STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE FORFEITURE OF BAIL BOND:

STATE OF MICHIGAN,

Plaintiff–Appellee,

v.

COREY D. GASTON,

Defendant,

and

YOU WALK BAIL BOND AGENCY, INC.,
a Michigan Corporation,

Surety–Appellant.

Supreme Court No: 146033

Court of Appeals No: 305004

Wayne County Circuit Court No.
07-020056-01-FC

BRIEF OF AMERICAN BAIL COALITION
AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF QUESTION PRESENTED

MCL 765.28(1) provides that after a criminal defendant fails to appear and his or her default is entered in the record, "the court **shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear** " (emphasis added). The trial court failed to give notice to the Appellant surety until more than **three years** after the Defendant failed to appear. Does MCL 765.28(1) by its plain and unambiguous language prohibit entry of judgment against the surety?

Appellant and Amicus Curiae say "Yes."

Appellee says "No."

The Court of Appeals said "No."

The trial court said "No."

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus curiae the American Bail Coalition (the "Coalition") is a national organization headquartered at 3857 Lewiston Place, Fairfax, Virginia 22030. The Coalition has 13 member companies, all of whom are underwriters of criminal court appearance bonds. The American Bail Coalition is formed primarily for a dual purpose: to educate local government on the benefits of commercial bail bonding and to advance the interests of the member companies' many retail agents. Most of the Coalition's member companies are admitted to all 50 states, including Michigan, and one member is domiciled in Michigan.

The Coalition serves to defend and expand the use of the commercial bonding system, and form a more effective public/private sector partnership for a safer and more responsible method of releasing Defendants pending trial. It also serves to develop specific programs through working closely with the members' thousands of agents, to expand and protect the interests of those particular businessmen and women. The holding of the Court of Appeals, and the issues raised by its opinion, are important issues of public interest and are critical to the Coalition and its members.

At issue in this appeal are the rights of Appellant, You Walk Bail Bond Agency, Inc., under MCL 765.28. That statute provides that after a criminal defendant's default is entered in the record, "the court **shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear**" (emphasis added). In this case, the Defendant failed to appear and the trial court properly recorded the Defendant's default on February 7, 2008. However, notice was not given to the appellant bonding agency in accord with the terms of MCL 765.28 until February 2011, more than **three years** after the Defendant failed to appear. The Court of Appeals held that the matter was controlled by a prior decision, *In Re Forfeiture Bail Bond (People v Moore),* 276 Mich App 482, 495; 740 NW2d 734 (2007). Although the operative

word in the statute is "shall," the plain meaning of which is mandatory, the Court of Appeals held that a general rule of statutory construction provides that a time limit for performance of an official duty is normally construed as directory, rather than mandatory, unless the statute contains language that precludes performance after a specified time. The Court of Appeals therefore affirmed the judgment of the trial court against the Appellant. *In re Forfeiture of Bail Bond (People v Gaston)*, No. 305004 (unpublished opinion of the Court of Appeals dated Sept. 13, 2012) (Appellant's Apx. 12a).

This is a case of important public interest because the ability of a bonding agency to recover and produce an absconding defendant declines exponentially with the passage of time, and the apprehension of absconding defendants is necessary to allow enforcement of our criminal laws. See E. Helland & A. Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J L & Econ 93 (2004) (Appellant's Apx 16a); and Appellant's Br., pp. 2-4. The outcome of this case is of continued and vital concern to the Coalition and its members for exactly the same reason.

The decision of the Court of Appeals conflicts with many recent decisions of this Court, including *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012); *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359; 817 NW2d 504 (2012); and *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). The plain language of MCL 765.28 is mandatory, and unambiguously expresses the intent of the Legislature, so no further construction of the statute is necessary or permissible. This Court has never recognized the "rule" of statutory construction on which the Court of Appeals relied, and necessarily rejected it in *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 602; 822 NW2d 159 (2012). The federal decisions on which Appellee relies are neither controlling nor persuasive authority in construing

a Michigan statute. See *County of Wayne v Hathcock*, 471 Mich 445, 479-80, 485; 684 NW2d 765 (2004); Justice Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 Okla City L R 263, 279 & n 67 (2008).

This Court should enforce the plain meaning of the statute, reverse the decision of the Court of Appeals under review, and overrule *In Re Forfeiture Bail Bond (People v Moore)*, 276 Mich App 482; 740 NW2d 734 (2007) as wrongly decided.

