STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM HENDERSON, ET AL,

Plaintiffs-Appellants,

v

MICHIGAN CIVIL SERVICE COMMISSION and MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.
_____/

Supreme Court No. 156270

Court of Appeals No. 332314

Ingham Circuit Court No. 15-645-AA

MICHIGAN CIVIL SERVICE COMMISSION'S SUPPLEMENTAL BRIEF

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Dated: June 29, 2018

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COUNTER-STATEMENT OF JURISDICTION

Appellant Henderson, under MCR 7.305(B), has sought leave to appeal the Michigan Court of Appeals' decision issued in this case on June 29, 2017.[1] In that decision, the Court of Appeals determined that when a final Michigan Civil Service Commission decision is reviewed by a court, and no hearing was required for the Commission to reach its decision, the appropriate standard of review is the "authorized by law" standard set forth in article 6, § 28 of the Michigan Constitution. In doing so, the Court of Appeals reversed the circuit court's decision to apply the "substantial evidence" standard and reinstated the Commission's final decision regarding the proper classification of the affected Department of Corrections employees.[2]

On April 6, 2018, this Court issued an order granting oral argument on Henderson's application and requiring the parties to submit supplemental briefing addressing three questions related to the "authorized by law" standard of review.

[1] The Court of Appeals, on August 15, 2017, approved the decision for publication.

[2] As with the brief in opposition to the application for leave to appeal, this supplemental brief is filed on behalf of both the Civil Service Commission and the Department of Corrections, which Henderson named as parties in the original circuit court appeal. But only the Commission's final decision is at issue in this appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Pursuant to its April 6, 2018 order, this Court has ordered supplemental briefing on the following questions:

1. Did the "authorized by law" scope of review under article 6, § 28 of Michigan's 1963 Constitution apply to the judicial review of the Commission's final decision on the proper classification of the affected state employees, which was made without a hearing?

   Henderson's answer: Yes. But only as a minimum.

   Commission's answer: Yes. As the sole standard.

   Circuit court's answer: Yes. But only as a minimum.

   Court of Appeals' answer: Yes. As the sole standard.

2. If the "authorized by law" scope of review did apply to the judicial review of the Commission's final decision, did the Court of Appeals give proper meaning to that constitutional standard?

   Henderson's answer: No.

   Commission's answer: Yes.

3. Did the Court of Appeals correctly apply the "authorized by law" scope of review to Henderson's challenge to the Commission's final decision?

   Henderson's answer: No.

   Commission's answer: Yes.

CONSTITUTIONAL PROVISION INVOLVED

Article 6, § 28 of the 1963 Michigan Constitution

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

INTRODUCTION

The framers of Michigan's 1963 Constitution, in response to the rapid growth of administrative tribunals in the mid-twentieth century, drafted a new provision governing how Michigan courts would review those tribunals' decisions. In plain and unambiguous language, the framers created two separate standards of review for courts to apply in the absence of specific controlling legislation. First, a reviewing court must determine if the final agency decision was "authorized by law." This is the minimum standard applicable to *all* final decisions and orders that fall under the constitutional provision. The framers then created a second standard applicable in one specific context: to "cases in which a hearing is required." In those cases, the reviewing court must *also* determine if the final agency decision was "supported by competent, material and substantial evidence on the whole record."

For nearly 60 years since this provision was introduced to Michigan jurisprudence, our courts have routinely recognized the important distinction between decisions in which a hearing was required and those in which no hearing was required. If no hearing was required prior to the agency reaching its decision, our courts have limited their review to determining whether the agency's decision was "authorized by law." If a hearing was required, our courts have applied the "substantial evidence" standard, which necessarily involves reviewing the evidence in the record.

This uncontroversial point of Michigan law was upended when the circuit court explicitly determined the "substantial evidence" test applies to *all* Civil Service Commission final decisions, regardless of whether a hearing was required.

The Court of Appeals rightfully corrected that error by turning back to the clear constitutional language. The Court of Appeals highlighted the plain fact that the standards are different depending on whether a hearing was required. The Court of Appeals correctly determined that because no hearing was required when the Commission issued its classification decision, only the "authorized by law" standard applied. The Court of Appeals correctly stated the current test for determining if an agency's decision is authorized by law. And the Court of Appeals correctly determined the Commission's decision regarding the classification of the affected employees was authorized by law. For those reasons, the Court of Appeals' decision should not be disturbed, and Henderson's application should be denied.

One broader issue yet remains, though, under this Court's second question in the supplemental briefing order. And that is whether the current four-factor test for applying the "authorized by law" standard, which was judicially developed over the last several decades, actually gives "proper meaning" to the constitutional text. And while the Court of Appeals correctly identified and applied that four-factor test in this case, the test itself is not faithful to the text of the Constitution because it incorporates evidentiary review standards, as opposed to simply asking whether the agency acted outside of or exceeded its authority. Because this case requires the Court to interpret the constitutional text, this Court should return the "authorized by law" review to its original, narrower focus on an agency's *authority* to act, not on the evidence underlying the decision.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

In its brief in opposition, the Commission set forth the underlying facts relevant to this appeal. (Br in Opp, pp 2–11.) In accordance with this Court's order not to "submit mere restatements of their application papers," the Commission incorporates and adopts the counter-statement of facts and proceedings from its brief in opposition.

STANDARD OF REVIEW

The supplemental questions address the proper interpretation and application of Article 6, § 28 of Michigan's 1963 Constitution. As such, the appropriate standard of review is de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558 (2007) ("Issues of constitutional construction are questions of law that are also reviewed de novo.").

ARGUMENT

I. The Commission's classification decision, which was made without a hearing, was subject to judicial review only under the constitutional "authorized by law" standard.

The first supplemental question posed by this Court, put broadly, asks whether the "authorized by law" standard was the proper standard to govern judicial review of the Commission's final decision. The Court of Appeals determined it was the proper governing standard, and the Commission agrees. Henderson does not dispute that the "authorized by law" standard applied, but rather asserts that it was the minimum standard, and that the "substantial evidence" standard *also*

applied. (Appellants' Supp Br, pp 25–30.) In that way, Henderson sides with the circuit court, which determined that the "substantial evidence" standard applied, even though there was no hearing. (Appellants' App'x, p 899a.) As argued in the Commission's answer in opposition, and as addressed below, the "authorized by law" standard was the sole standard to be applied in the judicial review of the Commission's decision.

