STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Talbot, P.J., Beckering and M. J. Kelly, JJ)

HELEN YONO,

Plaintiff / Appellee,

vs.

Supreme Court Docket No. 146603
Court of Appeals Docket No. 308968
Court of Claims Case No. 11-000117-MD

DEPARTMENT OF TRANSPORTATION,

Defendant / Appellant.
_____/

146603 (43)

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B41448

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE COUNTY OF MACOMB, DEPARTMENT OF ROADS, THE ROAD COMMISSION FOR OAKLAND COUNTY, AND WAYNE COUNTY IN SUPPORT OF DEFENDANT / APPELLANT DEPARTMENT OF TRANSPORTATION'S APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted by:

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NOW COMES *Amicus Curiae* the County of Macomb, Department of Roads, the Road Commission for Oakland County, and the County of Wayne, by and through their counsel of record, Lacey & Jones LLP, and for their Motion for Leave to File an *Amicus Curiae* Brief in the above-captioned matter, state, as follows:

1. *Amicus curiae* Wayne County maintains more than 1,000 miles of county primary and secondary highway. It annually receives dozens of notices under § 4[1] of the

[1] MCL 691.1404.

Governmental Tort Liability Act (GTLA)[2] in which claims are asserted under § 2, the so-called "highway exception" to governmental immunity.[3]

2. *Amicus curiae* the Road Commission for Oakland County is responsible for nearly 2,700 miles of highway.

3. *Amicus curiae*, Macomb County, through its Department of Roads, is responsible for approximately 1,888 miles of highway.

4. As with Wayne County, the counties of Macomb and Oakland receive many notices each year asserting claims under the highway exception.

5. In the case *sub judice*, the Court of Appeals' published opinion involves an issue of significant importance to *amicus curiae*.[4] This case presents the issue concerning an alleged duty to maintain an "improved portion of a highway designed for vehicular travel" and the holding of the Court of Appeals applies to *amicus curiae*. More particularly, this case involves the "scope" of the definition of "highway" under the highway exception to governmental immunity.

6. Given Plaintiff's factual allegations and the legal disposition of her claim, nearly every "portion" of a highway over which *amicus curiae* exercise jurisdiction will be subject to the scope of the highway exception. Many surface areas of highways and streets (whether integrated into or contiguous with the actual, improved *portion* of the highway that *is* designed for vehicular travel) are untraveled and/or are not designed for vehicular travel within the definition and meaning of the "highway exception" as provided in MCL 691.1401(e) and MCL

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[2] MCL 691.1401 *et seq.*

[3] MCL 691.1402.

[4] *Yono v. Dep't of Transportation*, 299 Mich. App. 102 (2012).

691.1402, and this Court's jurisprudence, respectively. Yet, these areas are quite extensive. As noted in the Department's Application for Leave to Appeal, imposing potential liability on governmental entities will burden these entities to an extent not intended by the GTLA.

7. Governmental entities with jurisdiction over highways with adjacent, integrated and contiguous non-traveled areas cannot ensure they will remain free of every surface anomaly that might arise. Bumps, ruts, surface depressions, debris and/or other road surface conditions resulting from day-to-day use coupled with weather conditions and weather changes associated with Michigan's climate can be present in many instances.[5]

8. The Court of Appeals majority's overly broad definition of highway brings potential liability to *amicus curiae* in a variety of circumstances not intended by the GTLA. To hold governmental entities to an absolute legal standard, which essentially requires perfect surface conditions *at all times* and upon *all surface areas*, is unreasonable, unworkable, and, as demonstrated herein, inconsistent with Michigan law. It imposes potential liability in circumstances not covered by the highway exception to governmental immunity.

9. There is considerable and legitimate concern among *amicus curiae* that the Court of Appeals' ruling will be detrimental to the public *fisc*. In the three counties participating as *amicus curiae* in this brief, there are over 5,500 miles of roadways which constitute "highways" within the meaning of the statutory exception. Virtually every highway that falls within the definition in the statutory exception contains significant surface areas of untraveled, but adjacent and contiguous areas with substantial pedestrian and vehicular occupancy.[6] It is well-established that such areas are frequently used for parking and access to public and private areas. The

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[5] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

[6] MCL 691.1401(e).

majority opinion inappropriately construes the "highway exception" broadly to include these non-traveled areas of every highway.

10. Ultimately, "[t]he liability of the state and county road commissions is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[7] As it is "a central purpose of governmental immunity...to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim based on governmental immunity", it is extremely important for this Court to maintain the Legislature's strictly construed and narrowly applied exceptions to immunity.[8]

11. *Amicus curiae* submit the outcome of this case will have an impact on their financial ability to maintain adequate and serviceable government operations for the support of their respective taxpayers. Every dollar spent litigating claims and every man-hour expended in defending them is a direct and palpable drain on the provision of services to all for the public good.[9] Therefore, *amicus curiae* urge this Court to carefully consider the disposition and outcome of the Department's Application for Leave to Appeal and peremptorily reverse the Court of Appeals' decision or grant the Application so the issues can be properly addressed.

12. The Michigan Supreme Court's Guidance regarding Processing of Cases and Administrative Matters, Section I(C) notes the absence of a Court Rule regarding filing of *amicus curiae* briefs at the application stage, but notes it is not only permitted, but encouraged.

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[7] *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143, 148, n. 1 (2000).

[8] *Mack v. City of Detroit*, 467 Mich. 186, 195 (2002).

[9] *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 410 (2006), citing *Mack, supra* at 203, n. 18.

WHEREFORE, counsel for *amicus curiae,* for good cause and reason, hereby moves this Court for an Order granting its Motion for Leave to File its *Amicus Curiae* Brief in this matter, and to accept said Brief for filing herewith.

Respectfully submitted,

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Dated: April 23, 2013

STATE OF MICHIGAN

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(Talbot, P.J., Beckering and M. J. Kelly, JJ)

HELEN YONO,

Plaintiff / Appellee,

vs.

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DEPARTMENT OF TRANSPORTATION,

Defendant / Appellant.

AMICUS CURIAE BRIEF BY THE COUNTY OF MACOMB, DEPARTMENT OF ROADS, THE ROAD COMMISSION FOR OAKLAND COUNTY, AND WAYNE COUNTY IN SUPPORT OF DEFENDANT / APPELLANT DEPARTMENT OF TRANSPORTATION'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Amicus curiae agree with Defendant / Appellant Department of Transportation's Statement of Jurisdiction (Defendant / Appellant is hereafter referred to as "the Department", unless otherwise specified). This Court has jurisdiction over this case pursuant to MICH CONST 1963 ART 6, § 4; MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b), (4)(a).

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Wayne County maintains more than 1,000 miles of county primary and secondary highway. It annually receives dozens of notices under § 4[1] of the Governmental Tort Liability Act (GTLA)[2] in which claims are asserted under § 2, the so-called "highway exception" to governmental immunity.[3] *Amicus curiae* the Road Commission for Oakland County is responsible for nearly 2,700 miles of highway. *Amicus curiae* Macomb County, through its Department of Roads, is responsible for approximately 1,888 miles of highway.

As with Wayne County, the counties of Macomb and Oakland receive many notices each year asserting claims under the highway exception. This case presents the issue concerning an alleged duty to maintain an "improved portion of a highway designed for vehicular travel" and therefore applies to all governmental entities represented by *amicus curiae*.[4] More particularly, this case involves the "scope" of the definition of "highway" under the highway exception to governmental immunity.

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[1] MCL 691.1404.

[2] MCL 691.1401 *et seq.*

[3] MCL 691.1402.

[4] MCL 691.1402. See also *Duffy v. Dep't of Natural Resources*, 490 Mich. 198, 207 (2011). It should be noted that MCL 224.21 addresses a county road commission's duty to keep in reasonable repair and maintain highways under its jurisdiction in a manner reasonably safe and convenient for public travel. However, the duty expressed in this statute has been held subject to and subsumed by the "highway exception" in MCL 691.1402, such that the principles of immunity inherent in the performance by all governmental entities of governmental functions applies equally to county road commissions as to other governmental entities exercising jurisdiction over highways. See *Potes v. Dep't of State Highways*, 128 Mich. App. 765, 769-770 (1983); *Moerman v. Kalamazoo County Road Comm'n*, 129 Mich. App. 584, 591-592 (1983), superseded by statute on other grounds as stated in *Ehlers v. Dep't of Transportation,* 175 Mich. App. 232 (1988) (citing *Mullins v. Wayne County*, 16 Mich. App. 365, 373, n. 3 (1969), lv. denied 382 Mich. 791 (1969) and stating MCL 691.1402 (the "highway exception" to governmental immunity "imposes an important limitation on the liability of the...county road commission[s]" as described in MCL 224.21).

