STATE OF MICHIGAN

IN THE SUPREME COURT

W.A. FOOTE MEMORIAL HOSPITAL, d/b/a ALLEGIANCE HEALTH, a Michigan non-profit corporation,

Plaintiff/Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN, MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants/Appellees

and

JOHN DOE INSURANCE COMPANY,

Defendant.

Supreme Court Case No. 156622

Court of Appeals Case No. 333360

Kent County Circuit Court
Case No. 15-08218-NF

Hon. Donald A. Johnston

Joseph J. Gavin (P69529)
Patrick M. Jaicomo (P75705)
MILLER JOHNSON
Attorneys for Plaintiff/Appellant
45 Ottawa Avenue, S.W. – Ste. 1100
P.O. Box 306
Grand Rapids, MI 49501-306
(616) 831-1700

Nicholas S. Ayoub (P61545)
HEWSON & VAN HELLEMONT, P.C.
Attorneys for Defendants/Appellees
625 Kenmoor Ave., S.E. – Ste. 304
Grand Rapids MI 49546
(616) 949-5700

PLAINTIFF/APPELLANT ALLEGIANCE HEALTH'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

On May 25, 2018, this Court ordered a MOAA on Allegiance Health's Application for Leave to Appeal and directed the parties to address three issues in supplemental briefing:

> (1) Whether the Court of Appeals correctly concluded that this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), has been "effectively repudiated" in the context of judicial decisions of statutory interpretation, see *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012); *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 n 57; 702 NW2d 539 (2005);
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> (2) If *Pohutski* has not been effectively repudiated whether the *Pohutski* framework should have been applied in *Spectrum Health*; and
>
> (3) Whether this Court's decision in *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), should be applied to this case.

As explained below, (1) *Pohutski* is still good law that (2) should have been applied in *Spectrum Health*. (3) Under *Pohutski*, *Covenant* should not be applied retroactively to this case.

In holding to the contrary, the Court of Appeals improperly rewrote the entire doctrine of prospective application of judicial decisions in Michigan under the guise of "Blackstonian pronouncement[s]" about what the law is and from where it derives. But the radical approach it took—that old caselaw is *actually* nullified by new caselaw nunc pro tunc and treated is if it never existed—has been repeatedly rejected by this Court:

> [A] new [interpretation] does not always nullify past application of the old [interpretation] when the old [interpretation] was understood to have conformed with the [statute] at the time it was applied: The actual existence of [the old interpretation], prior to such a determination, is an operative fact and may have

> consequences which cannot justly be ignored. *The past cannot always be erased by a new judicial declaration.* [*People v Carp*, 496 Mich 440, 496 n 25; 852 NW2d 801 (2014), citing *People v Smith*, 405 Mich 418, 432; 275 NW2d 466 (1979) (internal quotation marks omitted and emphasis added).]

Contrary to the Court of Appeals' opinion and consistent with this Court's long-standing jurisprudence, practical concerns—among them, the purpose of a new interpretation, reliance on the old interpretation, and the administration of justice—must be considered when determining whether a decision should be applied retroactively or with limited prospectivity.

This Court should reverse the Court of Appeals' published decision below, confirm that the *Pohutski* framework governs retroactive application of judicial decisions of statutory interpretation in Michigan, and hold that under *Pohutski*, *Covenant* does not apply to this case.

ARGUMENT

I. This Court has not "effectively repudiated" *Pohutski*.

A. Under the doctrine of stare decisis, principles of law decided by this Court should not be lightly departed and implicit repudiation is strongly disfavored.

The concept that a decision of this Court can be "effectively repudiated" is dubious and inconsistent with the doctrine of stare decisis—meaning, "to abide by, or adhere to, decided cases." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), citing Black's Law Dictionary (rev. 4th ed.). Under that doctrine, "principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990). "Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes

to the actual and perceived integrity of the judicial process.'" *Robinson*, 462 Mich at 465, quoting *Hohn v United States*, 524 US 236, 251 n 21; 118 S Ct 2581; 141 L Ed 2d 242 (1998).