A. The "authorized by law" standard applied because there was no hearing.

As explained in the Commission's brief in opposition (Br in Opp, pp 12–20), the Court of Appeals correctly determined that the constitutional "authorized by law" standard was the sole governing standard of review. This is because final Commission decisions are, as an initial matter, reviewed under the constitutional standard. *Viculin v Dep't of Civil Serv*, 386 Mich 375, 392 (1971); *Parnis v Dep't of Civil Serv*, 79 Mich App 625, 628 (1977); *Wescott v Civil Service Comm*, 298 Mich App 158, 162 (2012). In other words, when a final Commission decision is appealed to circuit court, there is no other statute or legal source that supplies the standard of review. It comes directly from § 28 of Article 6 of the Michigan Constitution.

The Constitution, in turn, creates two different standards of review, and the application depends on whether a hearing was required. The "minimum" standard, applicable to "[a]ll final decisions, findings, rulings and orders," is whether they "are authorized by law." Const 1963, art 6, § 28. Then, "in cases in which a hearing is required," the Commission's decision must also be "supported by competent,

material and substantial evidence on the whole record." *Id.* The Court of Appeals correctly identified those different standards and concluded that the "substantial evidence" standard is "applicable only in cases where a hearing is required." (Appellants' App'x, p 1089a.) This is consistent with decades of published case law. (*Id.*, pp 1089a–1090a (summarizing cases for the proposition that if no hearing was required, courts only review the decision under the "authorized by law" standard); see also Br in Opp, pp 15–16.)

There was no hearing in this case, as the Commission's rules do not provide a hearing for challenges to a technical classification decision. Civ Serv R 8-3.3(b)(1). To reach its conclusion that the "substantial evidence" test *also* applied, the circuit court misread this Court's *Viculin* decision, stating that *Viculin* did not "differentiat[e] on the issue of whether a hearing was being held." (Appellants' App'x, p 899a.) The circuit court reasoned that because *Viculin* applied the "substantial evidence" test to the Commission's final decision *in that case*, it was also appropriate to apply it in this case. (*Id.*)

The Court of Appeals correctly reversed the circuit court on that point, finding that because *Viculin* did not address the issue of what standard applies to a decision where there was no hearing (given that there *was* a hearing in *Viculin*), "the reliance of [Henderson] and the circuit court on *Viculin*" for that proposition "was misplaced." (Appellants' App'x, p 1090a.) This was the correct decision. Because there was no hearing, the Commission's final decision regarding the classification of the affected employees was subject to judicial review solely under

the constitutional "authorized by law" standard. There is no basis for further applying the "substantial evidence" standard.

B. Henderson does not identify any source that would justify imposing the heightened "substantial evidence" standard to a final Commission decision where there was no hearing.

In challenging the Court of Appeals' decision, it is incumbent upon Henderson to demonstrate why the "substantial evidence" standard would apply in the absence of a hearing. Henderson falls far short of accomplishing this heavy lifting, as there is simply no other authority or basis for going beyond the constitutional minimum standard. The Commission's decision on how to properly classify state employees is precisely the sort of decision that falls under the "authorized by law" standard.

Henderson urges the circuit court "was correct" to go beyond the constitutional minimum standard, despite the fact there was no hearing. (Appellants' Supp Br, p 26.) The circuit court, and now Henderson by virtue of endorsing the correctness of that decision, relied on three sources for its finding, none of which support the conclusion that the "substantial evidence" standard applies: (1) this Court's *Viculin* decision; (2) the Commission's reference to the Administrative Procedures Act (APA) in its final decision; and (3) the Commission's reference to the Court Rules governing circuit court appeals of final agency decisions. (Appellants' App'x, p 899a.)

Viculin is no help to Henderson for the reason explained above: *Viculin* simply did not address the issue of what standard applies to a Commission decision

where there was no hearing. True, *Viculin* did apply the "substantial evidence" standard, but that was a case *where a hearing had been held*. *Viculin*, 386 Mich at 381–383. This Court did not state that *all* final Commission decisions are subject to the "substantial evidence" test. And Henderson's arguments that the APA and Court Rules impose that standard are also incorrect.

1. The APA does not apply to Commission decisions.

Simply put, the APA does not apply to the review of final Commission decisions, because the APA expressly excludes the Commission from its definition of "agency." MCL 24.203(2) ("Agency does not include . . . the state civil service commission"); see also *Parnis*, 79 Mich App at 628–629 (finding it "was erroneous" to apply the APA judicial review provisions to a Commission decision because the APA "expressly excludes from its ambit the Civil Service Commission."). The circuit court attempted to avoid that plain exclusion by reasoning that the Commission somehow subjected its decision to APA review because it included a citation to the APA in its final decision. (Appellants' App'x, 899a.) But, to state the obvious, an agency cannot alter the plain text of a statute.

True, the Commission did refer to the APA. When the Commission issued its final decision, it included a "Notice" to inform Henderson of his basic appeal rights. That "Notice" informed Henderson the decision is subject to review in circuit court, that he has 60 days to file a claim of appeal, that he has to name the Commission as a party, and that he has to serve the Commission. (Appellants' App'x, p 783a.) The Commission included a *reference* to MCL 24.301 through 24.306, which is the

chapter of the APA that sets forth the rights and procedures for appealing a decision in a contested case.[3] (*Id.*) That includes the substantive review standards (such as the "substantial evidence" test) set forth in MCL 24.306. But even if the Commission were attempting to incorporate the APA review provisions, or apply them to the review of its decision, such an attempt would be contrary to the express terms of the APA, which expressly excludes the Commission from its coverage. The Commission could not do that even if it wanted to. The APA citation was instead only a reference to the mechanics of the appeal process established by the APA and Court Rules. It is effectively a remnant from the pre-2012 era of administrative agency appeals, during which an appeal of a final Commission decision was governed by the APA's appeal *process*. (Appellants' App'x, p 1091a, citing *Hanlon v Civil Serv Comm*, 253 Mich App 710, 725 n 10 (2002).) The APA does not, and indeed cannot, supply the substantive standard of review for a final Commission decision.

2. The Court Rules do not create or impose a substantive standard of review different from the Constitution.

As previously argued, the Court Rules provide that an appeal of a final Commission decision must comply with the rule governing appeals where the APA applies. (Br in Opp, pp 17–18; MCR 7.117(B).) Henderson continues to argue that the Court Rule in question, MCR 7.119(H), "expressly provide[s] for *both the process*

[3] The full reference reads: "See Michigan Court Rule 7.117 and Michigan Compiled Laws §§ 24.301–24.306." (Appellants' App'x, p 783a.)

and the scope of review applicable in this appeal." (Appellants' Supp Br, p 27 (emphasis added).) The Court of Appeals explained why this argument is wrong: MCR 7.119(H) "merely instructs the [circuit] court to clearly identify its reason for reversal of a [Commission] decision, regardless of whether it employs the competent, material, and substantial evidence scope of review, MCR 7.119(H)(1), or the authorized by law scope of review, MCR 7.119(H)(2)." (Appellants' App'x, p 1091a.)

