supra* at 763, quoting *Olano, supra* at 736.

IV. CONCLUSION

The sentencing court did not violate *Blakely* when it engaged in judicial fact-finding to score the OVs and then determined defendant's minimum sentence on the basis of those scores. Because defendant's OV score, PRV score, and offense class did not place him in an intermediate sanction cell, he never qualified for an intermediate sanction. Even if defendant were entitled to be sentenced solely on the basis of the PRVs and the offense class, an intermediate sanction does not constitute the statutory maximum sentence authorized by the jury's verdict or the guilty plea. See *Harper, supra* at 620-622. Finally, even if the trial court violated *Blakely* in sentencing defendant to a prison term, any error was harmless because it did not prejudice defendant.

TAYLOR, C.J., and WEAVER, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

KELLY, J. (*dissenting*). This case presents the majority with the opportunity to correct an error. When the Court previously sat in judgment of this case, the majority found that no Sixth Amendment[1] violation had

[1] The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

occurred at defendant's sentencing. It sanctioned the judge's fact-finding that increased defendant's sentence by moving it from an intermediate sanction cell to a straddle cell. The United States Supreme Court granted certiorari, vacated the decision, and remanded the case to this Court for further consideration in light of its most recent Sixth Amendment precedent, *Cunningham v California*, 549 US __; 127 S Ct 856; 166 L Ed 2d 856 (2007). *McCuller v Michigan*, __ US __; 127 S Ct 1247 (2007). On remand, the majority reaches the same decision as it did before, and it implies that the United States Supreme Court, in remanding this case, simply did not understand Michigan's sentencing laws. Because I believe that the majority fails to explain why *Cunningham* does not require a different result, I must once again dissent.

As I previously concluded, the judicial fact-finding occurring in this case violated defendant's Sixth Amendment right to a trial by jury.[2] Michigan's sentencing guidelines[3] are unconstitutional as applied.

I. PROCEDURAL FACTS

A jury convicted defendant of assault with intent to do great bodily harm less than murder. MCL 750.84. In imposing sentence, the trial court attributed scores to the prior record variables (PRVs) and the offense variables (OVs). The court assessed 2 PRV points for defendant's previous misdemeanor conviction. It assessed a total of 36 OV points. But in order to arrive at the OV score, the court had to make findings of fact,

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI.]

[2] See *People v McCuller*, 475 Mich 176, 183; 715 NW2d 798 (2006) (KELLY, J., dissenting).

[3] MCL 777.1 *et seq.*

which it did using a preponderance of the evidence standard. It assessed 10 points for OV 1 on the basis of its conclusion that a weapon, other than a gun or knife, touched the victim. MCL 777.31. It assessed 1 point for OV 2 on the basis of the finding of fact that defendant possessed a potentially lethal weapon. MCL 777.32. And it assessed 25 points for OV 3 on the basis of the finding of fact that the victim suffered a life threatening or permanent incapacitating injury. MCL 777.33. Defendant made no admissions at sentencing that supported the points attributed to these OV factors.

Assault with intent to do great bodily harm less than murder is a class D offense under MCL 777.16d. MCL 777.65 sets forth the class D sentencing grid. On this grid, a defendant having a PRV level of 2 points and an OV level of 36 points is placed in cell B-IV. This cell provides a minimum sentence range of 5 to 23 months.[4] MCL 777.65. Defendant had a prior felony conviction that was not used in scoring the PRVs. Consequently, the trial court increased the top number of the range by 25 percent, from 23 to 28 months in accordance with MCL 769.10[5] and MCL

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[4] This cell is referred to as a "straddle cell" because the sentencing court may impose either a prison sentence or an intermediate sanction. Straddle cells are addressed by MCL 769.34(4)(c), which provides:

> If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
>
> (*i*) To imprisonment with a minimum term within that range.
>
> (*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

[5] MCL 769.10, 769.11, and 769.12 deal with habitual offenders. They allow the absolute maximum sentence for an offense to increase by a set percentage. The new maximum set forth in these statutes is the absolute

777.21(3)(a).[6] This set the minimum sentence range at 5 to 28 months. The court sentenced defendant within this range, imposing a minimum sentence of 24 months' and a maximum sentence of 15 years' imprisonment.

After sentencing, but before defendant filed his claim of appeal, the United States Supreme Court released its decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Although defendant had been unable to rely on *Blakely* at sentencing, he could, and did, raise it in the Court of Appeals. Unfortunately, the Court of Appeals did not directly address the issue. Instead, it relied on the dicta discussion of *Blakely* contained in this Court's decision in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). On that basis, it found that defendant was not entitled to resentencing. *People v McCuller*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 250000).

Originally, this Court held the case in abeyance for the matter of *People v Drohan*, see 472 Mich 881 (2005). Later, oral argument was heard for the purpose of determining whether to grant the application or take

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maximum to which the sentencing judge can sentence a defendant. In this case, because defendant was a second-offense habitual offender, his maximum possible sentence increased from 10 to 15 years. MCL 750.84; MCL 769.10(1)(a).

[6] MCL 777.21(3) provides, in relevant part:

> If the offender is being sentenced under section 10, 11, or 12 of chapter IX [MCL 769.10, 769.11, and 769.12], determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.

other peremptory action pursuant to MCR 7.302(G)(1). The majority dispatched the case in a mere memorandum opinion. It concluded that defendant was not entitled to an intermediate sanction cell sentence and that the sentencing court properly made judicial findings of fact in assessing OV points, regardless of *Blakely*. *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006). I dissented, concluding that a Sixth Amendment violation had occurred and that the entire sentencing guidelines must be found unconstitutional when applied as they were in this case. *Id*. at 183.

Defendant sought leave to proceed *in forma pauperis* and petitioned for a writ of certiorari in the United States Supreme Court. The Court granted both motions. It then vacated this Court's judgment, remanding the case for further consideration and directing us to reconsider it in light of *Cunningham*. *McCuller*, 127 S Ct at 1247. This Court ordered that the case be argued with *People v Harper*, (Docket No. 130988), and *People v Burns*, (Docket No. 131898). *People v McCuller*, 477 Mich 1288 (2007). We heard oral argument in the three cases in April 2007.

II. MICHIGAN'S SENTENCING SCHEME

A review of Michigan's sentencing statutes must begin with MCL 769.8, which provides:

> (1) When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.

> (2) Before or at the time of imposing sentence, the judge shall ascertain by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct, which facts and other facts that appear to be pertinent in the case the judge shall cause to be entered upon the minutes of the court.

Under this statute, in a case not falling into an exception, a court must initially determine the minimum sentence. That sentence must be within the range set by the sentencing guidelines unless the sentencing judge finds that substantial and compelling reasons exist to exceed the range. MCL 769.34(2) and (3). Typically, in Michigan, the maximum sentence is established by statute. For instance, MCL 750.84 provides that the maximum sentence for assault with intent to do great bodily harm less than murder is ten years or a fine of $5,000. Unless a defendant has past convictions, the sentencing court cannot exceed the maximum sentence provided by statute.[7]

But MCL 769.8 makes clear that it is only the general rule. It makes this apparent by noting that exceptions do exist. They are indicated by the phrases "except as otherwise provided in this chapter" and "except as provided in this chapter." MCL 769.8(1).

One major exception to MCL 769.8 is a determinate sentence.[8] Determinate sentences are specific, fixed sentences, in contrast to indeterminate sentences, which fall within a range. The Legislature sets these fixed sentences by statute. For instance, a first offense of carrying or possessing a firearm when committing or

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[7] As noted above, MCL 769.10, 769.11, and 769.12 set new maximum sentences for habitual offenders.

[8] A "determinate sentence" is "[a] sentence for a fixed length of time rather than for an unspecified duration." Black's Law Dictionary (7th ed), p 1367.

attempting to commit a felony (felony-firearm) carries a mandatory determinate sentence of two years. A second conviction of felony-firearm requires a five-year sentence. MCL 750.227b(1). Given that these crimes require determinate sentences, the guidelines do not apply to them. Instead, they fall into the exceptions noted in MCL 769.8(1).

Another major exception to the focus on minimum sentences in MCL 769.8 involves sentences falling in an intermediate sanction cell. It is this exception that is the centerpiece of this case. Under Michigan's sentencing guidelines, intermediate sanction cells shift the sentencing court's attention from minimum sentences to maximum sentences.

III. INTERMEDIATE SANCTION CELLS

MCL 769.34(4)(a) creates intermediate sanction cells. It provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

MCL 769.31(b) further defines "intermediate sanction":

> "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

(*i*) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.

(*ii*) Probation with any probation conditions required or authorized by law.

(*iii*) Residential probation.

(*iv*) Probation with jail.

(*v*) Probation with special alternative incarceration.

(*vi*) Mental health treatment.

(*vii*) Mental health or substance abuse counseling.

(*viii*) Jail.

(*ix*) Jail with work or school release.

(*x*) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.

(*xi*) Participation in a community corrections program.

(*xii*) Community service.

(*xiii*) Payment of a fine.

(*xiv*) House arrest.

(*xv*) Electronic monitoring.

When one reads these statutes together, it becomes apparent that intermediate sanction cells have a highly unusual role in Michigan's sentencing scheme. If a defendant's minimum sentence range falls in an intermediate sanction cell, the guidelines are no longer concerned with the defendant's minimum sentence. Instead, under MCL 769.34(4)(a), the guidelines set the maximum sentence to which the court may sentence the defendant. That maximum is a jail term of either the upper limit of the guidelines range for the recommended minimum sentence or 12 months, whichever is shorter. The guidelines statutes do not permit a court to sentence a defendant to prison when his or her guidelines score falls within an

intermediate sanction cell. The court is required to impose a maximum term of 12 months or less, unless it can state substantial and compelling reasons for a longer sentence. MCL 769.34(4)(a).

In this case, if the trial court had not entered a score for OVs 1, 2, and 3, defendant's OV score would have dropped to zero. This would have moved him from the B-IV cell to the B-I cell. The B-I cell provides a minimum sentence range for a second-offense habitual offender of zero to 11 months in jail. MCL 777.21(3)(a); MCL 777.65. Because its upper limit is less than 18 months, the B-I cell is an intermediate sanction cell. Defendant's maximum sentence would have been 11 months in jail. MCL 769.34(4)(a).

But the trial court did not impose this maximum sentence. By making judicial findings of fact, the judge moved defendant out of the intermediate sanction cell and into a straddle cell. The judge then sentenced defendant to a higher maximum sentence than would have been possible had the sentence been based only on the jury's verdict and the defendant's criminal history. Because the judge increased defendant's OV score by making his own findings of fact, findings not made by the jury, defendant's sentence violated his Sixth Amendment right to a trial by jury. And it contradicted the United States Supreme Court's holding in *Blakely*, which was most recently reinforced by *Cunningham*.

IV. THE UNITED STATES SUPREME COURT'S PRECEDENT REGARDING "STATUTORY MAXIMUMS"

A. *McMILLAN v PENNSYLVANIA*

There is considerable precedent from the United States Supreme Court regarding judicial modification of

sentences using facts found by a judge after a jury's verdict. These judge-determined facts are referred to as "sentencing factors." In *McMillan v Pennsylvania*,[9] the Court addressed the constitutionality of Pennsylvania's mandatory minimum sentencing act, 42 Pa Cons Stat 9712. That act provided for a mandatory minimum sentence for certain felonies if the sentencing judge found, by a preponderance of the evidence, that the defendant " 'visibly possessed a firearm' during the commission of the offense." *McMillan,* 477 US at 81.

The United States Supreme Court found that the visible-possession requirement was a mere sentencing factor that did not change the prosecution's burden of proving guilt beyond a reasonable doubt. *Id*. at 86-88. It made another important point in *McMillan*: There are constitutional limitations on how far a state may go in reducing the factual support needed to prove a criminal offense beyond a reasonable doubt. The Court paid special attention to the fact that 42 Pa Cons Stat 9712 did not increase the maximum penalty faced by the defendant:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [*McMillan,* 477 US at 87-88.]

B. *JONES v UNITED STATES*

The Supreme Court next discussed sentencing factors in *Jones v United States*, 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999). It addressed whether the

[9] 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

federal carjacking statute[10] constituted three separate crimes or one crime with sentencing factors that increased the maximum penalty. *Id*. at 229. The Court concluded that a fair reading of the statute required it to find three separate offenses. But it went on to discuss alternative reasons for requiring that the state must prove to a jury all the "elements" of a crime beyond a reasonable doubt. They involve constitutional law. The Court's focus quickly centered on *McMillan*'s discussion of an increase in the maximum penalty:

> The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under [18 USC 2119(2)] (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. [*Id*. at 243-244.]

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[10] 18 USC 2119. At the time, the statute provided:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The reduction of the role of the jury greatly troubled the Supreme Court. In fact, it found the reduction inconsistent with the protections offered by the United States Constitution. It indicated that removal from the jury of control over the facts necessary for determining a statutory sentencing range would raise a genuine Sixth Amendment issue. *Id*. at 248. The Court stated that any doubt on the issue of statutory construction must be resolved in favor of avoiding such Sixth Amendment questions. *Id*. at 251.

C. *APPRENDI v NEW JERSEY*

The next year, the Supreme Court took an important step forward in its discussion of sentencing factors, in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). *Apprendi* dealt with a New Jersey hate-crime law. The statute allowed a defendant's maximum sentence to be increased from 10 to 20 years if the sentencing court found that the defendant " 'acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id*. at 468-469, quoting NJ Stat Ann 2C:44-3(e). The sentencing court could make the finding using a preponderance of the evidence. *Apprendi*, 530 US at 468. In its analysis, the Supreme Court specifically built on *Jones*. It concluded that the Fourteenth Amendment of the United States Constitution commanded the same answer for state statutes as the Fifth and Sixth amendments required in *Jones*. *Id*. at 476.