Thus, where this Court has determined that its prior cases are in conflict, it has explicitly overruled cases as necessary to clarify the law, but in so doing, it has addressed issues of stare decisis. In *Mudel v Great Atl & Pac Tea Co*, 462 Mich 691, 708-709; 614 NW2d 607 (2000), for example, this Court stated after concluding that the earlier decision under consideration was wrongly decided: "[W]e wish to make clear that we do not lightly overrule existing precedent." The Court then examined the question of whether it should overrule under stare decisis principles. This Court has, therefore, made it clear that its decision to overrule precedent should be deliberate and considered, not incidental or done "effectively," as the Court of Appeals held. Indeed, the very concept of "repudiating" decisions of this Court—as distinct from overruling them—is inconsistent with stare decisis.

As a corollary, and to further promote stability in the law, this Court has reserved to itself the power of changing its mind. In *People v Lewis*, 501 Mich 1, 9; 903 NW2d 816 (2017), this Court cited the United States Supreme Court's "admonition that other courts should not conclude that the Court's 'more recent cases have, by implication, overruled an earlier precedent' but should instead leave to the Supreme Court 'the prerogative of overruling its own decisions.'" *Agostini v Felton*, 521 US 203, 237, 237 n 6; 117 S Ct 1997; 138 L Ed 391 (1997). *Lewis* then cited *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016), noting that this Court has "recently emphasized that a similar rule governs" in Michigan.

The significance of stare decisis to the Court of Appeals' decision here is difficult to overstate. Indeed, in *McCormick v Carrier*, 487 Mich 180, 278 n 49; 795 NW2d 517 (2010)

(MARKMAN, J., concurring), Justice Markman noted that—at least up until 2010—there had not been "a *single* case in which we overruled precedent without specifically citing *Robinson*['s stare decisis analysis.]" That is because "[a]llowing a case to slip down a memory hole . . . is a poor substitute for deliberately examining and deciding a principle of law." *In re Simpson*, 500 Mich 533; 902 NW2d 383, 402 n 62 (2017) (citations, quotation marks, and brackets omitted); but see *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008) (dicta).

B. This Court's decisions in *Spectrum Health*, *Hathcock*, and *Devillers* did not repudiate *Pohutski*.

Setting aside this Court's general disapproval of implicit repudiation, *Spectrum Health*, *Hathcock*, and *Devillers* did not "effectively repudiate[]" the decades-old *Pohutski* framework. Far from it.

1. *Spectrum Health* did not mention *Pohutski*, its framework, or the application of stare decisis principles to either.

In *Spectrum Health*, this Court's focus was not on doctrine of retroactivity, but the family joyriding exception, which had been engrafted onto the no-fault act by a plurality of this Court in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). Accordingly, *Spectrum Health* spent very little time on "stare decisis and retroactivity." *Id.* at 535-537. And because, as *Spectrum Health* pointed out, *Priesman* was a plurality opinion, "the principles of stare decisis d[id] not apply[.]" *Id.* at 535.

In light of its reference to stare decisis, it would be passing strange if *Spectrum Health* implicitly overruled the dozens of majority decisions in the *Pohutski* line of cases without so much as a cursory reference to one of them, let alone the application of stare decisis principles. *Spectrum Health*'s analysis of retroactivity was set out in the following 224 words:

> "'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law,

> but that it never was the law.'" [*Gentzler v Smith*, 320 Mich 394, 398; 31 NW2d 668 (1948).] This principle does have an exception: When a
>
> > "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."
>
> Spectrum Health and Mary Free Bed claim that this opinion should only apply prospectively. They maintain that insurance companies set their premiums to reflect the family-joyriding exception and that it is the medical providers and insureds who will suffer the consequences of this opinion. Justice Cavanagh similarly claims there is an expectation that family members who drive a family vehicle without express permission will be covered. However, it is undisputed that there is no contractual right to have insurance companies provide PIP benefits to operators in these cases. Indeed, Ryan DeYoung is a named excluded driver on the policy purchased from Progressive. In other words, our decision today does not at all affect the parties' contractual rights, and it is retrospective in its operation. [*Id.* at 535-537 (footnotes omitted).]