As the Commission has explained (Br in Opp, pp 12–20), Henderson is now proposing a new rule of interpretation that would govern the meaning of MCR 7.119(H): "the process and the scope of review . . . are intertwined; no aspect should be rendered nugatory." (Appellants' Supp Br, p 28.) Henderson offers no authority for the idea that the *process* for seeking judicial review of an agency decision is inseparable from the *substantive scope* of the judicial review. Nor does Henderson illuminate how the Court of Appeals' decision renders some aspect of the Court Rules "nugatory." The Court of Appeals simply found that MCR 7.119(H) contained instructions to a circuit court for identifying the bases for its decision, *depending on which standard of review applied*. This interpretation is not only consistent with the text of the Court Rules, it pays proper respect to the controlling constitutional provision by recognizing that different standards could apply to the court's review, and a court should identify any deficiencies accordingly. The Court Rules do not supply the applicable standard of review, and they do not require the "substantial evidence" test to be applied to final Commission decisions.

3. The Commission is not required to hold hearings before every final decision.

As a final point on the question of whether the "authorized by law" standard applied in this case, Henderson asserts that "the Court of Appeals committed an error in allowing the Civil Service Commission itself rather than the Constitution to dictate the applicable standard of judicial review." (Appellants' Supp Br, p 29.) Henderson's argument on this topic is not actually an argument that the "authorized by law" standard did not apply, but rather a critique of the constitutional framework that provides a different standard of review "in cases in which a hearing is required" from cases in which one is not. It seems, in Henderson's view, that the Commission should not be able to establish its own rules governing its decision-making-process but should simply be required to provide a hearing in all cases.

Henderson's argument on this point is of no moment. The Commission is required to provide hearings when the Constitution so requires. When the Constitution does not require a hearing, the Commission is not required to provide one. There is nothing untoward, improper, or unconstitutional in allowing the Commission to establish its own procedures for deciding employee grievances and other complaints. In fact, the irony of Henderson's argument is that our courts have specifically and expressly held that the Commission is vested with plenary constitutional authority to do exactly that which Henderson now complains about.

The starting point on this issue is the constitutional text itself: "The commission shall classify all positions in the classified service according to their

respective duties and responsibilities, . . . make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service." Const 1963, art 5, § 11, ¶ 4. For as long as the Commission has existed, this Court has recognized its authority to make any rules and regulations that are consistent with the Constitution. *Reed v Civ Serv Comm*, 301 Mich 137, 158 (1942). "If rules and regulations are contrary to any provision of the [constitution], they cannot stand merely by virtue of the authority conferred upon the commission to make rules and regulations." *Id.* The Commission "is a constitutional body possessing plenary power and may determine, *consistent with due process*, the procedures by which a state civil service employee may review his grievance." *Viculin*, 386 Mich at 393 (emphasis added). "The Commission is free to adopt any grievance or appellate procedure it finds appropriate *as long as it does so consistently with the requirements of due process . . . .*" *Gilliard v Dep't of Soc Servs*, 135 Mich App 579, 585 (1982) (emphasis added).

In sum, the Commission has constitutional and plenary authority to issue rules regarding grievance and appeal procedures, and those rules are valid provided they do not violate the Constitution. Of relevance to Henderson's appeal, the Commission has adopted Rule 8-3.3(b)(1), which provides that an employee who files a technical classification complaint (which challenges a classification decision like the one in this case) is not entitled to a hearing. Instead, the decision is made by a review officer who reaches the decision based on submissions from the parties, among other things. Civ Serv R 8-3.3(b)(3).

This precise appeal process was challenged as a violation of due process when a state employee argued she was entitled to a hearing on her request to be reclassified. *York v Civ Serv Comm*, 263 Mich App 694, 697–698 (2004). At the time, the Commission had an equivalent to Rule 8-3.3(b)(1) providing that a "technical appeal officer is not authorized to conduct a hearing" when deciding a classification appeal. *Id*. at 699. When the reclassification request was denied, the employee argued that a hearing was necessary to protect due process rights and "only a full hearing on the record can correct these alleged inadequacies" of the Commission's rules. *Id*. at 701.

The Court of Appeals first rejected the argument that the Constitution requires the Commission to hold a hearing in all cases: "[t]he language in article 6, 'in cases in which a hearing is required,' clearly contemplates situations where courts would review administrative proceedings that *do not* require hearings. Logically, then, we must reject petitioner's claim that this section requires hearings in every case to facilitate [Commission] or judicial review." *York*, 263 Mich App at 701 (emphasis in original).

The Court of Appeals then rejected the argument that a classified employee has a due-process property interest in the reclassification of a position. *York*, 263 Mich App at 702-705. In contrast to an employee's interest in continued employment, which is a protected property interest that carries due-process rights, "a civil service employee's petition for reclassification represents that employee's unilateral aspiration for a different job classification," and such a "unilateral

expectation or hope for reclassification is not a property interest protected by the Michigan or federal constitution." *Id*. at 703-704. As a result, the Court of Appeals held "*the due process guarantee to a hearing is not applicable*" to a reclassification request. *Id*. at 704 (emphasis added).

When Henderson appealed the Commission's final decision, he could have challenged it claiming a hearing was required by due process, and Rule 8-3.3(b)(1) violates his due process rights. Had he done so, the lower courts could have engaged in the analysis of whether this was the sort of decision that requires a hearing.[4] But Henderson did not raise that challenge. Instead, he raises these issues now by suggesting there was something fundamentally improper about the Commission adopting Rule 8-3.3(b)(1) itself. Yet the cases and authority cited above reflect that the Commission is not required to provide a hearing for every decision. And Henderson does not even argue that a hearing *was* required to reach the classification decision in this case. Rather, Henderson simply argues against the *idea* that the Commission can adopt rules that do not offer a hearing to every employee in every appeal. But as long as the Commission does not run afoul of the Constitution in general, and due-process rights in particular, Henderson is exactly right: the Commission *may* decide which types of decisions entitle an employee to a hearing and which types of decisions do not. That is the framework established by the Constitution, and there is nothing inherently problematic with enforcing that.

[4] The lower courts, of course, would have been constrained to follow the binding precedent of *York*, which already decided that classified employees do not have a due-process right to a hearing on classification decisions. See MCR 7.215(J)(1).