The Court found that a legislature could not change the elements of a crime simply by labeling some of them "sentencing factors." Such actions run afoul of due process and violate a defendant's Sixth Amendment protections. The Court stated that a sentencing court

could exercise its judicial discretion on sentencing factors only as long as the sentence imposed fell within the appropriate statutory limits. *Id*. at 481-482. The Court expressed concern that a defendant not be deprived of his or her liberty or otherwise stigmatized by a conviction and sentence not authorized by the jury's verdict. For proper protection, the Court required that procedural practices adhere to the basic principles undergirding the requirement that the prosecution prove all facts constituting the statutory offense beyond a reasonable doubt. *Id*. at 483-484. The Court reasoned that increasing punishment beyond the statutory maximum violated those principles:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached. [*Id*. at 484.]

In reiterating its reasoning and holding in *Apprendi*, the Supreme Court used the phrase "statutory maximum":

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof

beyond a reasonable doubt." [*Id*. at 490, quoting *Jones*, 526 US at 252-253 (Stevens, J., concurring).]

D. *RING v ARIZONA*

Two years later, the Supreme Court renewed its discussion of "statutory maximums" in *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). That case dealt with Arizona's first-degree murder statute. The punishment for violation of this statute was life imprisonment or death. The statute referred to another statute that required a separate sentencing hearing. The judge was charged with determining at the hearing whether specific circumstances (sentencing factors) existed, allowing imposition of the death penalty. *Id*. at 592-593. The Supreme Court built on its decisions in *Jones* and *Apprendi* to conclude that a sentence of death violated a defendant's Sixth Amendment rights under these statutes:

> The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [*Id*. at 602, quoting *Apprendi*, 530 US at 483, 494 (citations omitted; emphasis in *Apprendi*).]

On the basis of this reasoning, the Court found that the "statutory maximum" sentence was life in prison, despite the fact that the statute allowed imposition of a sentence of death. This is because, in order to impose the death penalty, the judge had to make factual findings in addition to those reflected by the jury's verdict. The Supreme Court found nothing to distinguish the case from *Apprendi*. *Ring,* 536 US at 604-606. It reached this conclu-

sion because Arizona's enumerated aggravating factors were the functional equivalent of an element of a greater offense. Therefore, the Sixth Amendment required that a jury find those factors beyond a reasonable doubt. *Id*. at 609.

E. *BLAKELY v WASHINGTON*

The Supreme Court took its biggest step in defining the expression "statutory maximum" in *Blakely*. In that case, the defendant pleaded guilty of second-degree kidnapping involving domestic violence and the use of a firearm. The standard sentencing range for the offense was four years and one month to four years and five months in prison. *Blakely*, 542 US at 298-299. But under Washington State's sentencing guidelines, a court could impose a sentence above the standard range if it found substantial and compelling reasons to justify an "exceptional sentence." *Id*. at 299. The defendant had admitted no relevant facts other than having committed acts in violation of the elements of the crime. *Id*. But the sentencing court imposed an exceptional sentence of $7^1/_2$ years[11] after hearing the complainant's version of the kidnapping. The sentencing court based this departure on a finding that the defendant had exhibited deliberate cruelty. This was a statutorily enumerated ground for departure in domestic violence cases in Washington. *Id*. at 300.

Washington argued that its system did not present a Sixth Amendment problem because state law provided an absolute maximum sentence of ten years' imprisonment and in no instance could an exceptional sentence exceed this length. *Id*. at 303. Washington contended

[11] Washington's sentencing scheme provided for determinate sentences. *Blakely*, 542 US at 308.

that ten years was the true "statutory maximum" for purposes of Sixth Amendment review.

But the Supreme Court rejected this argument. Instead, it defined the "statutory maximum" as the maximum sentence that can be imposed without judicial fact-finding:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. [*Id*. at 303-304 (emphasis in original; citations omitted).]

Hence, for Sixth Amendment purposes, the maximum sentence was not ten years. It was four years and five months. This was because that sentence was the maximum the court could have imposed solely on the basis of the facts the defendant admitted when pleading guilty. *Id*. at 304. The Supreme Court concluded that its determination was the only one that would properly effectuate the people's control of the judiciary as intended by the Framers of the United States Constitution:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the

> civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. [*Id*. at 313 (emphasis in original).]

F. *UNITED STATES v BOOKER*

The Supreme Court next discussed "statutory maximums" and "sentencing factors" in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). In that case, the Court addressed the applicability of the preceding line of cases to the federal sentencing guidelines. The prosecution charged Booker[12] with possession with intent to distribute at least 50 grams of cocaine base. The federal statute for this crime provided a maximum sentence of life in prison. But because of Booker's criminal history and the quantity of cocaine base that the jury found was involved, the guidelines required a maximum sentence of 21 years and 10 months' imprisonment. Instead of imposing that sentence, the trial court held a hearing during which it made additional findings of fact. It concluded that Booker had possessed another 566 grams of cocaine base and that he had obstructed justice. Accordingly, using a preponderance of the evidence standard, the court increased his maximum sentence to 30 years in prison. *Id*. at 227.

After a discussion of *Jones*, *Apprendi*, *Ring*, and *Blakely*, the Supreme Court found the federal guidelines indistinguishable from the Washington guidelines that were at issue in *Blakely*:

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[12] *Booker* involved consolidated cases that included another defendant, Fanfan. In the interest of brevity, I will discuss only defendant Booker.

> Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases. [*Id*. at 235, quoting *Blakely*, 542 US at 305 (citation omitted).]

Again, the Supreme Court found it irrelevant that a statute existed setting an absolute maximum sentence. The sentencing court could not impose the absolute maximum sentence in every case. Instead, in cases like Booker's, the jury's verdict supported only a lower maximum sentence. *Booker*, 543 US at 234-235. The Supreme Court concluded:

> Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [*Id*. at 244.]

On this basis, the Supreme Court invalidated the statutory provisions that made the federal sentencing guidelines mandatory. *Id*. at 226-227.

G. *CUNNINGHAM v CALIFORNIA*

The final link in the "sentencing factor"/"statutory maximum" chain is *Cunningham*. Cunningham was

convicted of "continuous sexual abuse of a child under the age of 14." *Cunningham*, 127 S Ct at 860. California's determinate sentencing law (DSL) created a three-tiered sentencing system for most crimes. The statute defining a defendant's offense provided a lower, a middle, and an upper sentence. Cal Penal Code 1170 mandated that the trial court impose the middle term, unless circumstances in mitigation or aggravation existed. The trial court made factual findings under a preponderance of the evidence standard regarding whether aggravating circumstances existed. *Cunningham*, 127 S Ct at 861-863.

In Cunningham's case, the DSL provided for sentences of 6, 12, or 16 years. The sentencing court found by a preponderance of the evidence the existence of one mitigating factor and six aggravating factors. It found that the aggravating factors outweighed the mitigating factor and imposed the 16-year sentence. *Id*. at 860-861. As in the cases preceding *Cunningham*, the United States Supreme Court found that the judicial fact-finding that increased the maximum sentence violated the Sixth Amendment.

Despite California's arguments to the contrary, the Supreme Court found nothing to distinguish the DSL from the sentencing that occurred in *Blakely* and *Booker*:

> California's DSL, we note in this context, resembles pre-*Booker* federal sentencing in the same ways Washington's sentencing system did: The key California Penal Code provision states that the sentencing court "*shall order* imposition of the middle term" absent "circumstances in aggravation or mitigation of the crime," [Cal Penal Code] 1170(b) (emphasis added), and any move to the upper or lower term must be justified by "a concise statement of *the ultimate facts*" on which the departure rests, [Cal Ct R] 4.420(e) (emphasis added). [*Cunnigham*, 127 S Ct at 866 n 10 (emphasis in original).]

Quite simply, the Supreme Court viewed *Cunningham* as a continuation of its earlier precedent. It broke no new ground. But for the first time, the Supreme Court characterized its often-repeated holding as a bright-line rule:

> Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U.S., at 303, 124 S.Ct. 2531 ("The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the DSL violates *Apprendi's bright-line rule: Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt*." [*Cunningham*, 127 S Ct at 868, quoting *Apprendi*, 530 US at 490 (citations omitted; second emphasis added).]

Again, it was irrelevant that there existed the possibility of an absolute maximum sentence of 16 years. The Supreme Court stressed that the only concern was whether the bright-line rule laid down in *Apprendi*, *Blakely*, and *Booker* was violated. The Court expressed frustration at the state's inability or unwillingness to follow this precedent. *Id*. at 869-870. The Supreme Court left to California how to eliminate the constitutional violation. *Id*. at 871.

In summary, the Supreme Court established a consistent precedent from *McMillan* to *Cunningham*. The bright-line rule established was the same before and after *Cunningham*. And the Court's decision to remand this case must be considered in light of this fact.

V. THE BRIGHT-LINE RULE AND MICHIGAN'S GENERAL SENTENCING SCHEME

As discussed earlier, Michigan's sentencing guidelines generally focus on a defendant's minimum sentence. The average defendant's criminal history, the admitted facts, and the jury's verdict alone would allow the sentencing court, without recourse to judicial fact-finding, to impose the maximum sentence provided by law. Because of this, the judicial fact-finding necessary to score the OVs moves the typical defendant within a predetermined range of possible sentences. And the defendant's Sixth Amendment rights are not implicated, because all the facts necessary to support the maximum sentence have been proved to a jury beyond a reasonable doubt.

Such situations do not threaten the basic principles undergirding this country's jury-driven legal system. A defendant knows what maximum sentence he or she is facing regardless of judicial fact-finding. *Apprendi* noted that judicial fact-finding is acceptable when it does not increase the maximum penalty for a crime or create a separate offense calling for a separate penalty. " '[Judicial fact-finding] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding[s] . . . . ' " *Apprendi*, 530 US at 486, quoting *McMillan*, 447 US at 88. Because the right to a trial by jury is completely protected in such situations, there are no Sixth Amendment concerns.

The typical application of the Michigan sentencing guidelines more readily relates to *McMillan*. The score given to the OVs merely shifts a defendant's sentence within the minimum sentence range under the guidelines. It does not increase the defendant's maximum sentence. A defendant whose criminal history and jury verdict do not place him or her in an intermediate sanction cell always knows what the potential maximum sentence will be: it is the maximum penalty prescribed by Michigan law. All of this changes, however, when an intermediate sanction cell is involved.

VI. THE BRIGHT-LINE RULE AND MICHIGAN'S INTERMEDIATE SANCTION CELLS

When a defendant is entitled to a sentence that is within the range specified in an intermediate sanction cell, MCL 769.34(4)(a) sets his or her maximum sentence. That maximum sentence is a jail term of either the upper limit of the recommended minimum sentence range or 12 months, whichever is shorter. Under the guidelines, the court *must* impose this maximum sentence, unless it can state substantial and compelling reasons to increase the sentence. Therefore, the process is no longer concerned with the defendant's minimum sentence. Under the Supreme Court's bright-line rule, this alteration in focus changes the defendant's "statutory maximum."

The new maximum sentence set under MCL 769.34(4)(a) becomes the defendant's "statutory maximum." This is true because it is the longest sentence the court can give a defendant solely on the basis of the defendant's criminal record and admissions and the jury's verdict. *Cunningham*, 127 S Ct at 868; *Booker*, 543 US at 244; *Blakely*, 542 US at 301; *Apprendi*, 530 US at 490; *Jones*, 526 US at 251-252. And if the court

makes findings of fact moving the sentence to a higher statutory maximum, the defendant faces either (1) a different criminal charge or (2) the increased stigma of an extended sentence. This is specifically what the Supreme Court sought to avoid. *Apprendi*, 530 US at 484.

Any judicial fact-finding that shifts a defendant's sentence above the statutory maximum is unconstitutional and violates *Jones* and its progeny. A court engages in judicial fact-finding by scoring the OVs or stating substantial and compelling reasons to depart from the sentencing guidelines range. The sentencing court makes its own findings of fact by a preponderance of the evidence. These findings are separate and distinct from the findings establishing the elements of the crime, which must be proved to a jury beyond a reasonable doubt. Such sentencing mirrors the sentencing in *Cunningham*, in which the Supreme Court held:

> Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . [this] violates *Apprendi's bright-line rule*: Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [*Cunningham*, 127 S Ct at 868, quoting *Apprendi*, 530 US at 490 (emphasis added).]

As in *Cunningham*, any judicial fact-finding that increases a defendant's maximum sentence crosses the Supreme Court's bright line. And in doing so, it violates the constitution.

To fully analyze Michigan's sentencing system, it must be determined who is entitled to an intermediate sanction cell sentence. The Supreme Court's bright-line rule provides the answer to this question. "Except for a

prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Cunningham*, 127 S Ct at 868, quoting *Apprendi*, 530 US at 490. Hence, a defendant is entitled to a sentence based solely on (1) the defendant's prior convictions and (2) any facts that he or she admitted and any facts that were specifically found by the jury.

This requires a conclusion that, in order to determine a defendant's appropriate maximum sentence, a sentencing court should score only the PRVs. They reflect the defendant's prior convictions and relations to the criminal justice system. The sentencing court is free to score these because they fall under one of the exceptions noted in the bright-line rule: the defendant's prior convictions.

Scoring the OVs, on the other hand, requires factual determinations that are made by the trial court using a preponderance of the evidence standard. They are judicial determinations that occur only after the jury's verdict. Such findings of fact fall directly in line with the *Cunningham* decision. "Because [OVs] are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . [scoring them] violates *Apprendi*'s bright-line rule[.]" *Cunningham*, 127 S Ct at 868.[13] The

[13] The majority accuses me of ignoring the language of MCL 769.34(4)(a). Even a casual review of this opinion will show that the accusation is untrue. The majority asks why I would not require the OVs to be scored along with the PRVs. The answer is simple: The Sixth Amendment entitles a defendant to a sentence based solely on (1) the defendant's prior convictions, (2) any facts he or she has admitted, and (3) any facts that were specifically found by the jury. *Cunningham*, 127 S Ct at 868. The statutory language must bow to the requirements of the United States Constitution.

only time the court should score an OV is when the defendant admitted the fact justifying the score or a jury found its existence beyond a reasonable doubt. This occurs only in rare cases, and it did not occur in this case.