In the case *sub judice*, the Court of Appeals' published opinion involves an issue of significant importance to *amicus curiae*.[5] Given Plaintiff's factual allegations and the legal disposition of her claim, nearly every "portion" of a highway will be subject to the scope of the highway exception. Many surface areas of highways and streets (whether integrated into or contiguous with the actual, improved *portion* of the highway that *is* designed for vehicular travel) are untraveled and / or are not designed for vehicular travel within the definition and meaning of the "highway exception" as provided in MCL 691.1401(e) and MCL 691.1402, and this Court's jurisprudence, respectively. Yet, these areas are quite extensive. As noted in the Department's Application for Leave to Appeal, imposing potential liability on governmental entities will burden these entities to an extent not intended by the GTLA.[6]

Governmental entities with jurisdiction over highways with adjacent, integrated and contiguous non-traveled areas cannot ensure they will remain free of every surface anomaly that might arise. Bumps, ruts, surface depressions, debris and / or other road surface conditions resulting from day-to-day use coupled with weather conditions and weather changes associated with Michigan's climate can be present in many instances.[7] The Court of Appeals majority's overly broad definition of highway brings potential liability to *amicus curiae* in a variety of circumstances not intended by the GTLA. To hold governmental entities to an absolute legal standard, which essentially requires perfect surface conditions *at all times* and upon *all surface areas*, is unreasonable, unworkable, and, as demonstrated herein, inconsistent with Michigan

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[5] *Yono v. Dep't of Transportation*, 299 Mich. App. 102 (2012).

[6] Department's Application for Leave to Appeal, pp. 15-16; see also *Ross v. Consumers Power Co (On Rehearing)*, 420 Mich. 567, 618 (1984).

[7] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

law. It imposes potential liability in circumstances not covered by the highway exception to governmental immunity.[8]

Such a broad reading of the highway exception is not only contrary to the statute's plain language and this Court's jurisprudence interpreting the exception, but it results in a rule of law contrary to the goals and purpose of the sovereign's common-law *retained-unless-surrendered* immunity from suit. The Legislature's carving out of exceptions to this retained immunity restricts access to Michigan courts but for a small subset of cases where a cause of action falls within the strict parameters of the government's waiver of suit immunity in the GTLA.[9] Ultimately, the Legislature is the only branch that can legitimately waive such immunity. Thus, judicial constructs and interpretations of the highway exception should be confined to strict and faithful application of the Legislature's will in this regard.

In essence, the common-law immunity that pre-existed the GTLA is not subject to judicial deviation. If a rule of law must pronounce an expansion of one of the Legislature's exceptions to this immunity, it should come from this Court.[10] Yet, such deviation is uncommon and, in cases involving the government's suit immunity, naturally restrained to the narrowest confines to remain appropriately deferential to the Legislature's will.[11]

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[8] As explained by this Court in *Nawrocki*, *supra* at 157, governmental agencies are under many duties, including a duty to maintain surface areas outside of the improved portion of a highway actually designed for vehicular travel. However, "[a]lthough governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached." *Id.*, citing *Ross*, *supra* at 618-619.

[9] *Ross*, *supra* at 618.

[10] See *Price v. High Pointe Oil Co.*, ___ Mich. ___ (2013), Slip. Op. at 22-23, 25 and n. 20.

[11] *Id.* See also *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143, 148, n. 1 (2000).

Ultimately, "[t]he liability of the state and county road commissions is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[12] As it is "a central purpose of governmental immunity...to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim based on governmental immunity", it is extremely important for this Court to maintain the Legislature's strictly construed and narrowly applied exceptions to immunity.[13]

The opinion below will burden the public fisc because it allows suit and liability for incidents which occur without the traveled portion of highways designed for vehicular travel. The outcome of this case will have an impact on the ability of *amicus curiae* to maintain adequate and serviceable government operations for the support of their respective taxpayers.[14] Every dollar spent litigating claims and every man-hour expended in defending them is a direct and palpable drain on the provision of services to all for the public good.[15] In this latter regard, *amicus curiae* echoes the sentiments of the Department at pages 15-16 of its Statement in Support of its Application for Leave to Appeal to this Court.

Therefore, *amicus curiae* urge this Court to carefully consider the disposition and outcome of the Department's Application for Leave to Appeal and peremptorily reverse the

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[12] *Nawrocki, supra.*

[13] *Mack v. City of Detroit*, 467 Mich. 186, 195 (2002).

[14] "Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways." *Ross, supra* at 618.

[15] *Id.*, see also *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 410 (2006), citing *Mack, supra* at 203, n. 18.

Court of Appeals' decision or grant the Application so the issues can be addressed in the appropriate forum.[16]

I. INTRODUCTION

This case once again presents the Court with the question of the extent to which the "highway exception"[17] to governmental immunity should be construed to allow a claimant to access Michigan courts via the Legislature's strictly confined waiver of immunity in the GTLA. The People of Michigan, through the Legislature, vest courts with subject-matter jurisdiction in only a small subset of cases against the government.[18] Otherwise, the common-law immunity that pre-existed the GTLA is retained by the state and its subordinate entities.[19] Unless a party complies with the strict, statutory requirements of the GTLA, which strictly limit when governmental entities may be hailed into Michigan courts, the pre-existing immunity inherent in

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[16] *Price*, *supra*.

[17] MCL 691.1402(1).

[18] "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them". *County Rd. Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 118 (2010), citing *Pohutski v. City of Allen Park*, 465 Mich. 675, 681 (2002). See also *Sanilac County v. Auditor General*, 68 Mich. 659, 665 (1888). *Cf. Mack*, *supra* at 195 (stating "a governmental agency is immune *unless* the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government" and holding that a claimant must plead *and* prove at the outset that a case will fit within the narrow exception to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7) (emphasis added)).

[19] *Greenfield Constr. Co. v. Mich. Dep't of State Hwys.*, 402 Mich. 172, 193, 194 (1978), accord *Pohutski*, *supra* at 688. See also *Ross*, *supra* at 596-597 and *Ballard v. Ypsilanti Township*, 457 Mich. 564, 567-569 and 573-576 (1998) (explaining the history of common law immunity, the Legislature's statutorily created exceptions, and the fact that immunity must be expressly waived by statute because Michigan adheres to the jurisdictional view of governmental immunity).

the operations of these entities is not waived – a condition precedent to allowing a court of law to exercise subject-matter jurisdiction over the suit *and* to adjudicate its merits.[20]

Common-law immunity from suit and liability pre-existed the GTLA.[21] This common-law immunity could only be waived by express statutory consent.[22] The People, through the Legislature, allow suits against the government in only a small subset of cases and circumstances. Any court that liberalizes the statutory provisions allowing such suits to proceed is at risk of overstepping its authority because only the People, through the Legislature, can vest in courts of law the subject-matter jurisdiction necessary to adjudicate the merits of a suit against the government. As it goes, the state created the courts and so is not subject to them except by unequivocal statutory consent.[23]

In the case *sub judice*, the Court of Appeals' majority[24] applied an overly broad interpretation of the highway exception, concluding that surface anomalies in non-traveled but contiguous portions of highways can suffice to invoke the government's strictly confined waiver of immunity. As explained in this brief, this published opinion allows litigants to avoid

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[20] "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed." *Greenfield, supra* at 197, citing *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), cert den'd at 317 U.S. 677 (1942). See also *Maskery v. Bd. of Regents of Univ. of Michigan*, 468 Mich. 609, 613-614 (2003) (stating "[a]bsent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function"). See MCL 691.1401(b) defining "governmental function".