But *Gentzler*—which predates Michigan's adoption of the *Pohutski* framework from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965)—does not stand for the rigid rule for which it was cited. Contrary to *Spectrum Health*'s suggestion that the general rule cited in *Gentzler* allows for "*an* exception" (emphasis added), *Gentzler* sets out—and then follows—a broader exception:

> The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair the obligations of contracts entered into *or injuriously affect vested rights acquired in reliance on the earlier decisions*. [*Gentzler*, 320 Mich at 399 (citation omitted, emphasis added).]

This analysis, it is worth noting, anticipates the *Pohutski* framework much more closely than *Spectrum Health* suggests. After all, that framework simply provides a mechanism for

ameliorating the "effect of changing settled law[.]" *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108; 643 NW2d 553 (2002).

Applying this broader rule and concluding that retroactive application of its reinterpretation of a constitutional provision would affect vested rights—not contract rights—acquired in reliance on its earlier decision, *Gentzler* limited its ruling to prospective application:

> We are mindful that as to $38,000 of these bonds issued in 1939, the issuance thereof was not submitted to the electors for their approval. None-the-less as section 24, article 8 of the Constitution, was at that time judicially construed, it was self-executing, and for that reason approval of the bond issue by the electors was not required. [*Id.* at 399.]

That application is at odds with *Spectrum Health*'s reliance on *Gentzler* because *Spectrum Health* self-evidently "affected vested rights acquired in reliance on the earlier decisions." Namely, at the time the healthcare providers rendered treatment and care to the injured persons, and at the time those injured persons sought that treatment and undertook contractually to pay for it, their rights to no-fault benefits under the then-established "family joyriding exception" vested in reliance on *Priesman* and its progeny.

Other than *Spectrum Health*, this Court has cited *Gentzler* only three times in applying retroactivity principles. In one case, *Martin v White Pine Copper Co*, 378 Mich 37, 44; 142 NW2d 681 (1966), this Court held that its decision in *Autio v Proksch Const Co*, 377 Mich 517; 141 NW2d 81 (1966), applied retroactively to abrogate a judicially-created six-year period of limitations that would have barred a widow from workers compensation benefits owing due to her husband's on-the-job death. *Martin* was hardly a case where *Pohutski* was needed to soften the harshness of a new judicial decision. In the other two, this Court held the new decisions applied prospectively. See *WT Andrew Co, Inc v Mid-State Sur Corp*, 461 Mich 628, 632 n 1; 611 NW2d 305 (2000) ("However, our conclusion regarding the applicability of the statute to a

constitutional university marked a change in the law, and required the express overruling of *Weinberg v Univ of Mich Regents*, 97 Mich 246; 56 NW 605 (1893), and *William C Reichenbach Co v Mich*, 94 Mich App 323, 331–336; 288 NW2d 622 (1979). Thus the effect of the holding on other cases is limited by the principle stated in *Gentzler* . . . .") (citation omitted); *Alan v Wayne Co*, 388 Mich 210, 312; 200 NW2d 628 (1972) ("The impact of our holding on previous bond issues is not before this Court but whether or not they are valid under the law as stated herein, the rights of Bona fide purchasers of such bonds to be paid according to the tenor of the obligations cannot be impaired by the holding of this opinion[.]"). In short, the rigidity adopted by the Court of Appeals below is not supported by *Spectrum Health* or *Gentzler*.

Thus, not only would it be peculiar for *Spectrum Health* to have repudiated the *Pohutski* framework without even mentioning a single case applying it, *Gentzler*—decided decades before *Pohutski*—would provide a very peculiar basis for doing so. *Spectrum Health* did not repudiate *Pohutski*. Neither did *Hathcock* or *Devillers*.