STATEMENT OF THE CASE

The relevant facts are simple and undisputed. On November 7, 2007, Appellant You Walk Bail Bond Agency, Inc., posted Defendant Corey Gaston's bond in the amount of $50,000 in accord with MCL 765.6(2). Appellant's Br., p. 1. On February 7, 2008, Defendant failed to appear at his scheduled predisposition hearing; nor did he appear for trial on February 11, 2008. Appellant's Apx. 13a. On February 8, 2008, the trial court entered a Capias and Judgment directing that Defendant be taken into custody and remanded upon re-arrest. The order further provided "that bond is forfeited and that judgment is entered in the amount of such bond against Principal and Surety." Appellee's Apx. 22b. Appellant, however, was not notified of this order or of Defendant's failure to appear until more than three years later, after the trial court entered a Notice of Bond Forfeiture hearing, directing Appellant to show cause why a judgment should not be entered against it. Appellant's Br., p. 1; Appellee's Br., p. 4.

On April 8, 2011, Appellant filed a motion to set aside the notice and discharge the bond based on the trial court's failure to timely provide notice of Defendant's default, as required by MCL 765.25(1). Appellant's Apx. 13a. The trial court denied Appellant's motion at a hearing on June 3, 2011, and entered judgment against Appellant in the amount of $50,000. Appellee's Apx. 23b-24b.

The Court of Appeals affirmed on September 13, 2012. *In re Forfeiture of Bail Bond (People v Gaston)*, No. 305004 (unpublished opinion per curiam of the Court of Appeals dated Sept 13, 2012), Appellant's Apx. 12a. This Court granted Appellant's application for leave to appeal on February 8, 2013. The Court directed the parties to address: "(1) whether a court's failure to comply with the 7-day notice provision of MCL 765.28 bars forfeiture of a bail bond posted by a surety; and (2) whether *In re Forfeiture of Bail Bond*, 276 Mich App 482 (2007), holding that the 7-day notice provision is directory rather than mandatory, was correctly decided." The Court also directed that "[p]ersons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae."

ARGUMENT

I. STANDARD OF REVIEW.

Statutory interpretation is a question of law that is reviewed *de novo* on appeal. *Eggleston v Bio–Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The primary task of statutory construction "is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-49; 685 NW2d 275 (2004). "The overarching rule of statutory construction is 'that this Court must enforce clear and unambiguous statutory provisions as written.'" *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 12; 795 NW2d 101 (2009), quoting *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 721; 449 NW2d 660 (1989). This Court interprets the words of a statute "in light of their ordinary meaning and context within the statute and read[s] them harmoniously to give effect to the statute as a whole. . . . If the statutory language is unambiguous, no further judicial

construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

II. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF MCL 765.28 IS MANDATORY, AND MUST BE ENFORCED BY ITS TERMS.

MCL 765.28(1) provides:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. **After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear.** The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution shall be awarded and executed upon the judgment in the manner provided for in personal actions.

(Emphasis added).[1]

Before 2003, the highlighted sentence provided that the "court, upon the motion of the attorney general, prosecuting attorney or city attorney, **may** give the surety or sureties twenty [20] days' notice" (emphasis added). PA 2002, No. 659, effective April 1, 2003, re-wrote the

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[1] This Court reinforced the requirement of immediate notice in MCR 6.106(I)(2)(a), which provides:

> (2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> (a) **The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.**

(Emphasis added).

sentence to say "After the default is entered, the court, upon the motion of the attorney general, prosecuting attorney, or the attorney for the local unit of government, **shall** give each surety immediate notice not to exceed 7 days after the date of the failure to appear" (emphasis added). PA 2004, No. 332, effective September 23, 2004, deleted "upon the motion of the attorney general, prosecuting attorney or city attorney, or the attorney for the local unit of government," leaving the present language: "After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear." See *In re Forfeiture of Bail Bond (People v Moore),* 276 Mich App 482, 492-93; 740 NW2d 734 (2007), and Westlaw, MCL 765.28, Historical and Statutory Notes (accessed June 9, 2013).

Recent decisions of this Court leave no doubt that the plain meaning of the word "shall" in legislation establishing time limits is mandatory, and prohibits the doing of the act after the deadline established by the statute. In *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), this Court held that MCL 691.1404(1), which provided that a party wishing to recover for injuries sustained by reason of a defective highway "within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence and the defect," was mandatory and barred any claim where such notice was not timely given. The Court overruled two earlier decisions, *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Com'n*, 452 Mich 354, 356-57; 550 NW2d 215 (1996), that had required a showing of "actual prejudice" to the governmental agency from the failure to give timely notice. *Rowland*, 477 Mich at 200.