[21] *Ross, supra* at 598-599; see also *Ballard v. Ypsilanti Twp.*, 457 Mich. 564, 573-574 (1998), citing *Mead v. Public Service Comm'n*, 303 Mich. 168, 173 (1942).

[22] *Michigan State Bank v. Hastings*, 1 Doug 225, 236 (1844).

[23] *County Rd. Ass'n of Mich., supra* at 118; see also *Reed v. Yackell*, 473 Mich. 520, 547 (2005), citing *Detroit v. Rabault*, 389 Mich. 329, 331 (1973) and stating "Subject-matter jurisdiction is conferred on the court by the authority that created the court." See also footnote 14, *supra*.

[24] The majority panel consisted of Judges Beckering and Kelly, M.J. Presiding Judge Talbot dissented.

governmental immunity by alleging facts that do not constitute *actionable* defects within the meaning of the highway exception and this Court's jurisprudence interpreting same.[25] *Amicus curiae* respectfully submit that the Court of Appeals' decision must be reversed, or, in the alternative, that the Department's Application for Leave to Appeal be granted so the Court can address the issues raised by the errant opinion below.

A. The Court of Appeals' Opinion

A brief explanation of the Court of Appeals' opinion and its reasoning is warranted. In its published opinion, the majority affirmed the trial court's ruling that a depression on the edge of a state highway (M-22), which was located at the edge of the curb in a designated parallel parking space, was a "defect" in the improved portion of the roadbed designed for vehicular travel sufficient to invoke the highway exception to governmental immunity.

The majority cites *Grimes v. Michigan Dep't of Transportation*,[26] in which this Court held shoulders adjacent to highways were not designed for vehicular travel within the meaning of MCL 691.1402(1), and, as such, were not travel lanes. Thus, the shoulder of a highway, although adjacent to and contiguous with the improved and traveled portion of the highway designed for vehicular travel was not itself a "highway" so designed and with respect to which the Department had *both* a *duty* and *potential liability* for a failure of that duty.[27]

In the case *sub judice*, the majority downplays the limiting feature of this Court's proper interpretation of the exception in *Grimes* to those particular lanes *designed* for vehicular travel,

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[25] See *Nawrocki*, *supra* at 157, citing *Ross*, *supra* at 618-619.

[26] 475 Mich. 72, 89-91 (2006).

[27] See *Nawrocki*, *supra* at 157; *Ross*, *supra* at 618-619.

and emphasizes, instead, the word "*travel.*"[28] It then conflates the Department's argument that it has no *liability imposing duty* to maintain, in the majority's words, "a variety of highway improvements that were plainly designed for vehicular travel, but nevertheless not part of that portion of the highway commonly used as the thoroughfare", with the location of the alleged actionable defect in this case (a parallel parking space).[29] The majority asserts that according to the Department's argument, it "would have no duty to repair or maintain left-turn lanes, merge lanes, on and off ramps, right-turn lanes, lanes designed to permit vehicles to access the opposite side of a divided highway, such as median u-turn lanes and emergency turnarounds, or even the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left."[30] The majority then proceeds to destroy this "straw man",[31] as follows:

> [I]n each case, the lanes, or parts of lanes, are plainly designed for vehicular travel – *albeit limited travel.* We cannot give MCL 691.1402(1) a contrived meaning that contravenes its plain and ordinary sense. As our Supreme Court explained in *Grimes*, it is the *design* that controls whether the improvement falls within the highway exception. As such, if the improvement was *designed* for vehicular travel, it does not matter that it is not located within that portion of the highway that is mainly used for travel. Here, the highway—including that portion designated for parallel parking—is a contiguous whole; the portion where parallel parking is permitted is not physically separated from the center of the highway by a median, driveway, or other barrier. Absent the

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[28] *Yono v. Dep't of Transportation*, 299 Mich. App. 102 (2012), Slip Op. at 4.

[29] *Id.* at 4-5.

[30] *Id.* at 5. As noted by the Department in its Application to this Court, it does not dispute that these particularly listed features of a highway are designed for vehicular travel. See the Department's Application for Leave to Appeal, pp. 12-13.

[31] In fact, the Department makes no such assertion in its Application for Leave to Appeal; nor was such an argument put forth by the Department in the trial court. See *Id.*, pp. 9-13. In fact, the Department rightfully points out the unsupported (in fact refuted) emphasis placed by the majority on the word "travel" and its commensurately unjustified de-emphasis on the word "designed". See *Id.*, pp 10-12.

> painted markings, the area for parallel parking would be indistinguishable from the remainder of the highway. It is also evident that the lanes designated for parking were designed both to permit vehicles to merge from the center lanes to the parking lanes and from the parking lanes to the center lanes.[32]

The majority then judicially recognizes that the spans of parallel parking spaces that run parallel to the actual travel lanes of M-22 designed for regular vehicular travel, which spans comprise approximately 15 feet, or 7.5 feet on either side of the highway, are themselves capable of being used as regular thoroughfares.[33] The Court concludes: "the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the repair and maintenance of the area outside that used as a thoroughfare."[34] Having thus *distinguished* parallel parking spaces from highway shoulders, the majority concludes:

> For these reasons, the area of the highway designated for parallel parking are distinguishable from the shoulder at issue in *Grimes*. A highway shoulder is not designed for regular or continuous vehicular travel; rather, it is designed to permit brief moments of travel during an emergency and to provide a vehicle with a safe place to stop without blocking the highway. In contrast, the parallel

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[32] *Id.* at 5 (emphasis added) (internal citations omitted).

[33] *Id.* at 5.

[34] *Id.* at 6. *Amicus curiae* respectfully submit this inferred statement by the majority is, in fact, representative of the proper scope of the highway exception within the meaning of the statute and this Court's body of jurisprudence on the subject, notwithstanding the Department's *limited* concession at oral argument. See *Id.* at 3-4 (Talbot, P.J., dissenting opinion). Indeed, as explained by this Court in *Ross*, *supra* at 618-619, and, more recently in *Nawrocki*, *supra* at 157, there is a distinct difference between those areas of a highway with respect to which a governmental entity may have a *duty* to maintain and repair, and those areas of a highway with respect to which a governmental entity may have an *actionable duty* in this regard; or, put another way, those areas with respect to which a failure of the government's duty to maintain and repair may give rise to liability (assuming, of course, all remaining elements of the tort necessary to prove the case can be established). *Nawrocki, supra* at 157. Thus, it makes perfect sense, when viewed from the proper orientation of the retained-unless-surrendered nature of the government's preexisting immunity, and the strict confines required by the Legislature of the government's waiver thereof, to restrict the definition of highway to such a degree.

> parking areas at issue here are integrated into the highway's main travel lanes and were designed for regular vehicular travel in a variety of contexts.[35]

Judge Talbot dissented. He explains the portion of the roadway where plaintiff was allegedly injured is not "in the improved portion of the highway designed for vehicular travel".[36] It is rather, "at the edge of the parallel parking lane 'abutting the concrete gutter and curb'".[37] Judge Talbot points out the majority's error in conflating "concepts of contemplated use" and "design".[38] He also notes the majority apparently relied on the fact that the parallel parking spaces were not physically separated from the travel lane as if such separation would be required.[39]

Judge Talbot also challenges the majority's liberty to assert that this Court's failure to restrict the concept of travel in *Grimes*, gave the panel the judicial authority to construe the statute in a manner broader than intended by the Legislature.[40] Echoing his admonitions in *Lameau v. City of Royal Oak*,[41] Judge Talbot cautioned the majority against "attempting to judicially legislate and fashion a general rule" regarding the Department's duty related to

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[35] *Id.* at 6.

[36] *Id.* at 1 (Talbot, P.J., dissenting).

[37] *Id.*

[38] *Id.* at 2.

[39] *Id.* at 4.

[40] *Id.*

[41] 289 Mich. App. 153, 189 (2010) (Talbot, J., dissenting), rev'd by 490 Mich. 949 (2011), for the reasons articulated by Justice Talbot in his dissenting opinion.

highways as opposed to applying an established rule of law to the facts, the latter of which was the court's only mandate in this instance.[42]

B. Grounds for Appeal

The Department filed an Application for Leave to Appeal in this Court pursuant to MCR 7.302(B), which provides guidance with respect to the grounds justifying this Court's acceptance of an application. Many of the reasons stated in this court rule are present in the instant case.