Under the bright-line rule, a Michigan defendant is entitled to an intermediate sanction as a sentence when his or her PRV level alone supports such a sentence. On the other hand, a defendant whose PRV level is too high to place him or her in an intermediate sanction cell is not entitled to an intermediate sanction cell sentence. The latter defendant falls under the general sentencing scheme and is subject to the absolute maximum sentence set by law. In that case, the trial court is free to make the judicial findings of fact necessary to score the OVs.

A. HOW THE TRIAL COURT CALCULATED DEFENDANT'S SENTENCE

The case before us demonstrates the distinction. Defendant did not admit the facts necessary to attribute a score to OVs 1, 2, and 3. And the jury made no specific findings of fact regarding these OVs. Thus, defendant's sentence was based on judicial fact-finding, in violation of the bright-line rule. His sentence should have been based solely on his PRV level. Defendant's PRV level was 2 points, which placed him in the B-I cell. The B-I cell provides a minimum sentence range of zero to 11 months for a second-offense habitual offender. MCL 777.65; MCL 777.21(3)(a). This is an intermediate sanction cell. MCL 769.34(4)(a). Therefore, defendant was entitled to an intermediate sanction cell sentence. As discussed earlier, his maximum sentence was supposed to be 11 months in jail. The court could not properly impose a maximum sentence exceeding 11 months without using facts that defendant had not admitted or that were not proved to a jury beyond a reasonable doubt.

But the trial judge made such findings of fact to score OVs 1, 2, and 3. These judicial findings increased defendant's maximum sentence because they moved him into a straddle cell. At that point, he was no longer entitled to an intermediate sanction cell sentence that would be capped at 11 months in jail. Because the judge's findings of fact increased defendant's maximum sentence, they violated defendant's Sixth Amendment rights under *Apprendi*. Defendant suffered greater stigma through an increased sentence than the stigma he would have faced had his sentence been based solely on his PRV level. This increased stigma and punishment undermine the basic concepts of the right to a trial by jury and defeat the intent of the Framers to ensure a publicly controlled judiciary. *Apprendi*, 530 US at 483-484.

Scoring the OVs in this case was the functional equivalent of convicting defendant of a different criminal offense. Although he had been convicted of assault with intent to do great bodily harm less than murder, the trial court sentenced defendant for an assault with intent to do great bodily harm less than murder (1) in which the victim was touched by a weapon,[14] (2) in which the defendant possessed a potentially lethal weapon,[15] and (3) in which the victim suffered life threatening or permanent incapacitating injury.[16] Just as in *Ring*, the Sixth Amendment requires that the jury find the facts that enhanced defendant's sentence beyond a reasonable doubt. *Ring*, 536 US at 609. Because this did not occur, defendant's Sixth Amendment rights were violated by the sentence imposed.

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[14] This was the finding under OV 1. MCL 777.31(1)(c), now MCL 777.31(1)(d).

[15] This was the finding under OV 2. MCL 777.32(1)(d), now MCL 777.32(1)(e).

[16] This was the finding under OV 3. MCL 777.33(1)(c).

B. AT WHAT POINT MAY THE OVS BE SCORED?

The majority relies on MCL 777.21 to argue that no defendant is entitled to a sentence in Michigan until after the sentencing court scores the OVs. This argument withers when examined in light of the *Blakely* line of cases. The holding there is easily recited: Any facts, aside from past convictions, that increase a defendant's maximum sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Booker*, 543 US at 244.

The majority avoids directly applying this central tenet. Its insistence that a defendant would or could have received a longer sentence under the traditional application of the sentencing scheme is irrelevant. A defendant is *entitled* to the maximum sentence authorized by his or her past convictions, the facts he or she admitted, and the facts established by the jury's verdict. See *id*. A defendant's sentence cannot properly be based on facts that the judge later found using a preponderance of the evidence standard. Hence, if the judge determines the facts used to score the OVs, the OVs must be scored after it is determined whether a defendant falls into an intermediate sanction cell.

The majority's reliance on MCL 777.21 does not obviate this central tenet. This statute is similar to the statute in *Ring*. There, the judge was directed to conduct a separate sentencing hearing to determine the existence of specified circumstances in order to decide whether to impose the death penalty or life imprisonment. *Ring*, 536 US at 592. The fact that it is possible to impose a longer sentence under the sentencing scheme is not relevant. A defendant is *entitled* to a sentence based solely on the jury's verdict and the defendant's admissions and criminal history. The Supreme Court explained:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." [*Id*. at 603-604.]

The same is true of the Michigan sentencing guidelines. It does not matter that, as in defendant's case, there are two possible maximum sentences for the offense of which defendant was convicted. Defendant must receive the maximum sentence that is supported by the jury's verdict, his prior record, and his admissions alone.[17] *Id.* But that did not occur in this case. Instead, he was given a longer sentence than was authorized by the jury's verdict.[18]

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[17] The same analysis applies to another of the majority's contentions: that a defendant is not entitled to an intermediate sanction until after the sentencing court decides whether substantial and compelling reasons exist to exceed the guidelines range. That the statute provides for judicial fact-finding is irrelevant. The Sixth Amendment requires that all that may be considered are the defendant's admissions, his or her prior record, and the jury's verdict. A defendant is entitled to whatever maximum sentence these warrant without any judicial fact-finding whatsoever.

[18] In *People v Harper*, 479 Mich 599, 614 n 25; 739 NW2d 523 (2007), the majority attempts to distinguish *Ring* by focusing on the fact that the death sentence in that case could be imposed only if a judge found aggravating circumstances. It concludes that the situation in *Ring* is distinct from the situation in Michigan because only one maximum sentence exists in Michigan. As explained above, this is simply not accurate. The instant case illuminates the reason why. Here, just as in *Ring*, defendant faced one maximum sentence (11 months in jail) until the court made findings

For that reason, the sentence violated the Sixth Amendment. *Id*. at 609.

VII. A MAXIMUM BY ANY OTHER NAME

Here and in *People v Harper*,[19] the majority strives to convince the reader that the maximum sentence that MCL 769.34(4)(a) sets for intermediate sanction cells is really a minimum sentence. To arrive at this conclusion, it takes the reader through what might be mistaken for a shell game of statutory language. But a reading of the pertinent statutes as they are written undermines the central support for the majority's decision to affirm defendant's sentence despite the Supreme Court's remand. For example, MCL 769.34(4)(a) provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court *shall impose an intermediate sanction* unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that *does not exceed the upper limit of the*

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of fact to move him out of an intermediate sanction cell. Whether this is called identifying "aggravating circumstances" or "scoring of the OVs," the fact remains the same: The trial court increased the defendant's sentence by making findings not supported by the jury's verdict, the defendant's admissions, and the defendant's past record. In so doing, it violated *Blakely*'s bright-line rule.

The argument that there is only one maximum sentence is the argument made unsuccessfully by Arizona in *Ring*. Just as the argument failed in *Ring,* it must fail in this case. That an absolute maximum sentence exists is irrelevant if judicial fact-finding not supported by his admissions or prior conviction or the jury's verdict prevented defendant from receiving a lower statutory maximum sentence.

[19] *Id.* at 624.

> *recommended minimum sentence range or 12 months, whichever is less*. [Emphasis added.]

The language of this statute is not ambiguous. It mandates that the sentencing court impose an intermediate sanction when a defendant falls into an appropriate cell, unless the court makes judicial findings of fact to support a departure. MCL 769.34(4)(a). It also defines the outer limit of an intermediate sanction: 12 months in jail. Because this is the highest sentence a defendant may face, it is a maximum sentence. Without judicial fact-finding, the trial judge is not authorized to impose so much as a 13-month sentence.[20]

Even the majority seems to concede that, considering only the language of MCL 769.34(4)(a), 12 months is the maximum sentence. But it believes that this conclusion changes when MCL 769.34(4)(a) is viewed in light of other sentencing statutes. The majority first relies on MCL 769.8(1), which provides:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, *except as otherwise provided in this chapter*. The maximum penalty provided by law shall be the maximum sentence in all cases *except as provided in this chapter* and shall be stated by the judge in imposing the sentence. [Emphasis added.]

The majority focuses on the language "[t]he maximum penalty provided by law shall be the maximum

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[20] The majority claims that a Michigan defendant is liable to serve the absolute maximum sentence in every case. See *Harper*, 479 Mich at 614 n 25. MCL 769.34(4)(a) shows the fallacy of this point. Some Michigan defendants face no higher maximum than 12 months in jail, even though a second, higher statutory maximum sentence exists for their crime. This undeniable fact destroys the majority's premise that Michigan has only one maximum sentence for each crime.

sentence in all cases . . . .” But it dismisses as inapplicable the fact that this phrase is modified by “*except as provided in this chapter* . . . .” The Legislature twice makes clear that there are exceptions to the general rule stated in the statute. MCL 769.8(1). By treating these clauses as irrelevant, the majority ignores language chosen by the Legislature and rewrites the statute.

The majority concludes that the clauses must not refer to intermediate sanction cells. It reasons that the provisions creating intermediate sanction cells were enacted after the language contained in MCL 769.8(1) and that the clauses must refer only to preexisting exceptions. Not only does this defy logic, it is unsupported by any authority whatsoever.

The majority's new rule of statutory construction would render it nearly impossible to read statutes together. Someone reading two statutes that seem to discuss the same subject would be obliged to review the date of enactment of each statute to see which came first. If the language in the earlier statute made the two relate to one another, that language would have to be ignored. Hence, any attempt to read two statutes together must be accompanied by a history lesson. Such an odd requirement seems ill-advised.

Not only does the majority's new rule create confusion, it contradicts the majority's supposed “plain language” approach to statutory interpretation. The majority effectively rewrites MCL 769.8(1) to read:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter (*but only if this exception*

> *predates this statute*). The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter (*but not if that exception was enacted after 1927*) and shall be stated by the judge in imposing the sentence.

This Court has repeatedly admonished that a court must not read into a statute something that the Legislature did not put there. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003).[21] But the majority has done just that in this case. Does the majority now abandon this classic rule of statutory interpretation?

The majority notes that, under MCL 769.8(1), there are cases in which the sentencing court will not fix the minimum sentence and in which the absolute maximum sentence will not apply. It notes that other provisions in the chapter of the Code of Criminal Procedure in which MCL 769.8(1) appears state the exceptions to the general rule. MCL 769.34 is in that chapter of the code. And MCL 769.34(4)(a) provides that the sentencing court will set the maximum sentence rather than the minimum in cases involving intermediate sanction cells. Therefore, far from indicating that intermediate sanction cells set minimum sentences, when read together, these statutes demonstrate a legislative intent that intermediate sanction cells serve as an exception to the general rule. The Legislature intended intermediate sanction cells to dictate a maximum sentence. MCL 769.34(4)(a); MCL 769.8(1).

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[21] This principle has often been repeated by those comprising the majority here. See *People v Williams*, 475 Mich 245, 259; 716 NW2d 208 (2006), *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004), *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003), *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002), and *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The majority also turns to MCL 769.9, which provides:

> (1) The provisions of this chapter relative to indeterminate sentences shall not apply to a person convicted for the commission of an offense for which the only punishment prescribed by law is imprisonment for life.
>
> (2) In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.
>
> (3) In cases involving a major controlled substance offense for which the court is directed by law to impose a sentence which cannot be less than a specified term of years nor more than a specified term of years, the court in imposing the sentence shall fix the length of both the minimum and maximum sentence within those specified limits, in terms of years or fraction thereof, and the sentence so imposed shall be considered an indeterminate sentence.

The majority argues that, because this statute contains nothing to indicate that the sanctions are determinate, it supports a reading of intermediate sanction cell sentences as minimum sentences. But a reference to MCL 769.9 shows the fallacy of this reasoning. MCL 769.9(1) limits the courts' ability to impose intermediate sanction cell sentences. It provides that intermediate sanctions may not be used for offenses for which "the only punishment prescribed by law is imprisonment for life." It makes no other limitation, and no other should be read into it.

The majority claims that nowhere does the Legislature state that intermediate sanctions are an exception to the Michigan scheme of indeterminate sentencing. But it is more accurate to assert that nowhere does the Legislature indicate this *except* in the statutes creating intermediate sanctions. MCL 769.34(4)(a) makes clear that the maximum sentence possible, absent substantial and compelling reasons to exceed it, is 12 months in jail. MCL 769.31(b) also specifically allows for jail sentences. The Legislature wrote determinate sentences into these statutes. There would be no point in endeavoring to do it more clearly. And there was no need to do it anywhere else.

In the final analysis, the point is irrelevant. What matters is not whether the statute establishes intermediate sanction cell sentences as indeterminate or determinate sentences. What is crucial is whether a defendant's maximum sentence can be increased as a result of judicial fact-finding. *Cunningham*, 127 S Ct at 868. It is not significant that defendant's sentence in this case was zero to 11 months in jail or simply 11 months in jail. In either case, the Sixth Amendment would be violated by judicial fact-finding that increases the maximum sentence above the 11-month mark. *Id*.

A. MICHIGAN'S MIXED DETERMINATE/INDETERMINATE SENTENCING SCHEME

It seems that the preceding argument is a component of the majority's contention that Michigan has a true indeterminate sentencing scheme. I would agree that Michigan generally has an indeterminate scheme in cases in which a defendant's PRV level places him or her somewhere other than in an intermediate sanction

cell.[22] But I disagree with respect to cases in which the sentencing scheme sets two possible maximums,[23] which is exactly what occurs in cases involving intermediate sanction cells. In such cases, the sentencing scheme resembles the determinate sentencing schemes discussed in the *Blakely* line of cases. *Blakely* itself contains a discussion of the difference between indeterminate and determinate schemes:

> Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that

[22] As has been noted, exceptions exist with respect to the crimes of first-degree murder and felony-firearm.

[23] Here the two possible maximums were 15 years (set by MCL 750.84 and MCL 769.10) and 11 months (set by the guidelines).