2. This Court has already held that *Pohutski* is consistent with *Hathcock* and *Devillers*.

Rowland v Washtenaw Co Rd Comm, 477 Mich 210; 731 NW2d 41 (2007), is fatal to any argument that *Hathcock* or *Devillers* repudiated *Pohutski*. There, in addressing retroactivity, this Court began by citing *Pohutski*. 477 Mich at 220. It then explained that *Hathcock* and *Devillers* were consistent with the *Pohutski* framework. *Id.* at 220-222.

a. *Hathcock* relied on *Pohutski*.

In *Hathcock*, this Court overruled *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981), holding that it misinterpreted the Michigan Constitution. See *Hathcock*, 471 Mich at 482-483. In doing so, *Hathcock* did not repudiate *Pohutski*; *Hathcock* relied on *Pohutski*. See *Hathcock*, 471 Mich at 484 n 96, 484 n 98.

In rejecting the prospective application of its decision, *Hathcock* applied this Court's reinterpretation of a constitutional provision to "all pending cases *in which a challenge to Poletown has been raised and preserved*" – what has been characterized as the usual rule of limited retroactivity.[1] *Hathcock*, 471 Mich at 484 (emphasis added). In doing so, this Court addressed some concerns with finding any of its decisions *fully* prospective, i.e. that a decision would not even bind the parties before the court in the particular case. It explained in dicta:

> [T]here is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions. The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor—and, then, only "on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const. 1963 art. 3, § 8. Furthermore, this Court has recognized that "[c]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." [*Id.* at 484 n 98, citing *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (which further justified prospective application where "the bench and bar had justifiably relied upon [the since-overruled] precedent").]

The Court did not, however, repudiate the concept that limited prospective application (in which a case applies to the parties only and not to anyone else before the decision date) is viable under Michigan law, per *Pohutski*.

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[1] The requirement that the issue be raised and preserved presents an alternative basis to conclude that the Court of Appeals erred. Here, the record demonstrates that the MACP neither raised nor preserved for appellate review the argument that a healthcare provider lacks a direct statutory cause of action under the no-fault act. See App'x. at 24a-102a. Holding to the contrary, the Court of Appeals divined preservation out of "defendants' assert[ion] . . . that plaintiff lacked standing to sue and that defendants did not owe benefits to plaintiff because plaintiff was not the one who had 'incurred' them." *W A Foote*, 321 Mich App at 173-174. The Court of Appeals concluded "[t]his, in essence is an assertion that plaintiff did not have a statutory right to sue defendants directly . . . ." *Id.* at 174. That is simply incorrect. But the Court of Appeals went even further, stating that "given the state of the caselaw at the time of the proceedings in the trial court and defense counsel's statements at the summary disposition motion hearing, it is clear that counsel was aware that then-applicable Court of Appeals precedent likely would have rendered any such argument futile at the time." *Id.* at 174. Thus, notwithstanding the Court of Appeals' rigid fealty to Blackstone in applying the law retroactively to Allegiance Health and every other no-fault plaintiff in Michigan, it inexplicably forgave the MACP—*the party arguing that a new interpretation is retroactively the law immemorial*—its reliance on what "never w[as]" the law. Thus, at a minimum, *Covenant* should not be retroactively applied to any pending cases, including this one, where the defendants failed to raise the specific statutory issue that *Covenant* decided.

Hathcock also relied on another case applying the *Pohutski* framework: *Lesner*. See *Hathcock*, 471 Mich at 484 n 95. In *Lesner* this Court held that "the formula for calculating worker's compensation benefits for surviving partial dependents in *Weems* [*v Chrysler Corp*, 448 Mich 679; 533 NW2d 287 (1995)] was inconsistent with the governing statute, MCL 418.321. Accordingly, [this Court] overrule[d] that portion of the *Weems* opinion." *Lesner*, 466 Mich at 97. This Court then held that "the portion of this opinion that overrules *Weems* is to have limited retroactive effect." Applying the *Pohutski* test, *Lesner* noted that "recognition of the effect of changing settled law has led this Court to consider limited retroactivity when overruling prior caselaw." *Id.* at 108-109. Because "*Weems* ha[d] been controlling authority for over six and one-half years," this Court found reliance and determined that complete retroactive application would have "a detrimental effect on the administration of justice." *Id.* at 109.