Because Henderson was not entitled to a hearing on this technical classification decision, the sole governing standard of review was the "authorized by law" standard set forth in the Constitution. The Court of Appeals correctly determined that the "substantial evidence" standard did not apply.

II. The Court of Appeals gave proper meaning to the current four-factor test for determining whether a decision is "authorized by law," which was judicially developed over the last several decades.

The second supplemental question posed by this Court asks whether, assuming the "authorized by law" standard applied, the Court of Appeals "gave proper meaning" to that standard. If this Court's question as to the "proper meaning" is understood to mean "properly identified the prevailing test under Michigan case law," then the answer is yes. The Court of Appeals correctly identified and articulated the test that has been developed by the Court of Appeals for determining whether an agency's decision is authorized by law, as explained below in this section. But as explained in Argument III, the proper meaning of the Constitution is narrower than the test the Court of Appeals has developed.

To start with the current test, the Court of Appeals articulated the "authorized by law" standard as follows:

> An agency decision "[1] in violation of [a] statute, [2] in excess of the statutory authority or jurisdiction of the agency, [3] made upon unlawful procedures resulting in material prejudice, or [4] [that] is arbitrary and capricious" is not authorized by law. [Appellants' App'x, p 1092a, citing *Brandon Sch Dist v Mich Educ Special Servs Ass'n*, 191 Mich App 257 (1991).]

Henderson agrees that this is the governing test (Appellants' Supp Br, p 30), and those four factors have been cited consistently (with some slight variation) over

the last several decades as comprising the test for determining if an agency's decision is authorized by law. For example, the Court of Appeals in *Wescott v Civil Service Commission*, 298 Mich App 158, 162 (2012), described the first factor as whether a decision "violate[s] a statute *or the Constitution*."

The origin of this as the constitutional test appears to be a 1985 Court of Appeals opinion involving an appeal of a decision by the Department of Natural Resources to deny a landfill construction permit. *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 732 (1985). There, the Court of Appeals expressly adopted the circuit court's articulation of the standard of review under the Revised Judicature Act, which cited the constitutional provision in article 6, § 28 and *Viculin*: "The decision of the Director to deny Plaintiff's application must be affirmed *unless it is in violation of a statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure resulting in material prejudice to a party, is arbitrary or capricious*." *Michigan Waste Systems*, 147 Mich App at 736 (emphasis added).

From that case forward, this test has been routinely and consistently cited in cases where no hearing was required, and the "authorized by law" standard applied. E.g., *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 488 (1998); *City of Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 64 (2003); *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 87-88 (2013); *Bureau of Prof Licensing v Butler*, __ Mich App __ (2017) (Docket No. 334687), slip op at 3. Thus, under the current state of the law in Michigan, the

Court of Appeals' decision correctly identified and applied the "authorized by law" standard and is consistent with published decisions on this issue.

III. The current formulation of the "authorized by law" test exceeds the original intent of the constitutional text because it incorporates questions of evidentiary support.

Although the Court of Appeals has articulated that test for decades, this Court has not interpreted "authorized by law." But because it must apply that constitutional text in this case, the Court should examine for itself what that language means and whether our current "authorized by law" test is consistent with and faithful to the original intent of Article 6, § 28, of Michigan's 1963 Constitution.

The current test for whether an agency's decision is authorized by law did not arise from a careful study of the constitutional text. Instead, the current test grew from a circuit court's analysis in the 1980s in a case arising under the Revised Judicature Act. The test has since been expressly endorsed by the Court of Appeals and applied consistently, yet no meaningful judicial review of the constitutional text and original intent has ever been undertaken. To date, this Court has not adopted, endorsed, or addressed this test.

And it is apparent when reviewing this particular text that the framers, when they introduced the "authorized by law" standard into Michigan's judicial lexicon in 1963, had a narrower purpose in mind than our current test reflects. They intended a reviewing court to limit its review to questions related to an agency's authority to act: did it act outside of its statutory powers, or exceed its authority, or venture into an area outside its defined boundaries? The framers then

intended the second component of the constitutional provision (the "substantial evidence" test) to apply when a hearing was required. In those cases, they intended to have a court review the evidence relied on by the agency in making its decision. But there is no indication – in the constitutional text or convention record – that the framers viewed or understood "authorized by law" as going beyond basic questions of agency authority.

The current test has conflated the constitutional text with the provisions of the APA and so has inadvertently enlarged the original intent of the text by including factors such as "arbitrary and capricious" and "unlawful procedure." This Court should return the "authorized by law" test to its intended narrower focus.

A. The proper meaning of "authorized by law" is an issue of constitutional interpretation and intent.

At its core, determining the proper meaning of "authorized by law," as it is used in Article 6, § 28, of the Michigan Constitution is a question of constitutional interpretation and intent. Answering that question requires the application of principles that have long guided our courts in understanding constitutional text.

"When reviewing constitutional provisions, the objective of such review is to effectuate the intent of the people who adopted the constitution." *Straus v Governor*, 459 Mich 526, 533 (1999). To achieve that aim, the "primary rule" for interpreting a constitutional provision is "the rule of common understanding," which identifies the interpretation "which reasonable minds, the great mass of people themselves, would give it." *In re Proposal C*, 384 Mich 390, 405 (1971)

(citation omitted). "A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered." *Id.*

On that second point, "the most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record." *House Speaker v Governor*, 443 Mich 560, 580-581 (1993). While those debates have their limitations and are not "decisive" regarding the intent of a provision, they can be used as guidance when they contain "a recurring thread of explanation binding together the whole of a constitutional concept." *Regents of the Univ of Michigan v Michigan*, 395 Mich 52, 60 (1975).

These principles can be used to discern the meaning of the "authorized by law" phrase in § 28.

B. Since the phrase "authorized by law" was added to the Constitution in 1963, it has not been judicially interpreted from the perspective of ascertaining the framers' intent.

Before § 28 was added to the 1963 Constitution, there was no equivalent provision in Michigan's prior constitutions. When the Committee on Judicial Branch introduced this provision at the Constitutional Convention (designated "Committee Proposal 95" during the debates), the committee chairman described this as "a new constitutional provision." (Appellees' App'x, p 14b.) "Since the adoption of the 1908 constitution, the field of administrative law has assumed a more significant position in the jurisprudence of our state. This explains the absence of a similar provision in the present constitution and justifies the present

consideration of problems that arose in the developmental stages of this distinct field of law in our state." (*Id.*)

The full text of § 28, as added in 1963, reads as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination *whether such final decisions, findings, rulings and orders are authorized by law*; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law. [Const 1963, art 6, § 28 (emphasis added).]