> entitlement must be found by a jury. [*Blakely*, 542 US at 308-309 (emphasis in original; citation omitted).]

Once this reasoning is applied to the case at hand, it becomes apparent that Michigan's sentencing scheme is not a traditional indeterminate sentencing scheme. It would be one thing if every second-offense habitual offender convicted of assault with intent to do great bodily harm less than murder faced the same 15-year maximum. Then, no problem would arise if judicial fact-finding resulted in a sentence within the range of zero to 15 years. But that is not the case. Some second-offense habitual offenders convicted of assault with intent to do great bodily harm less than murder face a maximum sentence of 11 months in jail. They are offenders whose criminal records and admissions, together with the jury's verdict, do not support an OV score.[24] These offenders are entitled to a sentence that is an intermediate sanction. *Id*.

Given that there are two possible maximum sentences for the offense in question, a defendant is entitled to whichever is supported by the defendant's conviction, admissions, and criminal record alone. "[A]nd by reason of the Sixth Amendment the [additional] facts bearing upon that entitlement must be found by a jury." *Id*. at 309. Therefore, if certain other facts are necessary to move the defendant to the higher maximum sentence, they must be proved to the jury beyond a reasonable doubt.

The majority ignores this unusual nature of Michigan's intermediate sanction cells as compared with a traditional indeterminate sentencing scheme. Because intermediate sanction cells set maximum sentences, Michigan's sentencing scheme is distinct from the tra-

[24] These would be the equivalent of *Blakely*'s "burglar who enters a home unarmed . . . ." *Blakely*, 542 US at 309.

ditional indeterminate scheme. For Sixth Amendment purposes, it is properly viewed as a mixture of determinate and indeterminate sentencing schemes. This is because, as discussed in *Blakely*, a traditional indeterminate scheme can have only one maximum sentence. *Id*. at 308-309. The fact that Michigan's indeterminate scheme is different in this way mandates that it be treated differently. The majority fails to honor this distinction.

The majority's argument seems at least partially grounded in the argument raised by the Prosecuting Attorneys Association of Michigan and the Attorney General in their amici curiae brief. They assert that Michigan's sentencing system involves too much judicial discretion to violate the Sixth Amendment. They argue that the amount of discretion involved in sentencing in Michigan makes our system equivalent to traditional indeterminate systems. *Cunningham* specifically rejected this argument:

> The [California Supreme Court's] conclusion that the upper term, and not the middle term, qualifies as the relevant statutory maximum, rested on several considerations. First, the court reasoned that, given the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL
>
> "does not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge) . . . . Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury." [*People v Black*, 34 Cal 4th 1238, 1256; 29 Cal Rptr 3d 750; 113 P3d 534 (2005)] (footnote omitted).
>
> We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted

> in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. *Blakely*, 542 U.S., at 305, and n. 8, 124 S.Ct. 2531. [*Cunningham*, 127 S Ct at 868-869.]

The amount of discretion involved does not matter. What matters is what sentence a defendant would have received solely on the basis of the jury's verdict, his or her prior record, and any admissions he or she made. Whatever sentence a defendant would face as a maximum considering only these factors is the statutory maximum. Any fact-finding that changes this maximum violates the Sixth Amendment, regardless of how much discretion the trial court has in finding those facts. *Id*.

Both *Blakely* and *Booker* make clear that it is irrelevant that the possibility exists for the judge to depart from the statutory maximum sentence in some circumstances. Under *Blakely*, the statutory maximum in this case remains the 11-month intermediate sanction sentence, even though the judge was empowered to increase it after additional fact-finding. *Blakely* succinctly explained the Supreme Court's reasoning on this point:

> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," [*State v*] *Gore*, [143 Wash 2d 288, 315-316; 21 P3d 262 (2001)], which in this case included the elements of second-degree kidnapping and the use of a firearm, see [Wash Rev Code] 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the

> 90-month sentence solely on the basis of the plea, he would have been reversed. See [Wash Rev Code] 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator). [*Blakely*, 542 US at 304.]

In this case, the statutory maximum was 11 months in jail. Only the judicial fact-finding necessary to score the OV factors allowed the judge to impose the higher maximum sentence. Had the judge sentenced defendant to a maximum of 15 years without scoring the OVs or making additional fact-finding, he would have committed an error requiring reversal. The same rule of law applies as in *Ring*, *Blakely*, *Booker*, and *Cunningham*. Therefore, there is a Sixth Amendment violation in this case, regardless of the fact that the trial judge exercised the discretion that the sentencing guidelines allowed.

B. THE COURT'S COMPANION DECISION IN *HARPER*

In its decision in *Harper*, the majority relies heavily on the fact that probation is one of the possible intermediate sanctions provided for in MCL 769.31(b). It believes that this fact presents a strong indication that intermediate sanction cell sentences are not really maximum sentences, despite the language of MCL 769.34(4)(a). It is true, as the majority contends, that probation is a matter of grace. MCL 771.4. It may be revoked without a jury trial or proof beyond a reasonable doubt. *United States v Knights*, 534 US 112, 120; 122 S Ct 587; 151 L Ed 2d 497 (2001). But, again, this consideration is simply irrelevant to the question at hand.

It is not relevant that a court may revoke probation without violating the Sixth Amendment. What matters

is what the court may do after it revokes probation. "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4. This does not require the court to impose the same sentence it could have imposed at the initial sentencing. But after a probation violation, the court still is required to follow the sentencing guidelines. *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005). Therefore, the sentencing court is in the same position before and after a probation violation.

A sentencing court is not free to impose any sentence it may wish after a probation violation. Instead, it must comply with the same guidelines as before probation. And just as before probation, it can impose a sentence departing from the sentencing guidelines range only if it makes judicial findings of fact that substantial and compelling reasons exist to depart. The sentencing court may consider the defendant's postprobation conduct when determining if substantial and compelling reasons exist. But the fact that probation was violated does not automatically constitute a substantial and compelling reason. See *id*. at 562-563. The trial court still can depart from the guidelines range only if it makes findings of fact at sentencing justifying the departure. Because of this, a probation violation changes nothing for purposes of the Sixth Amendment analysis.

Although the trial court did not impose probation in this case, the facts of this case can be used for demonstration purposes. If only the PRVs had been scored, defendant's minimum sentence range would have been zero to 11 months. MCL 777.21(3)(a); MCL 777.65. Because the cell involved is an intermediate sanction

cell, MCL 769.34(4)(a) provides that defendant's maximum sentence would have been 11 months in jail. The sentencing court could have imposed probation rather than a jail term. MCL 769.31(b). If, later, defendant had violated that probation, the court could have revoked the probation and resentenced defendant. But when it did so, it still would have had to comply with the guidelines. *Hendrick*, 472 Mich at 560. Defendant again would have fallen into the zero- to 11-month guidelines range. Again, his maximum sentence would have been 11 months in jail, absent substantial and compelling reasons to exceed the maximum. MCL 769.34(4)(a). Because a maximum sentence is involved, the *Blakely* bright-line rule would apply. "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Cunningham*, 127 S Ct at 868, quoting *Apprendi*, 530 US at 490.

Increasing a defendant's maximum sentence solely on the basis of judicial fact-finding violates the Sixth Amendment just as much after a probation revocation as it does before. A defendant who has violated probation could be sentenced to no more than the original maximum sentence that was based on the jury's verdict. The court has no right to impose a new maximum simply because of the violation. *Cunningham*, 127 S Ct at 868.

In *Harper*, the majority relies heavily on *United States v Ray*[25] to support its argument that *Blakely*'s bright-line rule does not apply to resentencing after probation. *Ray* is highly distinguishable. Unlike the Michigan probation system, the federal system at issue in *Ray* did not mandate resentencing under the federal

[25] 484 F3d 1168 (CA 9, 2007).

sentencing guidelines. It imposed a completely new sentence based on the violation.

The federal criminal sentencing system has a process called supervised release. Federal supervised release differs from probation in that it is imposed in addition to imprisonment, rather than instead of it. *Samson v California*, 547 US 843; 126 S Ct 2193, 2198; 165 L Ed 2d 250 (2006), quoting *United States v Reyes*, 283 F3d 446, 461 (CA 2, 2002). 18 USC 3583 allows a federal court at sentencing to impose a term of supervised release distinct from the time for incarceration set by the federal sentencing guidelines. That same statute authorizes a new maximum sentence that can be imposed after revocation of supervised release. 18 USC 3583(e)(3).

Therefore, a federal court imposing sentence after a revocation of supervised release does not return to the sentencing guidelines to impose a sentence. It turns to the new sentence allowed by 18 USC 3583. Given that the federal system allows supervised release in addition to incarceration, a defendant faces this possible sentence from the beginning. It is not a judicially created increase in the defendant's statutory maximum sentence. It is a sentence created by the Legislature and faced by a defendant from the time that he or she commits the crime.

C. MICHIGAN'S PROBATION SYSTEM

This differs from Michigan's probation system. Michigan has no statute equivalent to 18 USC 3583. Rather than facing a new sentence set by statute specifically for the probation violation, a Michigan defendant is merely resentenced under the guidelines. *Hendrick*, 472 Mich at 560. Therefore, a Michigan defendant does not face an increased maximum in every

case. A Michigan court can move a defendant out of an intermediate sanction cell after probation only by making judicial findings of fact using a preponderance of the evidence standard. Again, because these findings of fact increase the defendant's statutory maximum sentence, they violate *Blakely*'s bright-line rule. *Cunningham*, 127 S Ct at 868.

A Michigan court imposing prison after a probation violation in an intermediate sanction cell case equates to a federal court imposing a sentence exceeding that allowed by 18 USC 3583 for revocation of supervised release. In both cases, the sentencing court is limited to the maximum sentence set by the Legislature. And in both instances, the imposition of a longer sentence violates the Sixth Amendment.

A similar distinction exists between the federal probation system and the Michigan probation system. Unlike a Michigan probationer, a federal probationer who violates the conditions of probation is not resentenced under the federal sentencing guidelines. Rather, the court must refer to a nonbinding policy statement released by the United States Sentencing Commission. *United States v Goffi*, 446 F3d 319, 322 (CA 2, 2006). The Court of Appeals for the Second Circuit explained why *Blakely* does not apply to sentencing after a federal probation violation:

> The statutory scheme thus requires a sentencing court to consider a variety of factors, including the non-binding policy statements applicable to probation violations, in determining an appropriate sentence. *Nowhere, however, does it require a court to sentence within the Guidelines range for the underlying conviction in determining punishment for separate and distinct malfeasance by the defendant —violation of probation*. . . . *United States v. Pena*, 125 F.3d 285, 287 (5th Cir.1997) ("Because there are no guidelines for sentencing on revocation of probation, and because the

> district court was not limited to the sentencing range available at the time of the initial sentence, we find no error in the trial court's failure to employ the analysis normally required in departure case[s].") . . . . [*Id*. at 322-323 (emphasis added).]

The exact opposite is true in Michigan. The guidelines continue to apply to a Michigan defendant. *Hendrick*, 472 Mich at 560. The sentencing court is limited to the sentence range available at the time of the initial sentence. And the probation violation is not treated as a separate malfeasance in Michigan. *People v Kaczmarek*, 464 Mich 478, 483-484; 628 NW2d 484 (2001).

These fundamental differences between Michigan's system and the federal system mandate different results in applying *Blakely*'s bright-line rule. Because none of the factors relied on by the federal courts exists in Michigan, *Blakely* continues to apply after probation revocation in Michigan. This completely undermines the majority's argument that, because of the possibility of probation as an intermediate sanction, intermediate sanction cells produce a minimum rather than a maximum sentence.[26]

Further undermining the majority's theory is the fact that, in practice, Michigan treats intermediate sanction cell sentences as maximum sentences. When a defendant receives an intermediate sanction that in-

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[26] The majority simply disregards the reasoning of *Goffi and Pena*. And, in doing so, it disregards the distinctions between the two systems. See *Harper*, 479 Mich at 628 n 51. In fact, the two systems differ greatly. In the federal system, a court no longer sentences under the guidelines, probation is viewed as a distinct malfeasance, and the former statutory maximum no longer applies. *Goffi,* 446 F3d at 322-323; *Pena*, 125 F3d at 287. In Michigan, probation is not a separate offense. The guidelines still apply, and the defendant remains subject to the statutory maximum sentence created by MCL 769.34(4)(a). Therefore, unlike the federal system, the Michigan system is still subject to the *Blakely* bright-line rule after a defendant violates probation.

cludes only a jail sentence, he or she faces that sentence and nothing more. A defendant who receives an 11-month jail sentence is released from supervision at the end of 11 months. The court does not review the case after 11 months to determine if more incarceration is warranted. Simply, the defendant finishes the sentence and is released from jail. Therefore, an intermediate sanction cell sentence that includes a jail term is treated just like any other maximum sentence.

In *Harper*, the majority further argues that intermediate sanctions must be minimum sentences because a defendant subject to them can be given a sentence of probation with jail. It argues that recognizing that intermediate sanction cell sentences are statutory maximum sentences will limit the effectiveness of imposing such sentences. Although it is true that MCL 769.31(b)(*iv*) allows for intermediate sanction cell sentences that include both probation and jail, the majority's reliance on this point is irrelevant.

The Legislature has determined that a sentence of 12 months in jail is an appropriate statutory maximum sentence for defendants who merit an intermediate sanction.[27] Our constitution vests the Legislature with the ultimate authority to set criminal penalties. Const 1963, art 4, § 45; *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The Legislature inserted the 12-month limit on jail sentences in MCL 769.34(4)(a). Only the Legislature, not this Court, may increase this limit. Someone who believes that the 12-month cap is insufficient can petition the Legislature to amend the statute. But the Court cannot ignore the statutory maximum sentence and a defendant's Sixth Amend-

[27] "An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." MCL 769.34(4)(a).

ment rights with regard to it because the Court finds the statutory penalty insufficient.