The expansive reading by the Court of Appeals of the "highway exception", which this Court has mandated be narrowly construed in accordance with the broadly applied and preexisting immunity to which the government is entitled, threatens the very purpose of the GTLA.[43] If the majority's ruling is indicative of a proper interpretation of *the exception* to the government's broad immunity under MCL 691.1402, then hardly a case will exist in which the exception cannot be invoked to proceed with a full trial on the merits. This is because highways contain many adjacent and contiguous surface areas with anomalies like that alleged in the instant case.

If a plaintiff can survive a motion under MCR 2.116(C)(7) merely by alleging such a defect caused his or her injuries, then the protections afforded by the statute will be meaningless.[44] Thus, the *exception* will become the rule, and the Legislature's broad and

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[42] Slip Op. at 4 (Talbot, P.J., dissenting), citing *Grimes*, 475 Mich. 72, 74, 92 (2006).

[43] *Nawrocki*, *supra* at 174-175.

[44] As explained in the argument section, *infra*, the plain language of the highway exception, narrowly construed as it must be, contains its *own* strict limitations by confining the location of an *actionable defect* to only a "portion" of a highway; to wit, "the improved *portion* of the highway designed for vehicular travel". MCL 691.1402(1) (emphasis supplied). Moreover, this strict limitation is further evidenced by the *exclusion* of "any other installation outside of the improved portion of the highway designed for vehicular travel." *Id.* A strict interpretation of the *excluded* areas, coupled with a *broad* definition of the term installation, both of which are

uniform grant of immunity will cease to exist. Therefore, the validity of MCL 691.1402 is threatened by the Court of Appeals' ruling. MCR 7.302(B)(1).

The disposition of this suit, absent this Court's intervention will result in substantial harm to the Department, and governmental entities, including *amicus curiae* represented herein. MCR 7.302(B)(5).[45] As noted previously, this Court in *Nawrocki*[46] and, more recently, in *Costa*,[47] stressed that the financial burden of a full trial on the merits in a suit against the government *always* provides sufficient cause to narrowly construe the statutory exceptions to immunity. Indeed, in these cases it is the state that bears the ultimate burden because the state's taxpayers provide the revenue to defend civil lawsuits and pay judgments rendered therefrom.[48]

Thus, the Department's Application for Leave to Appeal fulfills the requirements of MCR 7.302(B)(2) and (B)(3) in that the public's interest is directly implicated and the matter is of major significance to the state's jurisprudence, respectively. The Department details the effects of allowing the Court of Appeals' majority decision to stand upon the day-to-day operations of the governmental entities affected by the Court of Appeals' decision.[49] *Amicus curiae* are in the same position as the Department with respect to the consequences of this decision.

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required under the rules of interpretation concerning the highway exception, yields the argument that "parallel parking spaces" and the like, are, themselves, "installations outside of the improved *portion* of the highway *designed for* vehicular travel." *Id.* (emphasis added).

[45] *Costa, supra* at 410 (the purpose of immunity is to avoid the expense of having to contest claims against the government); *Mack*, 467 Mich. at 203, n. 18.

[46] *Nawrocki, supra* at 148, n. 1.

[47] 475 Mich. 403, 409-410 (2006).

[48] *Nawrocki, supra.*

[49] Department's Application for Leave to Appeal, pp. 2-3 and 14-16.

As further noted in the Department's Application for Leave to Appeal, and as further discussed herein, the Court of Appeals majority's opinion is clearly erroneous for at least three reasons.[50] First, the plain language of the exception, without the need for interpretation, supports the Department's position that no actionable defect can be alleged and proved in this case. Second, the opinion offers judicial of the plain language of the highway exception that results in an overly broad definition of the term "highway" to include areas in which non-actionable defects are now actionable. Third, it is, as the Department points out, contrary to this Court's body of jurisprudence interpreting the highway exception, and directly inconsistent with the Court's decision in *Grimes*.[51]

In addition to the grounds justifying this Court's review, the decision below is based on a policy choice that runs contrary, in all important particulars, to the goals and purpose of the GTLA. If a duty is imposed in this case, then it may be contended it is the government's duty to maintain constant patrols searching for the slightest anomaly in all surface areas of highways. Indeed, every pock mark, pothole, and indentation without the traveled portions of highways would subject the governmental entity with jurisdiction over it to suit and potential liability.

Governmental entities expend a great deal of resources maintaining public roads and highways every year and they are already aspirated of funds. As this Court noted long ago:

> If a liability exists, it is because of *a defect in the highway*; and, if ice frozen upon a sidewalk is a defect when it is caused by water flowing from a roof, why should it not be when it flows from a vacant lot, or when it falls upon the walk, or is caused by the melting of snow upon or adjoining such walk? If from a failure to keep its highways in a reasonably safe condition for travel extends

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[50] See MCR 7.302(B)(5) (the Court of Appeals' decision is clearly erroneous).

[51] *Id.* (the Court of Appeals' opinion conflicts with a decision of this Court). See *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72 (2006).

> to cases where such condition is not ascribable to defects in the construction and maintenance of the way, or to the action of the officers of the city or their negligence in the performance of a duty, it may be contended that cities must cause the streets to be patrolled, in search of bricks or coals that fall from wagons, for the treacherous banana peel, upon which the unwary are sure to slip, and for tacks or bits of glass or other rubbish, which puncture the tires of bicycles...such are not *defects in the highway*.[52]

To impose a duty to prevent the conditions described in Plaintiff's Complaint would be tantamount to requiring virtually perfect roadbed surfaces at all times upon all surface areas of roadways contiguous with and adjacent to the travel lanes of "highways". This is a proposition soundly rejected by this Court's jurisprudence.[53]

There is considerable and legitimate concern among *amicus curiae* that the Court of Appeals' ruling will be detrimental to the public *fisc*. In the three counties participating as *amicus curiae* in this brief, there are over 5,500 miles of roadways which constitute "highways" within the meaning of the statutory exception. Virtually every highway that falls within the definition in the statutory exception contains significant surface areas of untraveled, but adjacent and contiguous areas with substantial pedestrian and vehicular occupancy.[54] It is well-established that such areas are frequently used for parking and access to public and private areas. The majority opinion inappropriately construes the "highway exception" broadly to include these non-traveled areas of every highway.

Needless to say, the Court of Appeals decision, if left to stand, will have substantial economic consequences. Such consequences will be realized in the cost of liability imposed for

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[52] See *Mayo v. Village of Baraga*, 178 Mich. 171, 173-174 (1913) (emphasis added).

[53] See, e.g. *Wilson v. Alpena County Rd. Comm'n*, 474 Mich. 161, 167-169 (2006).

[54] MCL 691.1401(e).

a failure to maintain these roadways, or in expenditures made for the latter to avoid the former. This forced mandate is directly contrary to this Court's jurisprudence establishing that governmental entities have duty only to keep highways in *reasonable* repair.[55]

Ultimately, the sweeping ruling of the Court of Appeals is contrary to the basic notion that exceptions to governmental immunity are to be narrowly construed and the immunity extended to all governmental entities is to be broadly conferred.[56] It appears the majority broadly construed an exception to immunity, which is prohibited when interpreting statutes that waive the government's suit immunity. Strict or narrow interpretation of statutory provisions that allow suits against the government is a well-established principle of statutory construction that has its roots in the jurisdictional principles underlying governmental immunity.[57] Not only was this broad reading contrary to the principle that exceptions to governmental immunity are strictly construed and narrowly applied, but the majority panel also erred by essentially concluding, contrary to this Court's jurisprudence, that governmental entities must maintain nearly perfect conditions at all times to avoid what can be an omnipresent condition in areas adjacent to and contiguous with Michigan highways at any given time. The Court of Appeals appears to have skirted the application of this Court's binding ruling in *Grimes*[58] which, by all accounts does appear to contain a discernible ruling with respect to similar, if not legally

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[55] *Wilson, supra* at 168.

[56] *Nawrocki, supra* at 159.