Although this provision has existed for over 50 years, the "authorized by law" phrase has not been judicially reviewed from the perspective of effectuating the intent of this text. Instead, as set forth above, it has gained meaning through a string of Court of Appeals cases that developed a four-factor test that is now widely accepted as the governing standard, *Michigan Waste System*, 147 Mich App at 736; *Brandon*, 191 Mich App at 263; *Northwestern*, 231 Mich App at 488, but the test appears to have been imported from the APA, not from analyzing the words "authorized by law."

The *Northwestern* case came the closest to exploring what "authorized by law," as a phrase, actually means: "in plain English, authorized by law means allowed, permitted, or empowered by law." *Northwestern*, 231 Mich App at 488. The court properly focused on the common understanding of those words by examining a legal dictionary, though it did not take the additional step of analyzing what that phrase would have meant to the framers or ratifiers in 1963, or what the

"common understanding" would have been at the time it was adopted. *Id*. The court went on to cite the four-factor test from *Brandon* (which in turn came from *Michigan Waste Systems*) and at least attempted to connect those factors to the constitutional text: "we find that is also a reasonable articulation of the constitutional standard because *it focuses on the agency's power and authority to act rather than on the objective correctness of its decision*." *Id*. at 489 (emphasis added). But the court adopted the four-factor *Brandon* test to determine whether an agency's decision is authorized by law without carefully considering whether the "unlawful procedures" and "arbitrary and capricious" factors fit with the text.

Following *Northwestern*, the Court of Appeals has not revisited this issue in any depth. But in this case, the Court of Appeals expressly confirmed that it adopted the *Brandon* test for the reasons stated in *Northwestern*: "it focuses on the agency's power and authority to act rather than on the objective correctness of its decision." (Appellants' App'x, p 1092a.) And this Court has not weighed in on the constitutional meaning of "authorized by law," nor has this Court commented on or adopted the four-factor test. In 2008, this Court recognized that under Section 28, the applicable review "in cases in which no hearing is required" is "whether the decisions are authorized by law." *Ross v Blue Care Network*, 480 Mich 153, 164 (2008). But aside from the dissent in *Ross*, this Court did not adopt or reference the *Brandon* test. *Ross*, 480 Mich at 183 (KELLY, J., dissenting) (stating that the four-factor test would apply in a case where no hearing was required).

In sum, the "authorized by law" phrase, which was introduced as a new standard in 1963, has yet to undergo a rigorous evaluation to determine its intended meaning.

C. The convention debates reveal that the framers understood "authorized by law" to be a narrow question of an agency's authority to act.

As already noted, Section 28 was a new provision, introduced in response to the growing field of administrative law and agencies that acted in judicial or quasi-judicial capacities. "Whatever we put in here with reference to appeals from administrative agencies will be new. The Constitution of 1908 had no such provision probably because there were few or no administrative boards, bureaus and commissions, but since 1908 this administrative government has grown by leaps and bounds." (Appellees' App'x, p 18b.) The proposal that became § 28 was frequently referred to as providing a "minimum" review of administrative decisions. "In the opinion of the committee a constitutional provision is necessary in order to assure a judicial review of administrative agencies and appended thereto a *minimal scope of review*." (*Id.*, p 17b (emphasis added).) "[W]e have provided for a *minimum*; that whether or not the legislature provides for this in the establishment of one of these bodies, we have this." (*Id.*, p 38b (emphasis added).) "The only thing that we are attempting to do here is to grant to the citizens of this state a right of review of a determination by an administrative body. And bear in mind that we are only setting up *minimum rights* so far as appeals are concerned." (*Id.*, p 41b (emphasis added).)

During the debate on this provision, an amendment was introduced (the "Krolikowski-Bledsoe" amendment") to strike this proposal in its entirety. (Appellees' App'x, p 44b.) Effectively, that amendment would have left the question of the standard of review in the hands of the Legislature and declined to enshrine any specific level of review in the Constitution. The debate on this particular amendment was described at one point as "extremely prolonged," to the tune of four hours. (*Id*., p 50b.) But the delegates also recognized the importance of this issue: "I would like to say that this is one of the most important proposals that you will have to consider. I am assuming that you who are here realize that, and that you realize that if it takes us 4 hours or 4 days, it should be thoroughly discussed and should be thoroughly understood, and that the time is not being wasted." (*Id*., p 51b.) As stated by another, "[t]here is something big at stake." (*Id*.)

In this context, during a prolonged and important debate on whether Michigan's Constitution should enshrine a minimum review applicable to final agency decisions, the different levels of review contemplated by the proposal were explained:

> Now we go to the second sentence. All that second sentence says is that the review that is to be exercised by the court, as a minimum, shall determine first whether the decision of that administrative tribunal is authorized by law. *In other words, did it exceed the law? Did it get into a field it shouldn't have gotten into, that it wasn't authorized to get into?* . . . And the other thing that it says is this – and this is all it says – it says *if it's such a decision that a hearing is required*, then they've got to make their decision based on reliable,

> probative and substantial evidence on the whole record.[5] [(Appellees' App'x, p 52b (emphasis added).)]

This explanation continued, noting that "the only thing that the court can determine is, first, in the first part of that second sentence, *did it have authority to do what it is doing?* And, secondly, *if a hearing is required*, is it supported by reliable, probative, and substantial evidence?" (*Id.* (emphasis added).) And finally, the two standards were described as a "check" on administrative agencies: "that proper check is simply that *they act according to the law*; and *if they make findings on hearings*, that there be some evidence to back up those findings." (*Id.* (emphasis added).) The two different standards were separately described as "a question of law" (the "authorized by law" standard) and "a question of fact" (the "substantial evidence" standard). (*Id.*, p 51b.) None of the characterizations set forth above were challenged or disputed during this debate.

At the end of this debate, the delegates roundly defeated the amendment that would have stricken § 28 by a final vote of 83 to 37. (*Id.*, p 52b.) In doing so, the delegates elected to enshrine the minimum standards of judicial review in the Constitution.