For example, those who believe that 12 months is insufficient incarceration to punish probation violators could petition the Legislature to change Michigan's probation system to mimic the federal system. The Legislature could follow the lead of *Goffi* and treat a probation violation as a separate malfeasance. It could make probation violation subject, not to the guidelines for the underlying offense, but to independent punishment. See *Goffi*, 446 F3d at 322-323; *Pena*, 125 F3d at 287. If the Legislature effected such a change, it could eliminate the Sixth Amendment violation now lurking in the Michigan system. But, again, this decision must be left to the Legislature.

Ultimately, and most importantly, the majority cannot disregard the Sixth Amendment simply because it is convenient for purposes of the status quo or because it comports with legislative intent. *Blakely* specifically rejected any such approach:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. [*Blakely*, 542 US at 313 (emphasis in original).]

It might be easier to continue the current modus operandi: to punish probation violators by allowing judges to increase their statutory maximum sentence by using findings of fact not supported by the violator's prior record or admissions or a jury's verdict. But the Sixth Amendment does not allow courts to disregard defendants' rights just because making a correction would require the judicial system to undergo change. *Id*.

The majority is also incorrect in relying on its belief that the Legislature intended that probation violators be punished with more than 12 months in jail. Even if the Legislature intended that punishment, it is irrelevant. This fact was made obvious by the decision in *Ring*. The Arizona legislature intended that a sentence of death should be imposed in first-degree murder cases in which aggravating factors existed. *Ring*, 536 US at 592-593. But the Supreme Court found that this intent could not be effectuated in light of the Sixth Amendment. Notwithstanding the Arizona legislature's intent, the judicial fact-finding that increased Ring's maximum sentence to the death penalty violated *Blakely*'s bright-line rule: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602.

Moreover, the proper application of the Sixth Amendment to Michigan's intermediate sanction cells need not weaken an intermediate sanction cell sentence of probation with jail. The system easily could be made to comply with *Blakely*. For example, this Court could amend our court rules to provide for a jury to be impaneled after a court finds a probation violation. If the jury then found beyond a reasonable doubt the facts

necessary to move the defendant from an intermediate sanction cell, there would be no Sixth Amendment violation. Therefore, Michigan could both retain its current probation system and protect a defendant's constitutional rights.

In sum, intermediate sanction cells require a sentence that contains all the attributes of, and is in fact, a maximum sentence. This maximum sentence can be increased only by using judicial fact-finding occurring after the jury's verdict. This makes the intermediate sanction cell sentence equivalent to the middle term sentence under California's sentencing scheme. *Cunningham*, 127 S Ct at 868. Both sentences amount to the statutory maximum for *Apprendi* purposes. And a court violates the Sixth Amendment when it sentences a defendant to a sentence longer than this statutory maximum using judicial fact-finding. *Id*. at 870.

VIII. HARMLESS ERROR

The majority concludes that, even if defendant's sentence violated *Blakely*, the error was harmless. I disagree. While it is true that *Blakely* violations are subject to harmless error review, I believe that the error in this case was not harmless beyond a reasonable doubt.

The Supreme Court concluded that *Blakely* errors are not structural errors requiring automatic reversal. *Washington v Recuenco*, __ US __; 126 S Ct 2546, 2553; 165 L Ed 2d 466 (2006). The Court reasoned that sentencing factors are the equivalent of the elements of the crime, which must be proved to a jury beyond a reasonable doubt. *Id*. at 2552. " '[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' "

Id. at 2551, quoting *Neder v United States*, 527 US 1, 9; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (emphasis in original). Given that the failure to present a sentencing factor to a jury is the equivalent of the failure to submit an element of the offense, it cannot be a structural error. *Recuenco*, 126 S Ct at 2552.

The majority reviews this issue under a plain error standard because defendant did not raise a constitutional challenge at sentencing. But the trial court sentenced defendant before the United States Supreme Court decided *Blakely*. Given that *Blakely* was a seminal case and significantly clarified Sixth Amendment rights, I believe that it is excusable for defendant not to have raised the issue before *Blakely* was decided. The appropriate standard of review is whether the omission of an element of the offense is harmless beyond a reasonable doubt. *Neder*, 527 US at 18-19.

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless. [*Id*. at 19.]

This case involves three specific findings of fact. For OV 1, the court found that a weapon, other than a gun or knife, touched the victim. For OV 2, it found that defendant possessed a potentially lethal weapon. And for OV 3, it found that the victim suffered a life threatening or permanent incapacitating injury.

None of these findings is an element of the charged offense of assault with intent to do great bodily harm less than murder. MCL 750.84. Therefore, the jury

would have had to make special findings of fact to support an increase in the maximum sentence in this case. Michigan has no procedure for criminal juries to use to make such special findings.[28] See MCR

[28] In *Harper*, 479 Mich at 640 n 70, the majority mistakenly states that this Court has left open the question of special verdicts in criminal cases. The majority actually relies on a proposition in Justice LEVIN's dissenting opinion in *People v Ramsey*, 422 Mich 500; 375 NW2d 297 (1985), to reach this conclusion. In fact, this Court specifically rejected special findings by a jury in a criminal case as long ago as 1874. In *People v Marion*, 29 Mich 31, 40 (1874), the Court rejected the defendant's claim that a statute allowing special findings in civil trials should apply to criminal trials as well:

> The only remaining question relates to the refusal of the court to direct the jury to find specially upon certain particular points of fact. The statute which provides for this practice is found in a chapter relating to the "Trial of issues of fact" (chap. 103, R. S.; ch. 189, *C. L.*, 1871), the general purpose of which is to regulate the trial of civil causes, and many of its provisions are not only inapplicable but repugnant to the rules in criminal cases. There is a separate chapter devoted to "Trials in criminal cases" (ch. 165, R. S.; ch. 261, *Comp. L.*, 1871), covering the same ground for them that is covered by the other chapter in regard to civil cases.
>
> Unless an intention to the contrary is apparent, it would create much difficulty and confusion to blend the two sets of regulations, and presumptively the chapters must be confined to their respective purposes.

In fact, the Court stated that allowing special findings in criminal cases would be revolutionary. *Id*. at 41; see also *People v Roat*, 117 Mich 578, 583; 76 NW 91 (1898). Until today, this Court has never questioned the holding of these cases.

The Court of Appeals cases cited by the majority also do not support the majority's contention that special findings are permissible in criminal trials. Both cases mentioned "special verdict forms" merely in passing. And both of these references were directed at forms that would allow the court to distinguish multiple charges for the same offense. Neither case dealt with special findings made by a jury beyond a general verdict for the individual offense. *People v Kiczenski*, 118 Mich App 341, 345; 324 NW2d 614 (1982); *People v Matuszak*, 263 Mich App 42, 51; 687 NW2d 342

6.420.[29] This procedural deficiency is significant. The United States Supreme Court has stated that the lack of a procedure enabling a jury to make a finding suggestsithat a defendant will succeed in demonstrating the *Blakely* violation was not harmless. *Recuenco*, 126 S Ct at 2550. In this case, the lack of a procedure renders more difficult the prosecution's burden of showing that the error was harmless.[30]

Both OV 1 and OV 2 deal with possession of a weapon. The majority argues that the evidence that defendant possessed a weapon was overwhelming and uncontested. But this argument is unfair. At trial, defendant had no

(2004). Neither case can fairly be characterized as creating the "revolution" cautioned against in *Marion* and *Roat*. And, contrary to the majority's contention, this area of law appears well settled.

[29] In *Harper*, the majority also argues that special findings are permissible in criminal trials because the court rules allow for the application of the rules of civil procedure to criminal proceedings in certain circumstances. First, this is essentially the same argument that this Court rejected in *Marion*, 29 Mich at 40. Second, MCR 6.001(D)(2) specifically limits the application of the rules of civil procedure "when it clearly appears that they apply to civil actions only[.]" Given that this Court rejected the availability of special findings to criminal trials, it is clear that MCR 2.514 applies only to civil actions. Third, MCR 6.001(D)(3) indicates that the civil rules do not apply when a "court rule provides a like or different procedure." MCR 6.420 provides a similar but different standard for the returning of jury verdicts in criminal cases. Hence, this standard, which does not include special findings, takes precedence over the procedures allowed in MCR 2.514.

[30] The majority accuses me of effectively finding all *Blakely* errors "harmful per se." *Ante* at 695 n 17. This is inaccurate. I acknowledge that the *Blakely* error in *Recuenco* was not harmful per se. But when I apply the words of the United States Supreme Court, it is not clear to me that *Blakely* errors in Michigan may be harmless beyond a reasonable doubt. This is because, as the Supreme Court advises, the lack of a procedure will increase the difficulty of the prosecution's burden to prove any error harmless beyond a reasonable doubt. And Michigan lacks a procedure. If the jury has no means of making the finding, how can a reviewing court presume that the jury would have made that finding regardless of the prohibition against it?

opportunity or reason to contest the evidence regarding the weapon. It was not an element of the offense or relevant to defendant's defense strategy. For defendant to have objected to the existence of a weapon would have been distracting, irrelevant, and potentially confusing to the jury. Given that there was no reason or opportunity to present evidence on this point, defendant can hardly be faulted for not doing so.

Moreover, the evidence regarding the use of a weapon was in fact contested. One key prosecution witness, Gregory Thompson, testified that defendant did not use a weapon but beat the complainant with his fists.[31] And no weapon was ever found at the scene of the offense. This evidence contradicts the conclusion that a weapon was involved. Because of this, the prosecution cannot demonstrate beyond a reasonable doubt that a jury would have made the findings of fact necessary to score OV 1 and OV 2.

OV 3 deals with the injury suffered by the complainant. To warrant 25 points under OV 3, there must be a "[l]ife threatening or permanent incapacitating injury . . . ." MCL 777.33(1)(c). While there was evidence that the complainant's injuries were significant, there was no specific evidence that they were life threatening or permanently incapacitating. This lack of evidence precludes a conclusion that the error was harmless.

No medical expert testified at trial. And defendant's medical records were not submitted to the jury. Again, this is because neither defendant nor the prosecution had any reason to argue these issues at trial. Without

[31] I have not mischaracterized Thompson's testimony, as the majority claims. During initial questioning, Thompson stated that defendant indicated that defendant beat the complainant with his fists. During cross-examination, Thompson stated that it was possible that defendant used a weapon.

some medical evidence of permanent incapacitation or that the injuries were life threatening, a jury could not have made such a determination beyond a reasonable doubt.[32] Hence, the prosecution cannot carry its burden to prove that the *Blakely* error occurring in this case was harmless beyond a reasonable doubt. *Neder*, 527 US at 18-19.[33]

There is insufficient evidence that the jury would have made the findings of fact necessary to score the OVs. This is especially true in light of the fact that there are no procedures in place for a jury to make special findings in a criminal trial in Michigan. Therefore, the prosecution did not carry its burden. *Id.*; *Recuenco*, 126 S Ct at 2550. Defendant must be resentenced in a manner consistent with the Sixth Amendment.

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[32] An argument can be made that the evidence presented at trial supports a finding that the complainant suffered bodily injury requiring medical treatment. This evidence, it could be argued, would justify 10 points under OV 3. MCL 777.33(1)(d). But given that the prosecution never made this argument on appeal, it is not properly before the Court.

Even if the prosecution had made this argument, however, it would not have rendered the error in defendant's sentence harmless beyond a reasonable doubt. A score of 10 points would have given defendant a PRV score of 2 and an OV score of 10. This would have placed him in the B-II cell of the class D grid. MCL 777.65. The B-II cell sets a range of zero to 13 months for a second-offense habitual offender. MCL 777.65; MCL 777.21(3)(a). This is still an intermediate sanction cell. Defendant's statutory maximum sentence would have increased from 11 months to 12 months in jail. MCL 769.34(4)(a). Hence, imposition of a 15-year maximum sentence would still have violated *Blakely*'s bright-line rule.

[33] The majority summarily concludes that no medical evidence was necessary in this case. Its conclusion is contrary to the statute, which requires proof of "[l]ife threatening or permanent incapacitating injury . . . ." MCL 777.33(1)(c). The majority also inappropriately shifts to defendant the burden to disprove the nature of the injuries. This is inconsistent with harmless error review, which is required here. Moreover, it is inconsistent with the very nature of criminal trials, which mandates that the prosecution, not the defense, prove the elements of the crime charged beyond a reasonable doubt.

IX. CONCLUSION

Although it concedes that *Cunningham* presented nothing new and that it must follow the precedent of the *Blakely* line of cases, the majority reaffirms its previous decision in this case. In essence, the majority states today that the United States Supreme Court did not comprehend the majority's previous decision and misunderstood Michigan law.

The maximum sentence resulting from an intermediate sanction cell is a true statutory maximum for purposes of *Cunningham*. A court cannot increase this maximum sentence by scoring the OVs without violating the Sixth Amendment. Finally, the sentencing error in this case was not harmless, because the OVs were scored using facts that were not supported by overwhelming evidence.

I take the Supreme Court's order for what it is: an indication that there is a Sixth Amendment problem with Michigan's sentencing guidelines. This case illustrates that a grave constitutional violation occurs in this state when *Blakely* is correctly applied. Specifically, the judicial fact-finding that moved defendant from an intermediate sanction cell to a straddle cell violated his Sixth Amendment right to trial by jury.

Defendant's sentence should be vacated, and the case should be remanded to the trial court for resentencing. The Michigan sentencing guidelines statutes should be held unconstitutional as applied in this case.[34]

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[34] Because this is a remand from the United States Supreme Court, I believe that it is not necessary to address here the cure for the constitutional violation. I continue to believe what I articulated in my prior dissenting opinion. Given that a large portion of Michigan's sentencing guidelines involve intermediate sanction cells that intertwine with the rest of the guidelines, the unconstitutional sections cannot be severed. Therefore, the entire guidelines must be found unconstitutional

CAVANAGH, J. (*dissenting*). I agree with the result advocated by Justice KELLY in her dissent because it comports with my position in this case the first time it was before this Court. See *People v McCuller*, 475 Mich 176, 214; 715 NW2d 798 (2006) (CAVANAGH, J., dissenting). When dealing with intermediate sanctions, I believe that the requirements set forth by the United States Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and further applied in *Cunningham v California*, ___ US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007), must be followed. Thus, the trial court improperly engaged in judicial fact-finding, and this case should be remanded for resentencing.