[57] *Atkins v. SMART*, 492 Mich. 707, 714-715 and n. 11 (2012), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chose").

[58] *Grimes, supra.*

identical facts. It is therefore binding precedent that the Court of Appeals should have followed.[59]

Amicus curiae hereby urge the Court to peremptorily reverse the Court of Appeals or grant the Department's Application. The following constitutes argument and analysis supporting this position.

II. ARGUMENT AND ANALYSIS

A. Standard of Review

The Court of Appeals based its decision on the trial court's ruling on a motion brought by the Department pursuant to MCR 2.116(C)(7). Rulings on such motions are reviewed *de novo* by this Court.[60] In this case, MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.[61] The Court of Appeals interpreted MCL 6901.1401(e) and MCL 691.1402 of the GTLA. Review of its interpretation of a statute is also *de novo*.[62]

B. Applicable Law

Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, which limits imposition of tort liability upon a governmental agency.[63] Under the GTLA, governmental agencies are immune from tort liability when engaged in a

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[59] MICH CONST 1963, ART 6, § 6. See also *DeFrain v. State Farm Mut. Auto Ins. Co.*, 491 Mich. 359 (2012).

[60] *Maiden v. Rozwood*, 461 Mich. 109, 118 (1999).

[61] *Haliw v. Sterling Heights*, 464 Mich. 297, 301-302 (2001), quoting *Glancy v. Roseville*, 457 Mich. 580, 583 (1998).

[62] *Maiden, supra* at 119. See also *Mitan v. Campbell*, 474 Mich. 21, 23 (2005).

[63] *Ross v. Consumers Power Co.*, 420 Mich. 567, 621 (1984).

governmental function.[64] Immunity from tort liability is expressed in the broadest possible language – immunity is extended to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function.[65]

1. Michigan Adheres to the Jurisdictional Notion of Governmental Immunity

Michigan courts originally recognized that the state cannot be sued unless it consents to the jurisdiction of the courts. An act of the Legislature conferring such jurisdiction is the only means by which the state agrees to submit itself to the judgment of the judicial branch.[66] Immunity from suit is an inherent characteristic of government.[67] The GTLA preserved the doctrine as it existed at common law.[68] A necessary predicate of this retained immunity is the lack of a court's jurisdiction over claims not perfected in strict compliance with the Legislature's *express*, but *limited*, waiver thereof.[69]

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[64] MCL 691.1407(1); *Duffy*, *supra*.

[65] *Ross*, *supra* at 618.

[66] *Dermont v. Mayor of Detroit*, 4 Mich. 435, 441 (1857), *accord City of Detroit v. Blackeby*, 21 Mich. 84, 113, 117 (1870) (CAMPBELL, J.) (stating "there is no common law liability against towns and counties and they cannot be sued except by statute"), overruled in part by *Williams v. City of Detroit*, 364 Mich. 231 (1961), which was later limited by this Court in *McDowell v. State Hwy. Comm'r*, 365 Mich. 268 (1961), and then completely disavowed by the Legislature's enactment of the GTLA, which restored sovereign immunity uniformly to all governmental entities. See also the discussion in *Odom v. Wayne County*, 482 Mich. 459, 467-468 (2008).

[67] *Mack v City of Detroit*, 467 Mich 186, 203 (2002). See also *Ballard v. Ypsilanti Township.*, 457 Mich. 564, 567 (1998).

[68] *Id.* at 202, accord *Pohutski*, *supra* at 705 (by enacting the GTLA the Legislature retained the sovereign immunity that existed at common law in Michigan and extended that immunity to all other governmental entities encompassed within the act).

[69] *Greenfield Constr. Co. v. Mich. Dep't of State Hwys.*, 402 Mich. 172, 193, 194 (1978), accord *Michigan State Bank v. Hastings*, 1 Doug 225, 236 (1844).

Therefore, the immunity retained by the GTLA is jurisdictional.[70] "[T]he state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment".[71] The Legislature, not the judiciary, is the body that expresses the will of the sovereign, i.e., the People, and must therefore be the means by which subject-matter jurisdiction is conferred.[72] Therefore, the highway exception is to be strictly construed and narrowly applied because it vests the courts with the People's jealously guarded waiver of immunity and acquiescence to suit.[73]

2. General Principles of Statutory Interpretation

When this Court reviews interpretation of legislative provisions, its primary goal is to consider whether the reviewing court properly discerned the Legislature's intent as expressed in the statute's language.[74] In doing so, it is the Court's "duty to accept [a] statute as expressing the will of our people and to give it complete effect."[75] "[T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives."[76] "The Legislature is

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[70] *Ballard, supra* at 568, citing *Ross, supra* at 598.

[71] *Id.* (emphasis added).

[72] *Hastings, supra*; *Greenfield Constr. Co., supra*; *Pohutski, supra*; *Odom, supra* at 477.

[73] *Nawrocki, supra* at 158. See also *Atkins v. SMART*, 492 Mich. 707, 714-715 and n. 11 (2012), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred *any limitations it chose*") (emphasis added).

[74] *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 76 (2006), citing *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402 (2000).

[75] *Knight Morley v. Mich. Employment Security Comm'n*, 350 Mich. 397, 417 (1957).

[76] *Rowland v. Washtenaw County Road Comm'n*, 477 Mich. 197, 214, n. 10 (2007).

presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."[77]

The meaning of the Legislature "is to be found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense."[78] Statutory language should thus be given a reasonable construction "considering the provision's purpose and the object sought to be accomplished."[79]

Additionally, when parsing a statute, it is to be presumed "every word is used for a purpose" and effect will be given "to every clause and sentence."[80] Therefore, courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory.[81] Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another."[82] Arbitrary substitution of words and phrases in a statute to fit a different meaning or to attribute a greater or lesser significance to the provision is prohibited.[83]

It follows that a court may not impose its own policy choices when interpreting a statute.[84] "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy

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[77] MCL 8.3a; *Robertson v. Daimler Chrysler Corp.*, 465 Mich. 732, 748 (2002).

[78] *Gross v. General Motors Corp*, 448 Mich. 147, 160 (1995) (emphasis added).

[79] *Michigan Humane Society v. Natural Resource Comm'n*, 158 Mich. App. 393, 401 (1987).

[80] *Pohutski, supra* at 683.

[81] *Id.* at 684.

[82] *Robinson v. City of Detroit*, 462 Mich. 439, 459 (2000).

[83] *Pohutski, supra* at 687-688, 688.

[84] *People v. McIntire*, 461 Mich. 147, 152 (1999).

decisions for those already made by the Legislature."[85] In short, a court has no authority to add words, conditions or restrictions to a statute.[86]

3. Statutory Interpretation and the GTLA

The Court of Appeals interpreted MCL 691.1401(e) and MCL 691.1402(1) of the GTLA, the "highway exception" to governmental immunity. More particularly, the court examined the meaning and scope of the definition of "highway" as used within that provision, and as further interpreted by this Court's jurisprudence.

This Court's common-law jurisprudence has developed special rules for interpreting provisions the waiver of the government's pre-existing suit immunity. With respect to the GTLA, [this Court's] duty is to interpret the statutory language in the manner intended by the Legislature which enacted [the GTLA]."[87] Thus, in construing the GTLA, "courts may not speculate about an unstated purpose," *e.g.*, the creation of a common-law exception or an overly broad application of a statutory exception, "where the unambiguous text plainly reflects the intent of the Legislature."[88]

Specific provisions in the GTLA prevail over general statements in other parts of the statute.[89] The GTLA provisions granting immunity are broadly construed and the exceptions

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[85] *Rowland, supra*, citing *Mayor of Lansing v. Michigan Public Service Comm'n*, 470 Mich. 154, 167 (2004).

[86] *Id.*

[87] *Reardon v. Dep't of Mental Health*, 430 Mich. 398, 408 (1988), citing *Hyde v. Univ. of Mich. Bd. of Regents*, 426 Mich. 223, 244 (1986).

[88] *Gladych v. New Family Homes, Inc.*, 468 Mich. 594, 597 (2002), citing *Pohutski, supra* at 683.