The delegates' remarks during the debate over § 28 reflect a key point in understanding the "authorized by law" language: it was intended only to inquire about an agency's *authority* to act and was *not* intended to include any factual or

[5] The "reliable, probative and substantial" language was later amended to the current "competent, material and substantial" standard that was ultimately adopted and ratified.

evidentiary review. This makes sense when compared to the different standard where an agency conducts a hearing. The debates reflected a general consensus that if an agency holds a hearing and reaches a decision, a reviewing court should be entitled to engage in some evidentiary review, because agencies should base those decisions on the evidence in front of them. But if no hearing was required, it is entirely consistent to conclude that the framers were comfortable with the idea of a court simply asking, "Did the agency exceed the law or do something it wasn't authorized to do?" In those cases, the focus would be on the agency's authority to act, and not on the particular facts or underlying issues. In that sense, the view would be that the agency has already been vested with certain authority (either by legislation, executive order, or constitutional provision), and the court's only role is to ensure the agency did not exceed that authority.

The debate regarding § 28 certainly approaches the level of an "explanation binding together the whole of a constitutional concept," that concept being the intended scope of the "authorized by law" standard of review. *Regents of the Univ of Michigan*, 395 Mich at 60. It is, therefore, a "most instructive tool" in the endeavor to understand the intended meaning of this provision. *House Speaker*, 443 Mich 580-581.

D. The current four-factor test is not faithful to the constitutional text because it incorporates evidentiary questions.

The limited nature of an "authorized by law" review, which was reflected during the debate over § 28, can now be used as a lens through which to view the

current four-factor test used by our courts. Viewing the current test through that lens, it becomes apparent that this test is more expansive than it would have been understood in 1963. Consider the types of questions the framers viewed as applicable when a court engages in an "authorized by law" review:

- *Did the agency exceed the law?*
- *Did the agency get into a field it shouldn't have gotten into?*
- *Did it have authority to do what it did?*

Those are all variations of the same general question, which looks only to the agency's authority to act. Contrast those questions with the questions asked by the four-factor test currently used by our courts:

- *Did the decision violate a statute or the Constitution?*
- *Did the decision exceed the agency's statutory authority or jurisdiction?*
- *Was the decision made upon unlawful procedure resulting in material prejudice?*
- *Was the decision arbitrary or capricious?*

The first two questions under this test could fairly be understood as consistent with the framers' intent on limiting the focus to whether an agency exceeded its authority. But the second two questions stray from that narrow focus and get into areas of questionable connection to the original intent. The likely explanation for the inclusion of those two questions is that they were lifted directly from the APA and grafted onto the "authorized by law" standard. Both the "unlawful procedure" and the "arbitrary or capricious" tests are included in the APA's judicial review section. MCL 24.306(c) & (e). But neither set of words is a synonym for "authorized by law"; it is hard to imagine that a citizen asked in 1963

to explain what "authorized by law" means would respond with the formulations in the third and fourth factors.

The *Northwestern* decision recognized that the four-factor test is virtually the same as the APA judicial review section, but ultimately reasoned that this was acceptable because it was "a reasonable articulation of the constitutional standard . . . ." *Northwestern*, 231 Mich App at 488. But that decision did not analyze the intent of the constitutional provision or seek to give effect to the "common understanding" of what the framers would have understood "authorized by law" to mean in 1963. Its conclusion that the four-factor test reasonably expresses that constitutional standard is, therefore, of dubious merit.

Of the two questionable factors – "made upon unlawful procedure" and "arbitrary or capricious" – the latter expands the scope of the original intent the most. It could be reasonably argued that the "unlawful procedure" factor is just an extension of the first two factors, which ask whether the decision violated a law or exceeded authority. Certainly, if an agency adopts a procedure that violates the law (*i.e.* it is "unlawful"), that would fall under one of the first two factors.

But asking whether an agency's decision is "arbitrary or capricious" is a wholly different analysis. As demonstrated by the definitions our courts have recognized, those questions go to the substance of an agency's decision, not just its authority to act. "A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or

whimsical." (Appellants' App'x, p 1092a, quoting *Wescott*, 298 Mich App at 162.) Put another way, the following questions must be added to a court's analysis under the current four-factor test:

- *Did the agency's decision lack an adequate determining principle?*
- *Did the agency's decision reflect an absence of consideration or adjustment with reference to principles, circumstances, or significance?*
- *Was the agency's decision freakish or whimsical?*

To that list Henderson would add the following questions:

- *Was the agency's decision connected to the facts?*
- *Did the agency's decision run counter to the evidence? (Appellants' Supp Br, p 35.)*

These questions have travelled a long distance from "Did the agency have authority to do what it did?" Each one of those questions carries an inherent evidentiary component, requiring a reviewing court to refer to the *basis for the agency's decision*, and not simply the agency's authority to act.

The Commission argued above that under the current four-factor test, a reviewing court cannot review the evidentiary record, but is still capable of determining if a decision is arbitrary. That is precisely what our courts have said. *Brandon*, 191 Mich App at 264; *Wescott*, 298 Mich App at 162; *Natural Resources Defense Council*, 300 Mich App at 87. The Commission continues to maintain that it is *possible* for reviewing courts to pull off the balancing act now required. But the fact that "arbitrary and capricious" is part of the current test creates an unnecessary tension and invites overreaching by reviewing courts. The Court of Appeals has noted this very tension:

> There would appear to be some tension between the arbitrary-and-capricious standard and the inapplicability of the substantial-evidence test in cases in which no hearing was required, when, for example, there might be an absolute dearth of evidence supporting an agency's decision, which would seem to render the decision completely arbitrary and capricious, yet the rule against examining the evidentiary support for the decision would appear to mandate a holding affirming the decision. [*Wescott*, 298 Mich App at 163 n 4.]

If the review was faithful to the original intent, reviewing courts would no longer be asked to walk that line.

E. Adhering to the plain constitutional text, the proper review should consist only of determining whether the agency acted within its authority.

To remain consistent with and faithful to the constitutional text and the framers' intent, the Commission submits that the proper standard for determining whether an agency's decision is "authorized by law" can be expressed as follows:

> An agency's final decision that is subject to review by the courts under article 6, § 28 and was made without a hearing, is authorized by law if it (1) did not violate a statute or the Constitution; and (2) did not exceed that agency's authority or jurisdiction.

This expression of the test effectuates the original intent and understanding of the phrase "authorized by law" and eliminates the unnecessary tension that has been added by requiring courts to determine if a decision was arbitrary. It accomplishes this by clarifying that the "authorized by law" review was never intended to include a review of the evidence underlying an agency's decision, because only decisions reached after a hearing include that sort of review.

It is important to note that this revised test would have no effect on many of the administrative agency cases that are appealed to the circuit courts. Cases

arising under the APA (which applies to the clear majority of state agencies and their contested cases) would still be subject to review under those APA standards. If the APA did not apply, but a hearing was required, the constitutional "substantial evidence" test would still apply, and a court would still review the record evidence. The revised test endorsed by the Commission would apply only in a subset of cases: those cases where an agency's decision is appealable under the Constitution and not under the APA, but no hearing was required. This is a narrow class of agency decisions in the overall field of administrative practice.