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when applied as they were in this case. In future cases, Michigan trial judges should implement a bifurcated hearing system. And the prosecution should be required, after a guilty verdict, to submit the facts not admitted but necessary for scoring the OVs to a jury for resolution beyond a reasonable doubt. For a more thorough discussion of this issue, I refer the reader to my previous dissent. *McCuller*, 475 Mich at 208-213 (KELLY, J., dissenting).

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied July 18, 2007:

PEOPLE v TISDALE, No. 133008. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 270966.

CITY OF CHARLEVOIX v MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, No. 133088; Court of Appeals No. 271405.

KELLY, J. I would grant leave to appeal.

AMERISURE MUTUAL INSURANCE COMPANY v CAREY TRANSPORTATION, INC, Nos. 133196, 133669; Court of Appeals No. 270339.

KELLY, J. I would grant leave to appeal.

PEOPLE v SANDERS, No. 133219. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271000.

PEOPLE v WINTERS, No. 133245; Court of Appeals No. 275137.

KELLY, J. I would remand this case for resentencing.

PEOPLE v GOINES, No. 133290. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271759.

KELLY, J. I would remand this case for resentencing.

RICHARDS v APV NORTH AMERICAN, INC, No. 133312; Court of Appeals No. 262752.

PEOPLE v DOXEY, No. 133322; Court of Appeals No. 274643.

KELLY, J. I would remand this case for an evidentiary hearing.

PEOPLE v CLARK, No. 133345; reported below: 274 Mich App 248.

MASTEN v ABN AMRO MORTGAGE GROUP, No. 133350; Court of Appeals No. 261359.

KELLY, J. I would vacate that part of the judgment of the Court of Appeals that holds that the foreclosure sale was not voidable and that the plaintiff's claims are barred by laches because the Court of Appeals resolved the case on other grounds, and would allow the plaintiff to raise the issue of whether the foreclosure sale was voidable in the trial court on remand.

WESCON v GOEBEL, No. 133379; Court of Appeals No. 272059.

KELLY, J. I would grant leave to appeal.

PEOPLE v THOMAS HICKS, No. 133397; Court of Appeals No. 262567.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ROBERT JOHNSON, No. 133399; Court of Appeals No. 263320.

STEWART v STEWART, No. 133408; Court of Appeals No. 262213.

PEOPLE v BRANDON SMITH, No. 133452; Court of Appeals No. 264419.

PEOPLE v BRIDGES, No. 133489; Court of Appeals No. 275168.
KELLY, J. I would remand this case for appointment of counsel.

PEOPLE v ROWE, No. 133493. For purposes of MCR 6.502(G)(1), the Court notes that the reference to MCR 6.508(D) in the Court of Appeals order appears to characterize the application in that court as involving a motion for relief from judgment. The application to the Court of Appeals was in fact from the judgment of conviction. It was properly denied for lack of merit. Court of Appeals No. 273703.

PEOPLE v RAYMOND SMITH, No. 133504; Court of Appeals No. 274250.

BEAGLE v GENERAL MOTORS CORPORATION, No. 133529; Court of Appeals No. 272509.

PEOPLE v STATEN, No. 133537; Court of Appeals No. 275715.

PEOPLE v CODY, No. 133538; Court of Appeals No. 273602.

PEOPLE v STALLWORTH, No. 133540; Court of Appeals No. 266833.
KELLY, J. I would remand this case for resentencing.

PEOPLE v FRITZ, No. 133541; Court of Appeals No. 264609.

AUTO CLUB INSURANCE ASSOCIATION v NOVI CAR WASH, No. 133586; reported below: 273 Mich App 315.
CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

BAUR v MACOMB MALL, LLC, No. 133598; Court of Appeals No. 271474.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

GILLEYLEN v FARM BUREAU INSURANCE COMPANY, No. 133650. The claims advanced by appellant are completely lacking in merit. Costs of $250 are assessed against the plaintiff-appellant in favor of the defendants-appellees under MCR 7.316(D)(1) for filing a vexatious appeal. Court of Appeals No. 272760.

PEOPLE v JAMES PERRY, No. 133710; Court of Appeals No. 276458.

In re BELL (KING v DEPARTMENT OF HUMAN SERVICES), Nos. 133768-133770; Court of Appeals Nos. 271845-271847.

Leave to Appeal Granted July 20, 2007:

SMITH v KHOURI, No. 132823. The application for leave to appeal the November 16, 2006, judgment of the Court of Appeals is considered, and it is granted, limited to the issue of whether, under the factors set forth

in *Wood v DAIIE*, 413 Mich 573 (1982), MRPC 1.5, and other relevant caselaw, the trial court abused its discretion in awarding $65,556 in attorney fees on the basis of $450 and $275 hourly rates. Special attention should be given to: (1) whether the trial court evaluated all factors relevant to the determination of a reasonable fee; (2) whether the trial court applied such factors to all the attorneys involved; (3) whether in particular the trial court properly applied factors pertaining to the fees customarily charged in the locality for similar legal services, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services; (4) whether it is relevant to consider the proportionality between the amount of attorney fees and the award of damages; and (5) whether, if the plaintiff retained his attorneys pursuant to a contingent fee agreement, this fact should affect the calculation of reasonable attorney fees on the basis of hourly rates. The State Bar of Michigan, Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., Michigan Manufacturers Association, and Michigan Chamber of Commerce 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. Court of Appeals No. 262139.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

In re SMITH TRUST (PHILLIPS v HOMER), No. 133462. The parties shall include among the issues to be briefed whether a right of first refusal is revocable once the holder of the right receives notice of a third party's offer and whether the petitioners are entitled to summary disposition and specific performance of the right of first refusal, as the Court of Appeals held. The Real Property 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. Reported below: 274 Mich App 283.

Summary Disposition July 20, 2007:

PEOPLE v LINCOLN WATKINS, No. 134369. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the May 14, 2007, order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration of whether MCL 768.27a conflicts with MRE 404(b) and, if it does, whether the statute prevails over the court rule. *McDougall v Schanz*, 461 Mich 15 (1999). We further order that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 277905.

Leave to Appeal Denied July 20, 2007:

PEOPLE v APGAR, No. 127651; reported below: 264 Mich App 321.

In re PEOPLES (DEPARTMENT OF HUMAN SERVICES v PEOPLES), No. 134327; Court of Appeals No. 272972.

Leave to Appeal Denied July 25, 2007:

STURGIS BANK AND TRUST COMPANY v HILLSDALE COMMUNITY HEALTH CENTER, No. 130045; reported below: 268 Mich App 484.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal in this case. I write only to point out the accuracy of the following statement of the Court of Appeals, despite Justice CORRIGAN's questioning of that statement, *post* at 855:

> While [MCL 600.]2169(1) sets forth requirements or qualifications for an expert witness, [MCL 600.]2169(2) is not a set of requirements or qualifications; rather, it is the method by which the court *evaluates* whether an expert is qualified, and it directs the court to take into consideration the four factors listed therein. [*Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 492 (2005).]

The Court of Appeals statement is in accord with the majority opinion in *Woodard v Custer*, 476 Mich 545, 572-574 (2006). While Justice CORRIGAN is correct that the witness will ultimately require assessment by the trial court before testifying at trial, the criteria in MCL 600.2169(2) are not "requirements" that the affiant must "meet" when executing an affidavit of merit. It would be difficult to have a reasonable belief that the affiant "meets" any of the four criteria as they are denoted in MCL 600.2169(2):

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

Rather, after an expert witness meets the true "criteria," which are set forth in MCL 600.2169(1), the trial court may have reason to *further* assess the admissibility of the expert witness's testimony at trial under MCL 600.2169(2).

CORRIGAN, J. (*dissenting*). I would grant defendant's application for leave to appeal. In this medical malpractice case, the Court of Appeals establishes that the plaintiff's expert who submits the affidavit of merit required by MCL 600.2912d need only meet the matching requirements

in MCL 600.2169(1), but not the remaining requirements for medical experts listed in the other sections of MCL 600.2169. *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484 (2005). The Court of Appeals unnecessarily invents the proposition that a medical malpractice action consists of two stages with different requirements for the qualification of experts. Most significantly, its holding appears to violate the language of MCL 600.2912d(1), which states that "the plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional *who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169*." (Emphasis added.)

The mandate in MCL 600.2912d(1) is not limited to the attorney's reasonable belief that the expert merely meets the requirements in MCL 600.2169(1). Moreover, I question the Court of Appeals conclusion that the criteria in § 2169(2) cannot constitute "requirements" for purposes of § 2912d(1) because they merely provide "the method by which the court *evaluates* whether an expert is qualified" by directing the courts "to take into consideration the four factors listed therein." *Sturgis Bank, supra* at 492. Certainly an expert is ultimately *required* to be qualified by the trial court under § 2169(2). Further, I question Justice CAVANAGH's conclusion that "[i]t would be difficult to have a reasonable belief that the affiant 'meets' any of the four criteria as they are denoted in MCL 600.2169(2)[.]" *Ante* at 854. To the contrary, an attorney clearly may form a belief regarding whether an expert may qualify to offer his proposed testimony because of his "educational and professional training," his "area of specialization," "[t]he length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty, and "[t]he relevancy of the expert witness's testimony." MCL 600.2169(2)(a) to (d). Similarly, I question the Court of Appeals contention that acknowledging the criteria in § 2169(2) would require "minitrials . . . concerning the validity of an affidavit of merit" to any unusual degree. *Id.* at 493. MCL 600.2912d does not require a plaintiff to *prove* that his expert qualifies under § 2169. It merely requires a plaintiff to show that his attorney reasonably believed that the expert would meet the requirements.

To illustrate, an affidavit of merit must include the affiant's statement that "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." MCL 600.2912d(1)(d). In the case before us, it would take very little to prove or disprove the reasonableness of the belief of plaintiff's attorney that the nurses who provided affidavits of merit would qualify to offer relevant testimony—on the basis of their educational and professional training and length of experience—regarding whether the alleged breaches of the standard of care were the proximate cause of the injuries alleged in the notice. The alleged breaches consisted of failures of defendant's nursing staff to properly prevent the patient from falling out of her hospital bed. In the notice plaintiff filed pursuant to MCL 600.2912b, plaintiff claimed that these breaches caused "serious and permanent injuries." The complaint clarified that the "serious and permanent injuries" consisted of "severe closed head injury, intra cranial injury, brain damage and

unconsciousness" as well as "[i]mpaired cognitive functioning."[1] Indeed, the nurse affiants were unable to address whether the alleged negligence of defendant's nursing staff caused serious and permanent injuries to the patient's brain, although the affiants appeared qualified to address the standard of care. Plaintiff does not argue that its attorney reasonably believed otherwise.

Plaintiff attempted to rectify the problem by providing the affidavit of a neurologist who opined that the patient "sustained a closed head injury as a result of her fall from the hospital bed . . . and the neurological impairments and sequelae, as diagnosed in the subsequent medical records, were caused by the traumatic brain injury sustained in the fall." Although the trial court dismissed the case because the neurologist's affidavit was filed after the statutory limitations period expired, the Court of Appeals found the nurses' affidavits of merit, alone, sufficient and reinstated the case. Thus, in addition to ignoring the mandate in MCL 600.2912d(1) that an attorney must reasonably believe the affiant "meets the requirements for an expert witness under section 2169"—with no limitation merely to the matching requirements in § 2169(1)—the Court essentially permits a blatantly unqualified affiant to make statements regarding proximate cause. In other words, the Court concludes that an affidavit of merit may comply with MCL 600.2912d even if that affidavit does not contain a meaningful, relevant, or qualified statement of "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice," as required by § 2912d(1)(d). This thwarts the purpose of the statute, as evident in its language, because it fails to put a defendant on notice of the nature and merit of the causation element of the claim.

Finally, in a case like this one where a single expert will not qualify to address both the standard of care and proximate causation, I find nothing in the language of MCL 600.2912d that prevents a plaintiff from filing two affidavits of merit. MCL 600.2912d(1) refers to "an" affidavit or "the" affidavit, which is signed by "a" health professional or "the" health professional. Michigan's rules of statutory construction establish that "[e]very word importing the singular number only may extend to and embrace the plural number," MCL 8.3b, "unless such construction would be inconsistent with the manifest intent of the legislature," MCL 8.3. Here, the Legislature's intent supports the use of multiple affidavits because the statute requires a plaintiff to present affidavits from experts who can address the relevant standard of care *and* proximate causation. In a case like this one, a neurologist will generally be unable to meet the professional matching requirements in MCL 600.2169(1) that would be necessary for him to address the appropriate standard of care and its breach. Likewise, a nurse will generally be unable to address the medical cause of brain damage and impaired cognitive functioning, particularly in a patient with a preexisting head injury. Thus, affidavits from two experts appear necessary in order for plaintiff to provide notice of the merits of

[1] It is worth noting that the patient had been admitted to the hospital, before her fall, after a car accident. The emergency room report indicates that she was diagnosed with a closed head injury, among other things.

his claim and proceed with his suit. I see no reason why multiple affidavits would in any way thwart the language or apparent purpose of MCL 600.2912d.

For these reasons, I would grant leave to appeal.

Summary Disposition July 27, 2007:

PEOPLE v MARTH, No. 133104. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of its order. We note that the defendant filed a timely postconviction motion and did not purport to file a motion for relief from judgment, and that the trial court did not address the defendant's motion under MCR 6.501 *et seq*. On remand, the Court of Appeals shall reconsider whether its order properly denied the defendant's application for leave to appeal for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Within 28 days of the date of this order, the Court of Appeals shall either reconsider the defendant's application for leave to appeal under the standard applicable to direct appeals and decide whether it shall be granted, or submit to the Clerk of this Court, in writing, an explanation of why its order denied leave to appeal under MCR 6.508(D). We retain jurisdiction. Court of Appeals No. 273534.