Thus, *Hathcock* in no way repudiated *Pohutski*. To the extent it expressed concerns about "purely prospective opinions," it did so in dicta, and its criticism of prospectivity was only aimed at purely—not limited— prospective application.

b. *Devillers* relied on *Hathcock*.

Devillers overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986). Relying on *Hathcock*, *Devillers* similarly affirmed that, although this Court's decisions are typically "given retroactive effect, applying to pending cases in which a challenge . . . has been raised and preserved," limited prospective application is appropriate under certain circumstances. *Devillers*, 473 Mich at 587 (citation and internal quotation marks omitted). As *Devillers* noted, this application is "limited retroactivity." *Id.* at 588 n 57. And like *Hathcock*, *Devillers* criticized "prospective-only application" of this Court's decisions, stating that pure prospectivity should be limited to circumstances where the decisions "overrule *clear and uncontradicted* case law." *Id.* at 587, citing *Hathcock*, 471 Mich at 484 n 98 (quoted above).

Thus, while *Hathcock* and *Devillers* both criticize purely prospective application of decisions, they both recognize that the *Pohutski* framework governs Michigan law.

C. *Carp*'s reliance on the *Pohutski* framework demonstrates that it was not repudiated by *Spectrum Health*.

Finally, two years after *Spectrum Health* was decided, this Court addressed retroactivity in *Carp*. There, this Court applied the *Pohutski* framework. See, e.g., *Carp*, 496 Mich at 497, citing *People v Maxson*, 482 Mich 385, 393; 759 NW2d 817 (2008); *Carp*, 496 Mich at 511-512. Although *Carp* addressed the issue in the context of criminal procedure, it demonstrates the *Pohutski* framework survived *Spectrum Health*.

II. The *Pohutski* framework should have been applied in *Spectrum Health*.

In light of the foregoing history and principles of stare decisis, *Spectrum Health* should have applied the *Pohutski* framework in its consideration of retroactivity. That it did not makes it an anomaly. And to the extent it could be read to implicitly repudiate *Pohutski*, *Carp* would much more clearly repudiate *Spectrum Health*. In either case, this Court should maintain its disfavor toward implicit repudiation of its previous decisions.

The draconian position that the Court of Appeals gleaned from *Spectrum Health* is inconsistent with this Court's consideration of practical reality in evaluating the application of stare decisis and retroactivity. The Court of Appeals reshaped Michigan jurisprudence based on the legal fiction that—paraphrasing Blackstone—"intervening judicial decisions that may have misinterpreted existing statutory law . . . are not, and never were, 'the law.'" *W A Foote*, 321 Mich App at 190. Thus, because the overruled precedent "never was" the law, full retroactive application is required for all cases that provide new statutory or constitutional interpretations.

Observing the practical issues of such an unyielding position, the Court of Appeals wrote:

> We fully appreciate the conundrum faced by litigants who follow and endeavor to conform their behavior to what they legitimately understand to be the guidance and directives of our courts, only to be confronted with a subsequent judicial change of direction that seemingly pulls the rug out from under them. But we must be true to the law. [*W A Foote*, 321 Mich App at 190, n 16; but see *id.* at 174 (declining the pull the rug out from under the MACP for its failure to preserve issues for appeal).]

That understanding is inconsistent with Michigan retroactivity principles, stare decisis, and the binding nature of decisions on subordinate courts. It is also logically unsound; if the Court of Appeals truly believes that full retroactivity is always demanded as a foundational principle, there is no basis to exempt closed cases from that principle.