[89] *Jones v. Enertel Inc*, 467 Mich. 266, 270 (2002).

thereto are narrowly drawn.[90] As a result, "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]."[91] In 1986, "the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."[92]

a. The Necessity of Deciding Immunity at the Earliest Stage of Litigation

"[A] 'central purpose' of governmental immunity is 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.'"[93] Thus, merely allowing governmental entities to assert immunity "while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare [a] defense, would render illusory the immunity afforded by the

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[90] *Nawrocki, supra* at 158.

[91] *Id.* at 158-159 (emphasis added). See also *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 629-630 (1990).

[92] *Id.* at n. 16. The principle of statutory construction requiring strict or narrow interpretation of exceptions to governmental immunity has a distinguished pedigree. 3 Sands, Sutherland Statutory Construction (4th ed.), § 62.01, p. 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), cert den'd *Manion v. State of Michigan*, 317 U.S. 677 (1942). See also *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v. United States*, 155 U.S. 163, 166, 167-168 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

[93] *Costa*, 475 Mich. at 410.

[GTLA]."[94] Therefore, it is essential that motions for summary disposition based on the government's claim of immunity from suit be carefully considered.

b. The Burden is on the Plaintiff to Demonstrate (Plead and Prove) an Exception to Immunity

It follows from the GTLA's protective structure that a plaintiff must "allege facts justifying the application of an exception to governmental immunity".[95] Further, if a plaintiff alleges that governmental immunity *does not apply*, the burden is on the plaintiff to proffer material facts to the contrary.[96] Indeed, the burden is on plaintiff at the outset to both *plead* and *prove* facts in avoidance of immunity.[97]

c. The Jurisprudential Theme in Addressing Governmental Immunity Cases

Finally, and perhaps most important, this Court has developed a theme in addressing the overarching public policy concerns and importance of governmental immunity. As such, this Court strives for the following: (1) to faithfully interpret and define the GTLA "to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability"; (2) to "formulate an approach which is faithful to the statutory language and legislative intent"; and (3) develop a consensus of "what the Legislature intended the law to be" in the realm of governmental immunity.[98]

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[94] *Id.*

[95] *Fane v. Detroit Library Comm'n*, 465 Mich. 68, 74 (2001); *Mack*, *supra* at 203, 204.

[96] *Mack*, *supra* at 204, 205.

[97] *Id.* at 199.

[98] *Nawrocki*, *supra* at 148-149.

4. The Highway Exception to Governmental Immunity

Applying these principles of interpretation and application of the GTLA, this Court has developed a well-established jurisprudence concerning interpretation and application of MCL 691.1402, the "highway exception" to the government's broadly retained immunity from suit. The construction and maintenance of highways is the discharge of a governmental function for which the governmental entity with jurisdiction over a particular highway is generally immune from suit.[99] Interpreting and applying the highway exception requires a court to parse each sentence of the statute to ascertain the scope of the exception, as determined by the stated policy considerations of the Legislature.[100]

The GTLA additionally defines the term "highway" as follows:

> "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.[101]

MCL 691.1402 provides, in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in *reasonable* repair so that it is *reasonably* safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property *by reason of failure* of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road

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[99] *Braun v. Wayne County*, 303 Mich. 454 (1942) (addressing C.L. 1929, § 3996, a predecessor to MCL 691.1402 of the GTLA). See also *Thomas v. Dep't of State Highways*, 398 Mich. 1 (1976).

[100] *Nawrocki*, *supra* at 159-160.

[101] MCL 691.1401(e).

> commission shall be as provided in ...MCL 224.21.[102] [T]he duty of a governmental agency to repair and maintain highways, and the liability for that duty, *extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel....*[103]

MCL 691.1401(e) and MCL 691.1402 are to be read together as a single, comprehensive law.[104] When construing the terms of these provisions together, as required, the Court must give effect to *all* terms and phrases used in the exception.[105] In determining whether a particular governmental defendant has a duty to maintain a highway in a particular case (or, whether there is an "actionable defect"), this Court has stated it is "cognizant of the challenges presented by the drafting of the highway exception and mindful that [it is] 'constrained to apply the statutory language as best as possible as written....'"[106]

Three directly pertinent principles have emerged from this Court's jurisprudence interpreting the exception. First, the responsible governmental agency has only a duty of maintaining highways in *reasonable* repair and in a *reasonably safe* condition. Second, from this first principle, the responsible governmental agency does not have to maintain perfect roadway conditions to fulfill its duties. Third, the actionable defect must be a persistent defect existing within the improved *portion* of the highway designed for vehicular travel.[107] From these

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[102] See footnote 4, *supra.*

[103] MCL 691.1402(1) (emphasis added).

[104] *Robinson v. City of Lansing*, 486 Mich. 1, 8, n. 4 (2010).

[105] *Id.* at 213 and n. 5, citing *People v. Jackson*, 487 Mich. 783, 791 (2010); *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 237 (1999).

[106] *Duffy*, 490 Mich. at 206, quoting *Nawrocki*, *supra* at 171.

[107] *Grimes*, *supra.*

principles, a workable interpretation of sentence 1 and sentence 2 of MCL 691.1402(1) has emerged.

MCL 691.1402(1) requires the responsible governmental agency to repair and maintain the improved portion of the highways designed for vehicular travel that are within their jurisdiction.[108] This duty is measured by a standard of reasonableness applied to the governmental entity and the duty arises only when it can be shown that there were permanent and persistent defects within the portion of the roadway designed for vehicular travel.[109] As confirmed by this Court in *Nawrocki*, only injury occasioned by a defect that is the result of the responsible governmental entity's failure to keep a highway in reasonable repair and in a condition reasonably safe for public travel is actionable.[110] The case *sub judice* presents the Court with the opportunity to apply this rule of law.

a. The Duty of Reasonable Repair and Maintenance

The first sentence of the exception describes the basic duty imposed on all governmental agencies having jurisdiction over any highway: "[to] maintain the highway in *reasonable* repair so that it is *reasonably* safe and convenient for public travel."[111] As stated, this sentence establishes a duty to keep the highway only in *reasonable* repair. *Id.* As explained by the Court, the phrase "so that it is reasonably safe and convenient for public travel" "refers to the duty to maintain and repair". *Id.* Importantly, the Court noted this provision's plain language expresses

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[108] See *Evens v. Shiawassee County Road Commission*, 463 Mich. 143, 183-184 (2000) (*Evens* was a case that was consolidated with and addressed in *Nawrocki*).

[109] *Id.*

[110] *Id.* at 160, citing *Pick v. Szymzak*, 451 Mich. 607, 635-637 (1996) (Riley, J., dissenting).

[111] *Id.* at 160; MCL 691.1402(1) (emphasis added).

only "the desired outcome of reasonably repairing and maintaining the highway; *it does not establish a second duty to keep the highway 'reasonably safe'*".[112]

b. The Duty to Keep Highways in Reasonable Repair Does Not Require Perfection in Roadbed Conditions

In *Wilson v. Alpena County Rd. Comm'n*,[113] the Court elaborated on what *Nawrocki* meant for the government's duty to maintain highways in reasonable repair and to keep them reasonably safe and convenient for public travel. The Court noted that pursuant to MCL 691.1403 "in order for immunity to be *waived*, the agency must have had actual or constructive notice of 'the defect' *before the accident occurred.*"[114] In determining what constitutes such a "defect" in the roadway, the Court concluded that this inquiry is dictated by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1).[115]

In this regard, the Court stated that "[a]n *imperfection* in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' *and* the government agency is on notice of that fact."[116] Thus, MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair'...."[117] The Court explained "[t]he governmental

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[112] *Id.* (emphasis added), citing *Pick, supra.*

[113] 474 Mich. 161, 167-169 (2006). The Court in *Wilson* addressed the issue of "what notice of a defect in a road the governmental agency responsible for road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect." *Id.* at 162-163.

[114] *Id.* (emphasis added).

[115] *Id.*

[116] *Id.* at 168 (emphasis added).