KELLY, J. (*concurring*). The Court of Appeals erred in denying, under MCR 6.508(D), defendant's application for leave to appeal. The defendant filed a timely postconviction motion in the trial court and did not purport to file a motion for relief from judgment. His first and only application for leave to appeal was timely filed in the Court of Appeals pursuant to MCR 7.205(F)(4). Therefore, I would vacate the order of the Court of Appeals and remand the case to the Court of Appeals for reconsideration of the defendant's application for leave to appeal under the standard applicable to direct appeals. Because the Court of Appeals clearly erred, it is unnecessary for the Court of Appeals to reconsider whether it properly denied the defendant's application for leave to appeal for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)."

Leave to Appeal Denied July 27, 2007:

PEREZ v FORD MOTOR COMPANY, No. 131655. We clarify that only the events of which Ford had notice before Daniel Bennett allegedly sexually harassed the plaintiff are relevant to whether Ford had notice of a hostile work environment. Court of Appeals No. 249737 (on remand).

CAVANAGH, J. (*concurring*). I concur with this Court's decision to deny leave to appeal. However, I disagree with this Court's offering instruction to the trial court because no instruction has been shown to be needed. This Court's standard denial order leaves to the proper discretion of the trial court the determination of what evidence is relevant and admissible in light of the applicable claims and defenses. Other than the number of times this Court has heard cases involving different sexual harassment claims against the same employee of defendant's, there is nothing

confusing or exceptional about this case that necessitates the majority's interjecting its viewpoint about admissible evidence at this stage of the proceedings.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

In re SCHOTT (DEPARTMENT OF HUMAN SERVICES V SCHOTT), No. 134427; Court of Appeals No. 274170.

Reconsideration Denied July 27, 2007:

In re STEPHENS (DEPARTMENT OF HUMAN SERVICES V STEPHENS) and *In re* STURGIS (DEPARTMENT OF HUMAN SERVICES V STURGIS), Nos. 134094, 134095; Court of Appeals Nos. 271015, 271016.

Summary Dispositions July 30, 2007:

LEECH V KRAMER, No. 129930. By order of April 5, 2006, the application for leave to appeal the October 11, 2005, judgment of the Court of Appeals was held in abeyance pending the decision in *Rowland v Washtenaw Co Rd Comm* (Docket No. 130379). The case was decided on May 2, 2007, 477 Mich 197 (2007). On May 29, 2007, the defendant Board of County Road Commissioners of the County of Kent filed a motion for peremptory reversal. On order of the Court, the application and the motion for peremptory reversal are considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we grant the motion for peremptory reversal and reverse the judgment of the Court of Appeals. The plaintiff's notice to the defendant board was untimely under MCL 691.1404. *Rowland, supra*. We remand this case to the Kent Circuit Court for entry of an order granting summary disposition to the defendant board. Court of Appeals No. 253827.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE V MALONE, No. 133058. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the circuit court for resentencing. The prosecutor has conceded that the parties incorrectly informed the court that the guidelines range for the E-V, third-offense habitual offender, cell of the Class B offense grid was 99 to 240 months. The correct range is 87 to 217 months. Since the court was misinformed of the correct 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 question presented should be reviewed by this Court. Court of Appeals No. 264284.

PEOPLE V WOOLL, No. 133719. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 275673.

Leave to Appeal Denied July 30, 2007:

In re PETITION BY TREASURER OF WAYNE COUNTY FOR FORECLOSURE (WAYNE COUNTY TREASURER v MEXICO WHOLESALE GROCERY), No. 129335; Court of Appeals No. 261065.

In re PETITION BY TREASURER OF WAYNE COUNTY FOR FORECLOSURE (WAYNE COUNTY TREASURER v FULL GOSPEL OPENDOOR ASSEMBLIES, INC), No. 129337; Court of Appeals No. 261071.

In re PETITION BY TREASURER OF WAYNE COUNTY FOR FORECLOSURE (WAYNE COUNTY TREASURER v PRECISION MATERIALS & SERVICES, INC), No. 129339; Court of Appeals No. 261073.

JAMES v W A FOOTE MEMORIAL HOSPITAL and JAMES v RICHARDS, Nos. 130604, 130606, 130609; Court of Appeals No. 262622.

YOUNG, J. (*concurring*). I concur in the majority's decision to deny leave to appeal. I write separately because I am disturbed by the analysis the Court of Appeals employed in justifying its decision to reverse the trial court's summary disposition order. The statute at issue in this case, MCL 600.2912d(1), requires a medical malpractice plaintiff to file an affidavit of merit with his complaint. In *Roberts v Mecosta Co Gen Hosp (After Remand)*,[1] this Court discussed the adequacy requirements for notices of intent under MCL 600.2912b. Despite the striking similarities between the notice of intent statute and the affidavit of merit statute, the Court of Appeals held that differing "policy considerations" made an application of *Roberts* unwarranted. Indeed the panel made its "policy considerations" known by holding that "unlike the court in *Roberts*, we do not need to read additional requirements or limitations into the [affidavit of merit] statute to aid its rational application or workability."

Simply stated, the Court of Appeals erred by not applying *Roberts* to this case.[2] The panel did not provide adequate justification for its decision to disregard *Roberts*, but merely relied on "policy considerations" as a subterfuge for its obvious disagreement with *Roberts*. While the Court of Appeals is not required to agree with this Court's decisions, it is required to properly apply those decisions. However, because the Court of Appeals opinion is unpublished and has no precedential value, this Court's intervention is unwarranted at this time.

PEOPLE v ROBERT WEBB, SR, No. 132374; Court of Appeals No. 271901.

PEOPLE v PAVUK, No. 132632; Court of Appeals No. 273151.

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[1] 470 Mich 679 (2004).

[2] Moreover, the Court of Appeals ignored this Court's remand order in *Mullaney v Kistler*, 471 Mich 932 (2004), where this Court remanded back to the Court of Appeals a case dealing with the sufficiency of an affidavit of merit specifically instructing the Court of Appeals to reconsider the case in light of *Roberts*.

PEOPLE v LESTER, No. 132970; Court of Appeals No. 262293.

PEOPLE v GREGORY JACKSON, No. 133072; Court of Appeals No.264332.

PEOPLE v BASKIN, No. 133087; Court of Appeals No. 262370.

PEOPLE v WALKER, No. 133090; Court of Appeals No. 263440.

PEOPLE v CALHOUN, No. 133103; Court of Appeals No. 274279.

PEOPLE v TONY MACK, No. 133124; Court of Appeals No. 261912.

WALLINGTON v CITY OF MASON, Nos. 133131, 133132; Court of Appeals Nos. 267919, 269884.

PEOPLE v TOWLE, No. 133177; Court of Appeals No. 254487.

BARRETT v PREVOST, No. 133256; Court of Appeals No. 269477.

PEOPLE v HOOKER, No. 133260; Court of Appeals No. 263625.

PEOPLE v CATO, No. 133273; Court of Appeals No. 271231.

PEOPLE v MERRIWEATHER, No. 133287. We note that relief is not prohibited by MCR 6.502(G) because this appeal does not involve the denial of a motion for relief from judgment. Rather, this appeal involves only the defendant's motion for DNA testing under MCL 770.16. The defendant fails to establish an entitlement to DNA testing because he neglects to address the four conditions set forth in MCL 770.16(3). Court of Appeals No. 274697.

ROBERTS v DETROIT PUBLIC SCHOOLS, No. 133313; Court of Appeals No. 269414.

CITY OF DETROIT v 17526 RIOPELLE, No. 133316; Court of Appeals No. 269377.

PEOPLE v BRICKEY, No. 133343; Court of Appeals No. 261726.

HUGHES ESTATE v CITIZENS INSURANCE COMPANY, No. 133352; Court of Appeals No. 259987.

PEOPLE v MCGEE, No. 133354; Court of Appeals No. 263591.

PEOPLE v MONSON, No. 133366. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271382.

PEOPLE v MIXON, No. 133367. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271342.

ARNOLD v KEMP, Nos. 133371-133374; Court of Appeals Nos. 262349, 263157, 264126, 264578.

PEOPLE v RICHARDSON, No. 133375. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271858.

L N LAND COMPANY, INC v SCHWARTZ LAW FIRM, PC, No. 133395; Court of Appeals No. 263363.

PEOPLE v LLOYD, No. 133415; Court of Appeals No. 262582.

PEOPLE v RAMIREZ-GARCIA, No. 133425; Court of Appeals No. 261408.

PEOPLE v JOSHUA THOMAS, No. 133437; Court of Appeals No. 275397.

PEOPLE v FAYZ, No. 133438; Court of Appeals No. 262684.

PEOPLE v WALTER MORGAN, No. 133442; Court of Appeals No. 265288.

PEOPLE v BADGLEY, No. 133444; Court of Appeals No. 262942.

PEOPLE v MICHAEL ANDERSON, No. 133455; Court of Appeals No. 261933.

PEOPLE v HUGO MACK, No. 133461. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276609.

PEOPLE v PEREZ-HERNANDEZ, No. 133465; Court of Appeals No. 261729.

PEOPLE v JOSEPH KINNEY, No. 133478; Court of Appeals No. 265065.

PEOPLE v FRANK MORGAN, No. 133481. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272092.

PEOPLE v LEE, No. 133485. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271420.

PEOPLE v OGLETREE, No. 133499. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271640.

PEOPLE v PINA, No. 133506; Court of Appeals No. 274611.

PEOPLE v MARK JONES, No. 133507. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 274038.

PEOPLE v SPIGHT, No. 133508; Court of Appeals No. 275276.

PEOPLE v COREY MARTIN, No. 133509. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275631.

PEOPLE v GREENE, No. 133513; Court of Appeals No. 266030.

ISACK v ISACK, No. 133514; reported below: 274 Mich App 259.

CHASE EQUIPMENT LEASING, INC v DEPARTMENT OF TREASURY, No. 133515; Court of Appeals No. 272281.

PEOPLE v GEORGE, No. 133523; Court of Appeals No. 264765.

HI-LO HEIGHTS LAKEFRONT PROPERTY OWNERS ASSOCIATION, INC v COLUMBIA TOWNSHIP, No. 133524; Court of Appeals No. 260848.

PEOPLE v SAMUEL BROWN, No. 133539. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271899.

PEOPLE v LUHELLIER, No. 133546; Court of Appeals No. 276067.

PEOPLE v MINOR, No. 133547; Court of Appeals No. 267012.

PEOPLE v BURKS, No. 133548; Court of Appeals No. 265909.

PEOPLE v ARRINGTON, No. 133551. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275568.

PEOPLE v DUQUAN HICKS, No. 133552; Court of Appeals No. 266085.

WOODS v WILLIAMS & SON PLUMBING & HEATING, INC, No. 133553; Court of Appeals No. 256394.

PEOPLE v ZIEGLER, No. 133555; Court of Appeals No. 263169.

METRO PRODUCE, INC v DETROIT BOARD OF ZONING APPEALS, No. 133557; Court of Appeals No. 272897.

PEOPLE v ROBERT GUY, II, No. 133559; Court of Appeals No. 275736.

PEOPLE v PACHECO, No. 133565; Court of Appeals No. 265318.

DAIMLERCHRYSLER CORPORATION v PROFESSIONAL CORPORATE INTELLIGENCE, INC, No. 133568; Court of Appeals No. 272165.

PEOPLE v PUGH, No. 133570; Court of Appeals No. 266172.

PEOPLE v ARMENTERO, No. 133571. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271855.

PEOPLE v TIMS, No. 133572; Court of Appeals No. 265108.

PEOPLE v PRICE, No. 133576; Court of Appeals No. 273530.

HOSEY v BERRY, No. 133577; Court of Appeals No. 272336.

PEOPLE v FRANKLIN, No. 133584; Court of Appeals No. 275348.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

SCHOENFELD v PAROLE BOARD, No. 133585; Court of Appeals No. 273699.

LAKE STATES INSURANCE COMPANY v MASON INSURANCE AGENCY, INC, No. 133587; Court of Appeals No. 271666.

PEOPLE v LINDELL BROWN, No. 133592; Court of Appeals No. 267117.

PEOPLE v MAYER, No. 133595. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271788.

PEOPLE v ALLEN, No. 133600; Court of Appeals No. 273941.

PEOPLE v FIELDS, No. 133601. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275851.

PEOPLE v PENNINGTON, No. 133602; Court of Appeals No. 274951.

PEOPLE v PITTMAN, No. 133603; Court of Appeals No. 266276.

PEOPLE v RUIZ, No. 133604; Court of Appeals No. 276009.

PEOPLE v PHILLIPS, No. 133605; Court of Appeals No. 275816.

WMS GAMING, INC v DEPARTMENT OF TREASURY, No. 133606; reported below: 274 Mich App 440.

PEOPLE v RICHARD WATKINS, No. 133609. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272030.

PEOPLE v LIGE, No. 133610. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271757.

PEOPLE v MUNOFO, No. 133612; Court of Appeals No. 275249.

PEOPLE v WITHERSPOON, No. 133615; Court of Appeals No. 264711.

PEOPLE v DAVIS, No. 133617; Court of Appeals No. 275393.

PEOPLE v JIMMIE MACK, No. 133618; Court of Appeals No. 266374.

PEOPLE v WHITE, No. 133624; Court of Appeals No. 264436.

PEOPLE v ASHMON, No. 133628; Court of Appeals No. 265376.

PEOPLE v SAMPSON, No. 133630; Court of Appeals No. 275485.

PEOPLE v HAMBRICK, No. 133631; Court of Appeals No. 266910.

PEOPLE v BYROM, No. 133633; Court of Appeals No. 274699.

PEOPLE v STOCKS, No. 133634; Court of Appeals No. 272585.

PEOPLE v IRON, No. 133635. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272000.

PEOPLE v TURIC, No. 133636; Court of Appeals No. 276465.