And this test still requires agencies to comply with constitutional protections like due process and equal protection. And if the agency's governing statute contains requirements regarding procedure or how decisions are made, the agency would of course need to comply with the statute. The Commission, for example, would still need to continue to act within the confines of its authority in the Constitution. When the Commission makes a classification decision, the Constitution requires that decision to be based on the "respective duties and responsibilities" of the positions. Const 1963, art 11, § 5, ¶ 4. The continued requirement to comply with the governing statutes and the Constitution should serve to mitigate any trepidation that this narrower test would allow agency decisions to go unchecked.

Finally, under the current test, the Court of Appeals already instructs circuit courts not to review the evidentiary record when performing an "authorized by law" review. That instruction is appropriate given the constitutional text and the

framers' intent, but it understandably creates a tension when a circuit court is also told to determine if the decision was arbitrary. The solution to that issue is not, as Henderson suggests, to set aside the plain text of § 28 by allowing *more* evidentiary review. Henderson would solve this issue by introducing a new standard into the court's review: "whether the decision is rationally related to the facts in the record or whether the conclusion is affirmatively countered by the record facts, as opposed to whether it is supported by them." (Appellants' Supp Br, p 36.) Henderson's suggested review would, in effect, turn the "authorized by law" review into a mini-"substantial evidence" review. And this effect cannot be reconciled with the fact that § 28 sets out two distinct constitutional standards.

The solution to this issue should be found by going in the other direction. Limiting a reviewing court's analysis to the narrow question of an agency's authority to act serves the dual purpose of (1) effectuating the original intent and understanding of the "authorized by law" standard at the time it was introduced to our Constitution; and (2) clarifying to reviewing courts that this standard does not allow a review of the evidence underlying the agency's decision.

IV. Under both the current four-factor test and the more textually faithful understanding of "authorized by law," the Court of Appeals correctly recognized that it is not appropriate for a court to engage in an evidentiary review on appeal.

The final question posed by this Court asks whether the Court of Appeals "correctly applied" the "authorized by law" standard to Henderson's challenge of the Commission's final decision. This question encompasses two components: (1)

whether the "authorized by law" standard allows a reviewing court to review the evidentiary record; and (2) if the current four-factor test applies, whether the Court of Appeals properly determined that the Commission's classification decision was not arbitrary or capricious.

On the first issue, the Court of Appeals correctly determined that the current "authorized by law" review does *not* allow a court to review the evidentiary record. (Appellants' App'x, p 1093a.) Henderson argues that the "authorized by law" standard "does not foreclose review of the evidentiary record," and in fact, such review is *required* to determine if a decision is arbitrary or capricious. (Appellants' Supp Br, pp 30, 32.) On the second issue, the Court of Appeals correctly determined that the Commission's classification decision, which was based on an extensive classification study, was not arbitrary or capricious, and was therefore authorized by law. (Appellants' App'x, p 1094a.) Henderson contends that the Court of Appeals erred by not engaging in a more thorough review of the evidence that Henderson believes supports an alternative conclusion. (Appellants' Supp Br, pp 36-40.)

A. When the "authorized by law" standard applies, our courts have held that courts cannot review the evidentiary record.

After determining that the "authorized by law" standard governed the review of the Commission's decision and identifying the four-factor test set forth above, the Court of Appeals reversed the circuit court's decision because it exceeded the scope of that standard. (Appellants' App'x, p 1092a.) The Court of Appeals correctly

identified that the only factor at issue under that test was whether the Commission's decision was arbitrary and capricious. (*Id.*, p 1093a.) The Court of Appeals also stated "[t]he law is clear that, in a case where a hearing was not required, it simply is not 'proper for the circuit court or this Court to review the evidentiary support of [the] administrative agency's determination.'" (*Id.*, citations omitted.) This formulation came from *Brandon*, which was subsequently cited by *Wescott* with respect to Commission decisions. *Wescott*, 298 Mich App at 162.

Henderson quibbles with the fact that the Court in *Brandon* did not cite any precedent for this proposition. (Appellants' Supp Br, p 31.) Failure by the Court of Appeals to cite precedent is certainly not, by itself, a ground for disregarding a legal principle that is embodied in the text of the Constitution. Henderson may disagree with the initial formulation in *Brandon*, but the Court of Appeals has had numerous opportunities to revisit this issue and has consistently reaffirmed this principle. "When the agency's governing statute does not require the agency to conduct a contested case hearing, the circuit court may not review the evidentiary support underlying the agency's determination." *Natural Resources Defense Council*, 300 Mich App at 87 (applying the *Brandon* principle to case arising under the Clean Air Act); see also *Northwestern*, 231 Mich App at 488 (applying the *Brandon* principle to decision by the Insurance Commissioner); *Hammond v Civ Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2013 (Docket No. 309704), p 3 (applying *Brandon* principle to Commission decision on long-term disability benefits appeal); *Whaley v Civ Serv Comm*,

unpublished per curiam opinion of the Court of Appeals, issued May 30, 2013 (Docket No. 306353), p 2 (applying *Brandon* principle to Commission decision on long-term disability benefits appeal); *Denbeste v Civ Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued Aug. 7, 2012 (Docket No. 303215), p 2 (applying *Brandon* principle to Commission decision on long-term disability benefits appeal).[6]

The Court of Appeals' holding on this point is consistent with the prevailing case law on the "authorized by law" standard. When a reviewing court is governed by this standard, it is not appropriate to engage in a review of the evidentiary record. And that holding is also consistent with the original understanding of the words "authorized by law," especially given the separate standard expressly set out for cases that do involve a hearing.

B. The Commission's classification decision was the antithesis of arbitrary, and the Court of Appeals correctly affirmed it.

The final element of this Court's supplemental questions involves how the Court of Appeals applied the "authorized by law" standard in its actual review of the Commission's classification decision. As set forth above, the Court of Appeals determined: that the "authorized by law" standard was the sole governing standard to be applied; that the current test for applying that standard is the four-factor test

[6] *Hammond*, *Whaley*, and *Denbeste* are unpublished decisions from the Court of Appeals. The Commission cites these cases because they reflect the consistency with which the Court of Appeals has applied the principle in *Brandon* that an "authorized by law" review does not allow the reviewing court to review the evidentiary record. See MCR 7.215(C); (Appellees' App'x, pp 1b-13b).

from *Brandon*, *Wescott*, and other cases; and when that test applies, the reviewing court cannot review the evidentiary record.