[117] *Id.*

agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair."[118]

Thus, conditions may exist on a highway which, while unsafe and hazardous, do not rise to the level of the type of defect that a governmental agency is expected to address. As stated by Justice Coleman, speaking to the concept of holding the government only to the duty to keep highways reasonably safe for public travel, stated: "We will not require of [the government] more than what is reasonable under the circumstances; nor will we make [it] an insurer of the travelers of the roadway."[119]

c. Grimes Establishes the Proper Scope of the Term "Highway" for Purposes of Determining Actionable Defects

Nawrocki cautioned that an impermissibly "broad, rather than a narrow, reading of the highway exception is required in order to conclude that it is applicable to anything *but the highway* itself" and that such interpretations that did not "'limit[] governmental responsibility for public roadways to factors that are physically part of the roadbed itself'" would be a "complete abrogation of this Court's duty to *narrowly* construe exceptions to the broad grant of immunity."

Therefore, within the parameters of the foregoing framework, it is no surprise this Court's interpretation of the term "highway" has been restricted to only those lanes or thoroughfares of a highway actually *designed* and *used* for ordinary vehicular travel. It follows that *actionable* defects are only those that exist within the physical confines of this narrowest

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[118] *Id.* (emphasis in original).

[119] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

definition of "highway". The plain language of the statute, as well as this Court's jurisprudence fully supports this conclusion.

5. Summary of Applicable Principles

"The highway exception...is limited exclusively to dangerous or defective conditions *within the improved portion of the highway* designed for vehicular travel; that is, the *actual roadbed*, paved or unpaved, designed for vehicular travel."[120] In keeping with his or her burden to plead and prove facts in avoidance of immunity,[121] a plaintiff pursuing a cause of action under the highway exception must demonstrate the existence of an actionable defect, and that the government's failure to fulfill its duty with respect to that defect was *the* proximate cause of the injury complained of.[122] A defect is not actionable, even if it is a defect, if it does not exist within the improved portion of the highway actually designed and used for regular and ordinary vehicular traffic.

If the facts of a particular case demonstrate an alleged defect is not within "the improved portion of the highway designed for vehicular travel", the plaintiff will have failed to carry her burden to prove her prima facie case.[123] This also implicates the jurisdictional principle of governmental immunity. A failure to prove the prima facie case would necessarily mean that a trial court has no subject matter jurisdiction, i.e., a condition precedent to the government's suit

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[120] *Nawrocki*, *supra* at 151-152 (emphasis added).

[121] *Mack*, *supra* at 195.

[122] *Nawrocki*, *supra*.

[123] *Mack*, *supra*.

immunity will not have been fulfilled.[124] *Amicus curiae* respectfully submit that Plaintiff cannot sustain her burden in this case.

C. Analysis

In *Nawrocki*, this Court noted it was "return[ing] to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute previously issued by this Court and the Court of Appeals."[125] Although the majority acknowledges this Court's decision in *Grimes*[126] held "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)," it nonetheless attempts to distinguish that decision and thus creates that prohibited layer of judicial gloss referenced in *Nawrocki*.

There is merit to Judge Talbot's dissent. It appears the majority broadly construed an exception to immunity, which is prohibited when interpreting statutes that waive the government's suit immunity. Strict or narrow interpretation of statutory provisions that allow suits against the government is a well-established principle of statutory construction that has its roots in the jurisdictional principles underlying governmental immunity.[127] Not only was this broad reading contrary to the principle that exceptions to governmental immunity are strictly construed and narrowly applied, but the majority panel also erred by essentially concluding, contrary to this Court's jurisprudence, that governmental entities must maintain nearly perfect

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[124] See discussion, *supra* at pp. 17-18. See also, *Atkins*, 492 Mich. 714-715 and n. 11.

[125] *Nawrocki*, *supra* at 150.

[126] 475 Mich. 72, 91 (2006).

[127] See footnote 92, *supra*.

conditions at all times to avoid what can be an omnipresent condition in areas adjacent to Michigan highways at any given time.

1. The Plain Language of the Highway Exception Precludes Plaintiff's Suit

"[T]he highway exception applies when a plaintiff's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel".[128] The first sentence and second sentence of MCL 691.1402(1) must be read and applied together such that the government's duty, as expressed in the first sentence, must be shown to have been breached, and the breach must be shown to have been the direct cause of the defect that was then the direct and only cause of the accident.[129] If a particular "defect" is not in a "highway" as defined and applied, it is not an "actionable" defect.

Applying the rules of statutory interpretation and the special rules developed for statutory exceptions to immunity, the "defect" in the instant case was not an "actionable defect". Construing MCL 691.1401(e) and MCL 691.1402(1) together, as the Court must do,[130] reveals that the state's and a county's duty "to repair and maintain, and resulting liability for a breach of that duty, extends only to the improved *portion* of the highway designed for vehicular travel *and does not include* sidewalks, trailways, crosswalks, or *any other installation* outside the improved portion of the highway so designed.[131]

The statute therefore limits the location of an actionable defect and the concomitant duty to only a "portion" of the highway – the "improved portion" that is designed for vehicular travel.

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[128] *Nawrocki, supra* at 151.

[129] *Id.* at 160-161.

[130] *Id.*

[131] MCL 691.1402(1) (emphasis added).

The provision then excludes sidewalks, trailways, crosswalks, or *any other installation* that is not *part of* this "portion" of the highway.[132]

Strictly construing the language of this provision, two conclusions can easily be drawn. First, if a defect is not located within the improved portion of a highway designed for vehicular travel, then it is not actionable, because it is not located in the "highway" as that term is defined and applied under MCL 691.1402(e) and MCL 691.1402(1). That the statute restricts the location of actionable defects to only a "portion" of the highway is a logical consequence of the plain language's import. Second, the strict interpretation of the exception required by this Court's jurisprudence reveals that the "portion" must also be the *narrowest* portion of a roadway or thoroughfare designed for vehicular travel.[133] It follows that *all areas* outside of this *portion* of the highway are excluded.

Second, the statute also *excludes* adjacent and contiguous surface areas, which would necessarily include parallel parking spaces.[134] Under the exclusion, an area, location, or installation could be adjacent to and contiguous with that "portion" of the highway where actionable defects can be located. Such locations could also be those that are not physically or spatially separated from that portion of the highway, i.e., adjacent to and contiguous with. Indeed, applying the strictest interpretation of the term "highway", and, in light of the plain language of the exclusion, such areas would not even necessarily have to be visibly separate (i.e., by painted lane lines, boundaries, curbs, and the like) from the improved *portion* of the highway.

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[132] *Id.*

[133] See footnote 34, *supra*. See also Department's Application for Leave to Appeal, pp. 2-3 and 14-16.

[134] MCL 691.1402(1).

Moreover, the generalized phrase "any other installation outside of the improved *portion* of the highway designed for vehicular travel" would properly *include* parallel parking spaces (whether or not delineated by painted lane lines on the surface; or whether or not physically separated by some other more substantial delineation or barrier). First, those other enumerated items "sidewalks, crosswalks, trailways, etc., are excluded *even though* they are also *on the highway*, and *even if* such other installations may or may not be physically separated. A sidewalk, for example may be both adjacent to and contiguous with (in terms of linear level and plane – as in "two dimensional") the improved portion of a highway designed for vehicular travel, but cannot be a "highway" where an actionable defect may exist. This same conclusion would obtain with respect to a "trailway".[135] And, certainly, a "crosswalk" which normally would actually traverse the improved portion of a highway and would normally only be delineated by paint or other non-three-dimensional indicators, still is not part of that narrow portion of the highway upon which an actionable defect may exist.[136]

Finally, although not defined in the GTLA, "installation" would certainly include areas or things similar in kind and scope to sidewalks and crosswalks. Indeed, "installation" is defined as "something installed, as...apparatus *placed in position* or *connected* for use."[137] A parallel parking space, specifically delineated and identified, or not, but contiguous with and adjacent to a highway would certainly fall within the exclusion as "any other installation outside of the

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[135] See *Duffy*, 490 Mich. at 222-224.

[136] *Id.*

[137] Random House Dictionary of the English Language (2d ed.) (unabridged), p. 988.

improved portion of the highway designed for vehicular travel."[138] It is both placed in position and connected with the highway for use.