A. This Court's retroactivity jurisprudence demonstrates the role that practical considerations play in determining whether and how a decision should be retroactively or prospectively applied.

In *Carp*, this Court noted that prospective application is appropriate under "the principle of finality which is essential . . . ." *Carp*, 496 Mich at 470 (internal quotation marks omitted), citing *Teague v Lane*, 489 US 288, 307; 109 S Ct 1060; 103 L Ed 2d 334 (1989) (opinion by O'CONNOR, J.). "[T]he costs imposed . . . by retroactive application of new rules of constitutional law . . . generally far outweigh the benefits of this application." *Id.* (internal quotation marks omitted), citing *Teague*, 489 US at 301. There, the phrase "new rule" includes the Court's governing interpretation of the Constitution. Indeed, whether a rule is "new" is a question of whether "all reasonable jurists would have deemed themselves compelled to accept the rule at the time" the case became final. *Id.* (internal quotations and emphasis omitted), citing *Graham v Collins*, 506 US 461, 477; 113 S Ct 892; 122 L Ed 2d 260 (1993). Reliance on such practical considerations demonstrates that this Court does not share the unyielding view of retroactivity that the Court of Appeals reads from *Spectrum Health*.

Indeed, in applying Michigan's retroactivity standards—again, derived from *Linkletter* and embodied in *Pohutski*—this Court explained long ago:

> The traditional notion that a statute declared unconstitutional is in law a nullity from its inception is a legal fiction of judge-made origin which serves to supply logical symmetry to judicial declarations that a specific legislative pronouncement was beyond legislative capacity. [*People v Smith*, 405 Mich 418, 431; 275 NW2d 466 (1979).]

But that notion, this Court explained, "is not a rule without exceptions . . . . Like all rules of law its wooden application, resulting in fundamental injustice, is intolerable." *Id.* at 432. Thus, as *Carp* notes, *Smith* "departed from the view that an unconstitutional statute is a nullity *ab initio*." *Carp*, 496 Mich at 496 n 25.

Smith further explained that "a new constitutional rule does not always nullify past application of the old rule when the old rule was understood to have conformed with the Constitution at the time it was applied[.]" *Carp*, 496 Mich at 496 n 25, citing *Smith*, 405 Mich at 432 (internal quotation marks omitted). Simply put: "The past cannot always be erased by a new judicial declaration." *Id.* at 496 n 25 (citation omitted). Yet, that is what the Court of Appeals' decision demands.

B. This Court's stare decisis jurisprudence demonstrates the role that practical considerations play in that arena as well.

Stare decisis—like prospective application of judicial decisions— is "in practice a prudential judgment for a court." *Robinson*, 462 Mich at 467; see also *id*. at 464, quoting *Hohn*, 524 US at 251 n 21 ("[S]tare decisis is a 'principle of policy[.]'"). "[T]o 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them[.]'" *City of Coldwater v Consumers Energy Co*, 500 Mich 158; 895 NW2d 154 (2017), citing The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), p 471.

"[T]he mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson*, 462 Mich at 465. That is because "larger institutional issues are implicated . . . ." *McCormick v Carrier*, 487 Mich 180, 263; 795 NW2d 517 (2010) (MARKMAN, J., dissenting), citing *Paige v City of Sterling Hts*, 476 Mich 495, 543; 720 NW2d 795 (2006) (CAVANAGH, J., concurring in part and dissenting in part). Those things include the rule of law, respect for precedent, the integrity of this Court, and judicial restraint. *Id.* The disregard of stare decisis "sow[s] the seeds of confusion . . . making it difficult for the citizens of this state to comprehend precisely what our caselaw requires." *Devillers*, 473 Mich 571 n 19. "A justice's perspective on stare decisis is not evidenced by her willingness to maintain precedents with which she *agrees*, but by her willingness to maintain precedents with which she disagrees." *Rowland*, 477 Mich at 224-225 n 3 (MARKMAN, J., concurring).