At the outset, if this Court examines the original understanding of the terms "authorized by law" and agrees that it does not include the concept of review for arbitrariness or caprice, then this step is irrelevant; there is no need to examine whether the decision was arbitrary or capricious.

But even under the four-factor test, by declining to wade into the underlying evidentiary record, the Court's application of that test reflects the proper amount of judicial restraint that is called for under this standard:

> Regarding whether the decision was arbitrary and capricious, the CSC predicated its decision on an extensive and detailed classification study, the determining principle of which was to identify the extent to which employees in the newly created positions participated in the treatment-related activities envisioned for the RUO and CMUO positions. The conclusions of the OCSC were subject to multiple layers of review that included an opportunity for plaintiffs to submit additional documentation and express their critique of the study and resulting classification. The CSC's decision came at the end of this process. In light of the foregoing and of our limited scope of review, we cannot say that this decision "lacks an adequate determining principle" or that it "reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance," or that it is "freakish or whimsical." [Appellants' App'x, p 1094a.]

There is no dispute that the Commission undertook a months-long classification study to determine which position classification was the best fit for the affected employees in this case. (Appellants' App'x, pp 6a-22a.) The study included on-site position reviews at every major correctional facility by a team of eight classification experts, desk audits of 120 employees who were selected with the input of management and the Michigan Corrections Organization, and

interviews. (*Id.*, pp 6a-7a.) The result of the study was a 17-page classification decision that reached a conclusion as to the proper classification for the affected employees. (*Id.*, pp 21a-22a.) That decision was then subjected to a de novo review on appeal by the Commission's technical review officer. (*Id.*, pp 607a-665a.) It was affirmed by the technical review officer and then affirmed by the Commission in its final decision. (*Id.*, p 783a.)

If the Court of Appeals' review demonstrates the measured restraint that is necessary when applying the "authorized by law" standard, the circuit court's decision falls on the opposite end of that spectrum. As the Court of Appeals rightly noted, the circuit court erred "by reweighing the evidence, making credibility decisions, and substituting its judgment" for the Commission's. (Appellants' App'x, p 1094a.) Indeed, the circuit court's decision reflects these deficiencies by discrediting certain evidence the Commission relied on, giving more weight to "contradictory" evidence, questioning the credibility of evidence, and improperly characterizing evidence to inflate its importance. (Appellants' App'x, pp 900a-903a.)

Henderson's argument in support of the circuit court's decision continues to invite *more* evidentiary review by the judiciary, rather than less. In fact, Henderson now claims that it is impossible to determine if a decision was arbitrary without engaging in a review of the evidence. (Appellants' Supp Br, pp 35-36.) But this Court need only look to the Court of Appeals' decision in this case for an example that shows Henderson's claims are unfounded. By keeping its analysis focused on a high-level view of the Commission's decision, as opposed to probing the

actual evidence, the Court of Appeals gave proper meaning to the standard of review. Consider, for example, the differences between the Court of Appeals' and circuit court's descriptions of the Commission's decision:

- **Court of Appeals:** The Commission based its decision on "an extensive and detailed classification study, the determining principle of which was to identify the extent to which employees in the newly created positions participated in the treatment-related activities envisioned for the RUO and CMUO positions." (Appellants' App'x, p 1094a.)

- **Circuit Court:** "The results of the classification study appear to have showed, at best, that the questions posed by the study to the former RUOs were flawed in regards to the treatment teams, and that the [Department's] statements regarding the involvement of the RUOs in treatment teams were contradicted by those former RUOs who appeared to have understood the concept of a rehabilitative treatment team and by the vast majority of the former RUOs' supervisors. (Appellants' App'x, pp 900a-901a.)

The first example shows that a court does not need to re-sift the evidence to determine if an agency's decision was arbitrary. The reviewing court can of course review the agency's final decision and the substantive steps the agency took in reaching that decision. That review should enable the court to determine if the agency's decision "lacks an adequate determining principle" or "reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance" or is "freakish or whimsical." *Wescott*, 298 Mich App at 162. Those are the long-accepted definitions of an arbitrary and capricious decision. Courts can make those determinations without resorting to a review of the underlying evidence. The second example shows a court that has waded into the evidence that was presented to the agency and is making determinations on the respective weight

and credibility. That level of evidentiary review is unnecessary and inappropriate to reach a conclusion.

Notably, Henderson points to the *Brandon* decision as support for the idea that a reviewing court must be able to investigate the underlying evidentiary record in an "authorized by law" review. (Appellants' Supp Br, p 31.) But *Brandon* actually demonstrates the opposite level of analysis: the Court did *not* probe into the evidence, but merely described the process by which the Insurance Commissioner reached a decision, and held that it was not arbitrary or capricious:

> The commissioner's order was based on a review of petitioners' claims by the staffs of the Insurance Bureau and the Attorney General. This review included an examination of the contract between the MESSA and Blue Cross. On the basis of this review, the commissioner concluded that the contract was outside the regular authority of the bureau. This finding was not arbitrary or capricious. [*Brandon*, 191 Mich App at 265-266.]

The key takeaway from this holding is the Court's recognition that *the agency* reviewed the contract at issue and *the agency* reached a conclusion about that contract. The *court* itself did not review the contract or reach any conclusions about that contract. This is the important distinction between reviewing the agency's decision for arbitrariness and reviewing the actual evidentiary record. A court, just like *Brandon* or this case, can do the former without engaging in the latter.

For these reasons, the Court of Appeals correctly applied the "authorized by law" standard in its review of the circuit court's decision by refraining from an evidentiary review. The Court of Appeals correctly determined that the circuit court violated the limited scope by engaging in a full review of the underlying evidence. The Court of Appeals' decision should be affirmed.

CONCLUSION AND RELIEF REQUESTED

When the Court of Appeals undertook its review of the circuit court's decision in this case, it did so consistently with the last several decades of decisions applying the "authorized by law" standard. It recognized that this standard applies where there was no hearing, that it includes a four-factor test, and that it does not allow for an evidentiary review. The Court of Appeals correctly applied that standard in concluding that the circuit court had erred, and correctly determined the Commission's classification decision was authorized by law.

But the current test itself did not arise from a careful review of the constitutional text or with the purpose of effectuating the framers' intent. Accordingly, this Court should revisit the current test from that perspective, because a narrower articulation, which eliminates the possibility of an evidentiary review, is more faithful to the original meaning.

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Dated: June 29, 2018