In *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005), this Court considered the meaning of MCL 600.2912(b), which provides that a person "shall not" commence an action for medical malpractice until 182 days have elapsed after giving the

statutorily-required notice. The Court held that plaintiff's malpractice action, which was filed before the 182 days required by MCL 600.2912(b) had elapsed, did not toll the statute of limitation. The Court noted "that the Legislature's use of the word 'shall' indicates a mandatory and imperative directive." The Court in Burton followed similar holdings in *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000) and *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997).

In *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 602; 822 NW2d 159 (2012), this Court held that "[t]he Legislature's use of the term 'shall' 'indicates a mandatory and imperative directive,'" quoting *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). The Court in *Stand Up* rejected the doctrine of "substantial compliance" as contrary to the plain statutory language, and overruled the contrary Court of Appeals decision in *Bloomfield Charter Twp Charter Township of Bloomfield v. Oakland County Clerk*, 253 Mich App 1; 654 NW2d 610 (2002). See *Stand Up*, 492 Mich at 594, 606-07.

Most recently, in *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012), the Court followed *Rowland*, holding that a similar statute was "mandatory" and acted as an absolute bar to the filing of a claim against the University of Michigan where claimant failed timely to give the notice required by the statute. 492 Mich at 735. The statute, MCL 600.6431, provided that a claimant "shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action . . . ." The Court rejected the contention that either "substantial compliance" or the university's "actual knowledge" satisfied the unambiguous statutory requirement. 492 Mich at 735. The Court concluded, "the courts may not engraft an 'actual prejudice' component onto the statute before enforcing the legislative prohibition." 492 Mich at 738.

The Court's decisions in *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359; 817 NW2d 504 (2012), and *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), are also instructive, since the rules applied in interpreting contracts are similar to the rules applied in interpreting statutes. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467-68; 663 NW2d 447 (2003). In *DeFrain*, an unambiguous provision in the insurance policy required a claimant seeking uninsured motorist benefits to report the accident to the police within 24 hours and to State Farm "within 30 days." 491 Mich at 363. The Court held that plaintiff's failure to give timely notice to State Farm acted as an absolute bar to the claim. The Court reversed the Court of Appeals' conclusion that State Farm was required to show "actual prejudice" as a result of claimant's late notice. 491 Mich at 365, 367-68. This Court relied on its decision in *Rory*, which held that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of 'reasonableness' is an invalid basis upon which to enforce contractual provisions." 473 Mich at 470.

Under each of these decisions, the unambiguous requirement of MCL 765.28(1) that "[a]fter the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear," is mandatory and failure to give the required notice acts as an absolute bar to an action to enforce the bond.

Appellee effectively concedes that MCL 765.28(1) is mandatory, Appellee's Br., pp. 7-8, 9 ("the question before this Court is not whether the word 'shall' imposes a mandatory duty, which it generally does"), but argues that the correct issue is "the appropriate sanction, if any, for noncompliance with a statutory directive." *Id.* at 8. Relying on the Court of Appeals decision in *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993), quoting 3 Sutherland, Statutory

Construction (5th ed.), § 57.19, pp. 47-48, and several U.S. Supreme Court decisions, Appellee contends that if a statute states a time for performing an official duty, but does not expressly provide a sanction for nonperformance, no such sanction exists. Appellee's Br., pp. 7-10.

People v Smith is a 1993 decision by the intermediate Court of Appeals, which was obligated to follow this Court's then-controlling decisions on statutory interpretation. *People v Smith* is no longer good law since this Court in *Rowland* overruled *Hobbs* and *Brown* .

Appellee also relies on *Brock v Pierce Co*, 476 US 253 (1986) and its progeny[2] for the proposition that failure to comply with a statute imposing a time limit for a mandatory official duty does not deprive the official of the power in issue. Appellee suggests that "[r]equiring a surety to demonstrate actual prejudice strikes the appropriate balance . . .." Appellant's Br., p. 12. Besides Appellant's failure to suggest the standards or procedure by which a surety would make such a showing, there are at least four fatal problems with Appellant's argument. First, federal court decisions are neither controlling nor persuasive authority in construing a Michigan statute. See *County of Wayne v Hathcock*, 471 Mich 445, 479-80, 485; 684 NW2d 765 (2004); and Justice Robert P. Young, Jr., "A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy," 33 Okla City L Rev 263, 279 & n 67 (2008).

Second, this Court in *Stand Up for Democracy* necessarily rejected the argument that a statute must expressly spell out the consequences of failure to comply with a mandatory duty. The statue in *Stand Up* provided only that a referendum petition "shall be prepared in the following form," without specifying the consequences. See 492 Mich at 601, quoting MCL 168.482(2).