Thus, the very doctrine of stare decisis—which permits incorrect interpretations to continue as the law—is diametrically at odds with the Court of Appeals' position. So too is the basic concept that subordinate courts like the Court of Appeals are required to follow the precedent of superior courts, even where the precedent may depart from the statutory or constitutional text. See *Associated Builders*, 499 Mich at 191-192. If the Court of Appeals is correct that the "first obligation must be to maintain the rule of law," *W A. Foote*, 321 Mich at 186, there is no principled basis why this Court should, or even could, instruct subordinate courts that they are not permitted to disregard extant precedent whose "foundations … have been undermined." *Id.* But that is exactly what this Court has directed. Indeed, it is foundational to our judicial system. And the reason is as axiomatic as it is practical: it creates a single controlling understanding of the law to which parties and lower courts can conform their actions.

C. If the Court of Appeals is correct, there is no logical basis to restrict retroactive application to cases that are still open.

If the Court of Appeals' reimagining of retroactivity jurisprudence is required because bad law is not law and never was, the Court of Appeals does not go far enough its analysis. The MACP and the Court of Appeals operate under the following syllogism:

- Major Premise:

  > "[I]ntervening judicial decisions that may have misinterpreted existing statutory law . . . are not, *and never were*, 'the law.'" *W A Foote*, 321 Mich App at 190; (citation omitted, emphasis added)

- Minor Premise:

  > The pre-*Covenant* decisions interpreting the no-fault act to provide a statutory cause of action to healthcare providers misinterpreted existing statutory law.

- Conclusion:

  > Because pre-*Covenant* decisions never were the law, Covenant is fully retroactive and applies to this case.

But there is sleight of hand in the analysis. *To wit*, the Court of Appeals concludes without explanation that the retroactivity applies only to cases "still open." *Id.* at 190-191. Nowhere, however, does the Court of Appeals' logic explain, let alone support, such a limitation.

The reason for such an exception is understandable: reopening every closed case to correct the results in accordance with the law would unleash chaos and instability in our legal system. But that concern is wholly practical and inconsistent with the major premise of the Court of Appeals' position. If it is actually true that previous decisions never were law, there is no logical reason not to apply the correct interpretation—the actual law—to cases that became final under the previous, null interpretation.

That no one would argue for such a radical application of retroactivity demonstrates that the Blackstonian principles yield to practical reality. And with that in mind, the question becomes, as a practical matter, where to draw the line. *Pohutski* gives us the answer, and it has for half a century. This Court has not departed from *Pohutski* and, under a very simple application of stare decisis, should not do so now.

III. Under the *Pohutski* framework, *Covenant* should not be applied to this case.

Under *Pohutski*, the threshold issue is whether the decision clearly established a new principle of law. 465 Mich at 696-697 (citations omitted). A court's interpretation of a statute—where it "gives effect to the intent of the Legislature that may be reasonably inferred from the text of the governing statutory provisions"—is "akin to the announcement of a new rule of law," especially when it addresses earlier "erroneous interpretations" made by other courts. *Pohutski*, 465 Mich at 696-697, citing *Gusler v Fairview Tubular Prod*, 412 Mich 270, 298; 315 NW2d 388 (1981) ("In the interest of fairness we do not believe our holding should affect any disability compensation payments already made."). Thus, *Covenant* established a new principle of law here.

That triggers a three-factor test, considering: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski*, 465 Mich at 696 (citation omitted). All three factors disfavor the retroactive application of *Covenant* to this case.

A. The purpose of the new rule favors prospective application.

The purpose of the new rule is the primary consideration in determining whether limited prospective application is appropriate. See *Carp*, 496 Mich at 502. The purpose stated by *Covenant* is "to conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law."