A parallel parking space would even fall within those similar aspects of a highway's adjacent features such as sidewalks and crosswalks under the restrictive rule of statutory interpretation known as *ejusdem generis*;[139] although that rule would not necessarily pertain to a provision the construction of which is to be as narrow as possible in favor of the government's *broadly retained* immunity.[140]

In fact, the oft-confusing grammar of this particular provision does not pose a problem in this instance.[141] A parallel parking space, even if technically and physically "on" a highway, falls outside the narrow lanes of the improved portion of the highway actually designed for vehicular travel.[142]

As a strict construction of this provision is required and immunity broadly conferred on the state, any other reading including that of the majority in the Court of Appeals here would be unwarranted.

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[138] MCL 691.1402(1).

[139] Where general words follow the specific enumeration of things, the general words are to be construed as applying only to the same kinds of things previously enumerated. *Southeastern Oakland Incinerator Authority v. Dep't of Natural Resources*, 176 Mich. App. 434, 441 (1989).

[140] *Stanton v. City of Battle Creek*, 466 Mich. 611, 618 (2002).

[141] See, e.g., *Duffy*, *supra* at 206, citing *Nawrocki*, *supra* at 167, n. 24 and stating "the Court has recognized that the language of the highway exception is not altogether clear".

[142] See, e.g., *Grimes*, 475 Mich. at 90.

2. *This Court's Jurisprudence Interpreting the Highway Exception Also Precludes Plaintiff's Suit*

"Highway" within the meaning of the highway exception to governmental immunity is a legal term of art. This particular term as defined by MCL 691.1401(e) and as applied in MCL 691.1402(1) has acquired a unique legal meaning in this Court's jurisprudence addressing the exception. Where a term or phrase has acquired specific meaning through its usage in jurisprudence developed over time with respect to a particular and unique subject matter, the term or phrase is regarded as having acquired a particular legal meaning when discussed or considered in a similar case.[143]

In *Grimes*, this Court ruled that momentary vehicular travel on areas of the highway outside the improved portion, as, for example, on parallel parking spaces, is not sufficient to bring the area within the narrow confines of the limited portion of the highway designed for vehicular travel.[144] This Court has otherwise rejected attempts to expand the meaning of the term "highway" to encompass areas outside the regularly traveled portion of the highway actually designed for vehicular travel. That would include areas in which Plaintiff here alleges a *defect* is *actionable* under the highway exception.

In the instant case, the Court concludes: "the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the

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[143] See MCL 8.3a ("technical words and phrases, and such as may have acquired a peculiar meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"); *People v. Thompson*, 477 Mich. 146, 152 (2007).

[144] *Grimes*, *supra* at 90.

repair and maintenance of the area outside that used as a thoroughfare."[145] Having thus *distinguished* parallel parking spaces from highway shoulders, the majority concludes:

> For these reasons, the area of the highway designated for parallel parking are distinguishable from the shoulder at issue in *Grimes*. A highway shoulder is not designed for regular or continuous vehicular travel; rather, it is designed to permit brief moments of travel during an emergency and to provide a vehicle with a safe place to stop without blocking the highway. In contrast, the parallel parking areas at issue here are integrated into the highway's main travel lanes and were designed for regular vehicular travel in a variety of contexts.[146]

Amicus curiae respectfully submit the statement attributed to the Department by the majority is, in fact, representative of the proper interpretation of the scope of the highway exception within the meaning of the statute and this Court's body of jurisprudence on the subject, notwithstanding the Department's *limited* concession at oral argument.[147]

Indeed, as explained by this Court in *Ross*,[148] and, more recently in *Nawrocki*,[149] there is a distinct difference between those areas of a highway with respect to which a governmental entity may have a *duty* to maintain and repair, and those areas of a highway with respect to which a governmental entity may have an *actionable duty* in this regard; or, put another way, those areas with respect to which a failure of the government's duty to maintain and repair may give rise to liability (assuming, of course, all remaining elements of the tort necessary to prove

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[145] Slip Op. at 6.

[146] *Id.*

[147] *Id.* at 3-4 (Talbot, P.J., dissenting).

[148] 420 Mich. at 618-619.

[149] 463 Mich. at 157.

the case can be established).[150] Thus, it makes perfect sense, when viewed from the proper orientation of the retained-unless-surrendered nature of the government's preexisting immunity, and the strict confines required by the Legislature of the government's waiver thereof, to restrict the definition of highway to such a degree.

III. CONCLUSION

In the GTLA, the Legislature provided its own internalized definition of "highway".[151] "Highway" as used in MCL 691.140(1)(e) and MCL 691.1402(1) is further defined by this Court's significant jurisprudence as the traveled portion of the roadway, paved or unpaved, actually designed for public, vehicular travel.[152] Given the narrow interpretation mandated for statutes waiving the government's suit immunity and the broad grant of immunity, and the fact that the definition of "highway" provided by the Legislature suffers from "no apparent ambiguity",[153] resort to speculation about what should or should not be included as "part" of a highway is prohibited.

Indeed, engaging in such an exercise is nothing more than substituting one Court of Appeals' panel's policy choices for that of the Legislature – it is an expression of what the particular panel thinks should and should not be included as part of a highway.[154] Such policy choices (or speculating about what should or should not be included as waiving the government's

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[150] *Id.* at 157.

[151] MCL 691.1401(e); *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 87 (2006).

[152] See *Nawrocki, supra* at 179.

[153] *Grimes*, 475 Mich at 87.

[154] *McIntire*, 461 Mich. at 152.

inherent immunity) are best left to the Legislature.[155] This is especially true when addressing provisions that lift the broad veil of immunity and subject the government to suit in its own courts.[156]

Any road crew would have prior notice of the types of defect alleged in Plaintiff's complaint. They exist in many locations outside the traveled portions of highways over which governmental entities have jurisdiction within the meaning of MCL 691.1402. While a cause for caution to the reasonable person, and even dangerous under the proper circumstances, these defects are not "actionable defects" thereby triggering the government's duty under the second sentence of MCL 691.1402(1).

In properly limiting the scope of the highway exception to only the traveled portion of the highway designed for vehicular travel, this Court recognized the Legislature's right to limit the government's waiver of immunity in all but a small subset of cases. Indeed, in *Nawrocki*, the Court reiterated the thrust of the Legislature's intent in strictly confining causes of action brought under the highway exception. A cause of action exists only for "actionable" defects, as opposed to other defects, the latter being defects with respect to which though the government may have a "duty", it is not one breach of which gives rise to a cause of action under the "highway exception".[157]

Imposing a duty to make highways *safe* or *safer*, if these defects are considered *actionable defects*,[158] would place an undue burden on the government. It must be remembered

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[155] *Rowland, supra* at 214.

[156] *Mack, supra.*

[157] See *Nawrocki*, 463 Mich. at 157, citing *Ross, supra* at 618-619.

[158] *Pick, supra* at 624, overruled by *Nawrocki, supra.*

that "a central purpose of governmental immunity is to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity."[159]

Moreover, the majority's opinion presumes a duty exists to remedy these ordinarily encountered conditions always; which further presupposes that such remedial measures are fiscally and physically possible. This is precisely why such ordinarily encountered conditions are not actionable defects within the meaning of the highway exception to governmental immunity.

As in *Nawrocki*, the Court of Appeals ruling "disregards the basic principle of *Ross* and contradicts the plain language of the highway exception...."[160]

> [A]llowing [it] to stand...would perpetuate the lack of a principled and consistent application of the law and would permit the continuation of a heightened potential for arbitrary, inconsistent, and highly confused decision making in personal injury or property damage cases involving the state or county road commissions. Such results would be contrary to the statute, undermine other important case law, and impose far more injury upon the judicial process than any effect associated with our decision to apply the policy decisions of the Legislature instead of the policy decisions of this Court.[161]

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[159] *Costa v. Community Emergency Medical Services*, 475 Mich. 403, 410 (2006) (internal quotation marks omitted), citing *Mack v. City of Detroit*, 467 Mich. 186, 203, n. 18 (2002).

[160] 463 Mich. at 175.

[161] *Id.* at 183 (internal citations omitted).

IV. RELIEF REQUESTED

Amicus curiae urges the Court to peremptorily reverse the Court of Appeals' decision. In the alternative, the Court should grant the Department's Application for Leave to Appeal to fully address this case.

Respectfully submitted,

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