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[2] *Dolan v United States*, ___ US ___; 130 S Ct 2533 (2010); *Barnhart v Peabody Coal Co*, 537 US 149 (2003); *United States v James Daniel Good Real Property*, 510 US 43 (1993); and *United States v Montalvo-Murillo*, 495 US 711 (1990).

Third, contrary to Appellee's argument, there is no principled reason to assume that the Legislature meant something entirely different when it used the word "shall" to prescribe an official duty than it did when it has used the same word to prescribe a private duty. As this Court stated just last year in *McCahan*, "We can discern no principled reason to limit artificially the principles or logical import of *Rowland* to the circumstances of that case." 492 Mich at 746.

Fourth, *Rowland*, *McCahan* and *Stand Up* explicitly prohibit the type of statutory "interpretation" that involves engrafting "actual prejudice" or similar exceptions like "substantial compliance" onto unambiguous, mandatory statutory language. *Rowland* overruled *Hobbs*, which had engrafted an "actual prejudice" requirement onto the Government Immunity Act. Similarly, *DeFrain* and *Rory* prohibit engrafting such language onto unambiguous contracts. Indeed, Appellant's argument is exactly the sort of statutory revisionism that Justice Young has cautioned against, see 33 Okla City L Rev at 270-71, and which *Rowland* and its progeny intended to root out of Michigan jurisprudence. Also see Antonin Scalia & Bryan A. Garner, Reading Law: Interpretation of Legal Texts, pp. 112-14 & nn 6, 7 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive" (italics in original), and criticizing the decisions upon which Appellee relies).

If Appellee is right, the 2003 amendment to MCL 765.28(1), which changed "may" to "shall", see pp. 5-6, supra, was an act of complete futility by the Legislature, and accomplished nothing. This interpretation would contravene the settled rule that "[w]hen parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. 'The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.'" *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). In accord is

Scalia & Garner, supra, p. 63 (courts must presume that a statute has some effect).

Finally, a statute should be interpreted in a way "which will carry out . . . [its] manifest object". Scalia & Garner, supra, p. 63, quoting *Citizens Bank of Bryan v First State Bank*, 580 SW 344, 348 (Tex 1979). The manifest object of MCL 765.28(1) is to require timely notice that will enable the bonding agency to apprehend and return an absconding defendant to custody, which serves the important public interest of promoting enforcement of our criminal laws. The Court of Appeals' interpretation allows notice to be given years after the defendant has absconded, when the trail is cold and apprehension is impossible, defeating and frustrating the paramount public interest in enforcement of the criminal laws.

III. MCL 765.27 SHOWS THAT THE LEGISLATURE KNOWS HOW TO WAIVE DEFECTS IM PERFORMING A MANDATORY STATUTORY DUTY, AND DID *NOT* DO SO IN MCL 765.28(1)

Appellee also contends that MCL 765.27 "evinces a legislative intent that defective notice does not bar recovery." Appellee's Br., p. 11. This argument is without merit. MCL 765.27 actually establishes the exact opposite of the proposition for which Appellee cites it. MCL 765.27 shows that the Legislature knows how to provide that substantial performance of an official duty is sufficient, but did **not** do so in MCL 765.28(1).

MCL 765.27 provides:

> **No action brought upon any recognizance** entered into in any criminal prosecution, either to appear and answer, or to testify in any court, **shall be barred** or defeated nor shall judgment thereon be arrested, **by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, nor by reason of any defect in the form of the recognizance**, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or a magistrate before whom it was taken was authorized by law to require and take such recognizance.

(Emphasis added). By its plain language, MCL 765.27 waives defects (in the stated circumstances) **only** in (1) the action of the court in "recording the default of any principal or surety," and (2) the "form of the recognizance." In the present case, it is uncontroverted that the trial court properly recorded the Defendant's default, once on February 8, 2008, and again on February 11, 2008. See Appellant's Apx. 13a. And there is no claim that there was any default by the surety, or any defect in the form of the recognizance. Thus, MCL 765.27 is inapplicable by its terms, but – directly contrary to Appellee's argument – shows the Legislature knows how to draft a statute that excuses strict compliance with a statutory duty when it wants to do so: "No action brought upon any recognizance . . . shall be barred" appears in MCL 765.27, but **no such language appears** in MCL 765.28(1). Both sections must be enforced by their plain language, and this is fatal to Appellant's argument.

CONCLUSION AND RELIEF

WHEREFORE, the American Bail Coalition respectfully requests that this Court reverse the decision of the Court of Appeals and overrule *In Re Forfeiture Bail Bond (People v Moore),* 276 Mich App 482, 495; 740 NW2d 734 (2007) as wrongly decided.

Respectfully submitted,

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