PEOPLE v RUTTAN, No. 133637; Court of Appeals No. 274439.

PEOPLE v ROBBINS, No. 133639; Court of Appeals No. 266045.

STEELE v DEPARTMENT OF CORRECTIONS, No. 133640; Court of Appeals No. 274087.

PEOPLE v GATISS, No. 133643; Court of Appeals No. 274814.

ANDERSON v JOHNSON, No. 133644; Court of Appeals No. 263972.

PEOPLE v MCCLURE, No. 133646. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272306.

THOMAS v DEPARTMENT OF CORRECTIONS, No. 133647; Court of Appeals No. 264585.

PEOPLE v MORRISH, No. 133653; Court of Appeals No. 275055.

DAIMLERCHRYSLER CORPORATION v WORKERS' COMPENSATION APPELLATE COMMISSION, No. 133657; Court of Appeals No. 272032.

PEOPLE v STALLINGS, No. 133660; Court of Appeals No. 274326.

PEOPLE v GARDNER, No. 133662; Court of Appeals No. 266205.

PEOPLE v CHU, No. 133665. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276491.

PEOPLE v SHULIE JONES, No. 133666; Court of Appeals No. 264888.

PEOPLE v PLEASANT, No. 133668; Court of Appeals No. 275694.

PEOPLE v BASS, No. 133675. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271987.

PEOPLE v WALLACE, No. 133679; Court of Appeals No. 276072.

PEOPLE v TARKET, No. 133680; Court of Appeals No. 268415.

PEOPLE v RUSSELL, No. 133688; Court of Appeals No. 274434.

PEOPLE v EUGENE HILL, No. 133690; Court of Appeals No. 275958.

PEOPLE v KEVIN JOHNSON, No. 133692; Court of Appeals No. 266367.

PEOPLE v RONALD JACKSON, No. 133699; Court of Appeals No. 265957.

PEOPLE v PALMER, No. 133701; Court of Appeals No. 265289.

PEOPLE v BUTLER, No. 133703; Court of Appeals No. 267907.

PEOPLE v ROWLAND, No. 133706; Court of Appeals No. 266081.

PEOPLE v KEMP, No. 133708. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271609.

FAGAN v LOMUPO, No. 133711; Court of Appeals No. 264270.

PEOPLE v MARDENLI, No. 133713. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 275565.

PEOPLE v KLINE, No. 133714; Court of Appeals No. 274478.

PEOPLE v JOHN, No. 133716; Court of Appeals No. 275790.

SHAKOOR v OAKWOOD HOSPITAL ANNAPOLIS CENTER-WAYNE, No. 133722; Court of Appeals No. 264499.

PEOPLE v HUNTER, No. 133726. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276523.

PEOPLE v MIDDLETON, No. 133728; Court of Appeals No. 265143.

PEOPLE v STACKHOUSE, No. 133731; Court of Appeals No. 276461.

SUN/FOREST, LLC v TJ HOLDINGS, LLC, No. 133733; Court of Appeals No. 262155.

SKY REACH, INC v BLUE LINE ELECTRIC, INC, No. 133734; Court of Appeals No. 268546.

PEOPLE v GRAHAM, No. 133738; Court of Appeals No. 263702.

PEOPLE v TULLOS, No. 133739; Court of Appeals No. 264364.

PEOPLE v HARDING, No. 133740; Court of Appeals No. 270221.

PEOPLE v MYRON JACKSON, No. 133741; Court of Appeals No. 265377.

PEOPLE v GLENN, No. 133745; Court of Appeals No. 260500.

PEOPLE v CREAGER, No. 133746; Court of Appeals No. 264417.

PEOPLE v WESTERFIELD, No. 133747; Court of Appeals No. 275604.

PEOPLE v MAYS, No. 133748. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276483.

PEOPLE v RAWLS, No. 133752; Court of Appeals No. 264892.

PEOPLE v CARMONA, No. 133756; Court of Appeals No. 263272.

PEOPLE v MARSHALL, No. 133757. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272002.

PEOPLE v MARK BROWN, No. 133774; Court of Appeals No. 265955.

PEOPLE v SAMUEL WEBB, No. 133775; Court of Appeals No. 274955.

PEOPLE v JAMES, No. 133776; Court of Appeals No. 274455.

PRICE v RCO ENGINEERING, INC, No. 133779; Court of Appeals No. 272330.

AMERICORP FINANCIAL GROUP, INC v POWERHOUSE LICENSING, LLC, No. 133781; Court of Appeals No. 271189.

MEAGHER v LAFONTAINE, No. 133782; Court of Appeals No. 271439.

PEOPLE v PERKINS, No. 133783; Court of Appeals No. 274221.

PEOPLE v EWING, No. 133784; Court of Appeals No. 267153.

PEOPLE v UMBARGER, No. 133786. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 276183.

PEOPLE v CLAY, No. 133787; Court of Appeals No. 267862.

PEOPLE v MICHAEL MARTIN, No. 133788; Court of Appeals No. 266588.

BOTSFORD v CLINTON CHARTER TOWNSHIP, No. 133789; Court of Appeals No. 272513.

PEOPLE v ADAMS, No. 133794; Court of Appeals No. 275636.

PEOPLE v WILLIE EDWARDS, No. 133795; Court of Appeals No. 267212.

PEOPLE v BRENT THOMAS, No. 133796; Court of Appeals No. 275763.

ROGERS v DEPARTMENT OF CORRECTIONS, No. 133799; Court of Appeals No. 273287.

PEOPLE v ROGER ANDERSON, No. 133800; Court of Appeals No. 275675.

PEOPLE v OWENS, No. 133804; Court of Appeals No. 275952.

PEOPLE v KELLY, No. 133805. The provisions of the Court of Appeals April 23, 2007, order remain in effect, and the 21-day time period for payment of the initial partial fee pursuant to MCL 600.2963(1) shall run from the date of this order. Court of Appeals No. 277175.

KINNEY v DEPARTMENT OF CORRECTIONS, No. 133807; Court of Appeals No. 273833.

PEOPLE v STEVEN JACKSON, No. 133813; Court of Appeals No. 268411.

PEOPLE v DWAYNE HILL, No. 133822. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272222.

FOURNIER v CAPPY HEATING & AIR CONDITIONING, INC, No. 133826; Court of Appeals No. 272642.

JENSEN v COCA COLA ENTERPRISES, INC, No. 133828; Court of Appeals No. 272641.

PEOPLE v SALTER, No. 133830; Court of Appeals No. 267477.

PEOPLE v LITFIELD, No. 133831; Court of Appeals No. 266237.

PEOPLE v PARKER, No. 133832; Court of Appeals No. 266089.

PEOPLE v WIMBLEY, No. 133833. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271957.

PEOPLE v LEWIS, Nos. 133836, 133837; Court of Appeals Nos. 277353, 277355.

PEOPLE v BENAVIDEZ, No. 133839. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 271896.

PEOPLE v ZARKA, No. 133840; Court of Appeals No. 265239.

PEOPLE v INGRAM, No. 133841; Court of Appeals No. 275786.

PEOPLE v WILSON, No. 133842; Court of Appeals No. 276738.

PEOPLE v POLK, No. 133843; Court of Appeals No. 276157.

PEOPLE v HARRIS, No. 133846. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272683.

PEOPLE v TROY BROWN, No. 133856; Court of Appeals No. 275399.

PEOPLE v SUTHERLAND, No. 133859; Court of Appeals No. 266204.

PEOPLE v RYAL, No. 133860; Court of Appeals No. 265534.

PEOPLE v FLANAGAN, Nos. 133862, 133863; Court of Appeals Nos. 273489, 273490.

GOODLAND TOWNSHIP v WYCKSTANDT, No. 133864; Court of Appeals No. 272900.

CITY OF GRAND RAPIDS v BRIGHT, No. 133870; Court of Appeals No. 277604.

PEOPLE v BUCHLER, No. 133871; Court of Appeals No. 276330.

PEOPLE v RODERICK SMITH, No. 133878; Court of Appeals No. 265804.

GREENWOOD v COLONY ARMS LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP, No. 133884; Court of Appeals No. 265531.

PEOPLE v JAMERSON, No. 133893; Court of Appeals No. 276916.

PEOPLE v JUENEMANN, No. 133898. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 272107.

PEOPLE v WHITTAKER, No. 133902; Court of Appeals No. 267043.

PEOPLE v CHRISTOPHER PERRY, No. 133904; Court of Appeals No. 276588.

PEOPLE v FRAZIER, No. 133906; Court of Appeals No. 267518.

PEOPLE v RUDOLPH, No. 133907; Court of Appeals No. 276462.

PEOPLE v WATERS, No. 133914; Court of Appeals No. 264993.

KIM v WERNETTE, No. 133916; Court of Appeals No. 277362.

PEOPLE v ROSS, No. 133925; Court of Appeals No. 268079.

PEOPLE v MOON, No. 133927; Court of Appeals No. 275221.

PEOPLE v BLAKE, No. 133935; Court of Appeals No. 266094.

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 133937; Court of Appeals No. 275511.

PEOPLE v CONTRERAS, No. 133940; Court of Appeals No. 276900.

PEOPLE v PATRICK KINNEY, No. 133941. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 272602.

PEOPLE v ANDRE BROWN, No. 133947; Court of Appeals No. 266206.

PEOPLE v COLLINS, No. 133948; Court of Appeals No. 272582.

PEOPLE v HICKERSON, No. 133949; Court of Appeals No. 265417.

PEOPLE v RAMSEY, No. 133950; Court of Appeals No. 266371.

PEOPLE v RUSHING, No. 133952; Court of Appeals No. 275218.

PEOPLE v NORTON, No. 133963; Court of Appeals No. 268223.

PEOPLE v BLACK, No. 133971; Court of Appeals No. 266831.

PEOPLE v NIX, No. 133975; Court of Appeals No. 263642.

PEOPLE v JOHNNIE EDWARDS, No. 133995; Court of Appeals No. 266207.

ELLIS v ELLIS, No. 134022; Court of Appeals No. 275831.

ELLIS v LOPEZ, No. 134024; Court of Appeals No. 275832.

PEOPLE v LAYVELL GUY, No. 134042; Court of Appeals No. 276892.

PEOPLE v ZMIJA, No. 134075; Court of Appeals No. 277126.

ORR v WILSHIRE CREDIT CORPORATION, No. 134166; Court of Appeals No. 276809.

Interlocutory Appeal

Leave to Appeal Denied July 30, 2007:

SCHMIDT v SHAFINIA, No. 133758; Court of Appeals No. 276304.

Reconsiderations Denied July 30, 2007:

TOBEY v DEPARTMENT OF CORRECTIONS, No. 131375. Leave to appeal denied at 477 Mich 868. Court of Appeals No. 267805.

PEOPLE v DILLARD, No. 132562. Leave to appeal denied at 477 Mich 1111. Court of Appeals No. 274013.

PEOPLE v KYES, No. 133054. Leave to appeal denied at 477 Mich 1116. Court of Appeals No. 273734.

Leave to Appeal Denied August 10, 2007:

In re GARCIA (DEPARTMENT OF HUMAN SERVICES v GARCIA), No. 134442; Court of Appeals No. 273626.

Reconsideration Denied August 10, 2007:

In re JACKSON (DEPARTMENT OF HUMAN SERVICES v JACKSON), No. 134145. Leave to appeal denied at 478 Mich 938. Court of Appeals No. 272459.

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available to all state residents (Const 1963, art 8, § 9). *Goldstone v Bloomfield Twp Public Library*, 479 Mich 554.

SEARCHES AND SEIZURES

5. *People v Gillam*, 479 Mich 253.

SUITS BY TAXPAYERS

6. MCL 129.61, which provides, in part, that any person paying taxes to a political unit may institute actions at law or in equity on behalf of the treasurer of the political subdivision for an accounting or recovery of moneys misappropriated or unlawfully expended by a public officer of the political subdivision, is unconstitutional to the extent that it confers standing on taxpayers who do not meet the three-part test for determining whether a party has constitutional standing; standing requires that the plaintiff must have suffered an injury in fact, that there be a causal connection between the injury and the conduct complained of, and that it is likely, not speculative, that the injury will be addressed by a favorable decision. *Rohde v Ann Arbor Public Schools*, 479 Mich 336.

COVENANTS

ACQUIESCENCE

1. A plaintiff may contest a "more serious" violation of a deed restriction, even if that plaintiff has not contested less serious violations of the deed restriction in the past. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206.
2. A "more serious" violation of a deed restriction occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation; that is, use that constitutes a "more serious" violation imposes a greater burden on the holder of a deed restriction than the burden imposed by a previous violation. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206.

WORDS AND PHRASES

3. A deed restriction limiting use of land to "residential" purposes and permitting only a "single dwelling house" to be built indicates that the intended use is as a "single dwelling house" and immediately related purposes.

Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham, 479 Mich 206.

CRIMINAL LAW

CHARGED OFFENSES

1. A defendant charged with an offense consisting of various degrees may not be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree (MCL 768.32[1]). *People v Nyx*, 479 Mich 112.

EVIDENCE

2. *People v Gillam*, 479 Mich 253.

SEARCHES AND SEIZURES

3. *People v Gillam*, 479 Mich 253.

DUTY—*See*

NEGLIGENCE 1

ELECTIONS—*See*

CONSTITUTIONAL LAW 1, 2

ENVIRONMENT

STANDING

1. The Michigan Supreme Court lacks the judicial power to hear an environmental claim if the plaintiff cannot aver facts to indicate that he or she has suffered or will imminently suffer a concrete and particularized injury in fact (MCL 324.1701[1]). *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280.
2. An environmental plaintiff adequately alleges an injury in fact by averring that he or she has a property interest or uses the affected area or is a person for whom the aesthetic and recreational values of the area will be lessened by the challenged activity (MCL 324.1701[1]). *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280.

EQUAL PROTECTION—*See*

CONSTITUTIONAL LAW 2

EVIDENCE—*See*

CRIMINAL LAW 2