Covenant, 500 Mich at 201. As the Court of Appeals acknowledges, "*Pohutski* suggests that such a purpose might favor prospective application." *W A Foote*, 321 Mich at 193. Indeed, *Pohutski* explicitly states that such a purpose *does* favor prospective application. As noted above, similar to *Covenant*, *Pohutski* overruled a case involving erroneous statutory interpretation. On the first factor, *Pohutski* explained that prospective application would further the purpose of correcting that error. 465 Mich at 697 ("First, we consider the purpose of the new rule set forth in this opinion: to correct an error in the interpretation of § 7 of the governmental tort liability act. Prospective application would further this purpose."). The same is true for *Covenant*'s purpose.

B. The overwhelming extent of reliance and the effect of retroactivity on the administration of justice also favor prospective application.

Factors two and three should be considered together. *Carp*, 496 Mich at 502. The Court of Appeals correctly notes that "there can be no doubt that plaintiff and others have relied on our prior caselaw over the course of many years" and that "insurers and healthcare providers have acted in reliance on the caselaw that *Covenant* overturned." *W A Foote*, 321 Mich App at 194. That is correct. Thousands of cases were decided in the pre-*Covenant* landscape. Insurers and healthcare providers alike shaped their practices and procedures around that caselaw.

On this subject, a passage from *Carp* applies to *Covenant* as much as it did there:

> Applying these considerations in evaluating the second and third factors to [*Covenant*], it is apparent that these factors do not sufficiently favor the retroactive application of [*Covenant*] so as to overcome the first factor's clear direction against its retroactive application. The old rule permitting [healthcare providers to bring suit against insurers] on the basis of the pre-[*Covenant*] scheme . . . received in 199[5] the specific approval of its [application] by our judiciary. Further, nothing in [Michigan] Supreme Court caselaw called into any question [provider suits] until [*Covenant*] was decided in 201[7] . . . . Accordingly, at the time [healthcare

> providers] across Michigan [sued insurers] who would [be unreachable by providers directly] if [*Covenant*] were applied retroactively, the [no-fault act] was affirmatively understood as permitting the [commencement of direct actions by providers against insurers.]
>
> On the basis of this state of the law, [injured people. healthcare providers, and insurers] across Michigan entirely in good faith relied on the old rule whenever [providers brought suit directly against insurers.] Considering the . . . approval the old rule received from . . . our judiciary. . . as well as the length of time during which the old rule prevailed—dating back to [1995]—the reliance on the old rule by Michigan [injured people, healthcare providers, and insurers] was significant and justified. [See *Carp*, 496 Mich at 505-506.]

For the same reasons that the second and third factors did "not sufficiently favor retroactive application so as to overcome the first factor" in *Carp*, they do not do so here. Here, reliance and the administration of justice are even more strongly in favor of prospective application because injured people, healthcare providers, and insurers relied on pre-*Covenant* caselaw in their frequent interactions.

And because *Covenant* was the first and only case to hold that the no-fault act did not provide a direct cause of action to healthcare providers since the inception of the no-fault act in 1973, physicians who provided care, injured people who relied on their providers to pursue their claims, adjusters who processed those claims, and attorneys who litigated their disputes worked entire careers under that system.

There is a further effect on the administration of justice if *Covenant* is to apply retroactively. This Court's jurisprudence of the last two decades has emphasized that Michigan citizens are first to look to the words of their statutes to know what the law is. But where those words reasonably admit different interpretations, Michigan citizens have likewise justly relied on the decisions of their courts for guidance. This Court has repeatedly stated that one of the policies underlying stare decisis is to "foster[that] reliance." See, e.g., *Robinson*, 462 Mich at

465. It would be a cruel irony for this Court to, in one breath, encourage Michigan citizens to rely on the decisions of the courts through the doctrine of stare decisis, and in the next, punish them for that reliance when those courts are determined to have erred but the correction is fully retroactive to strip them of vested rights.

> Justice Black articulated this point more than fifty years ago:
>
> > Nunc pro tunc law, enacted judicially by the process of overruling unanimous and mature decisions dealing with standing statutes, is consummately indefensible. That is why no member of our Court attempts to defend the practice as he proceeds with it.
> >
> > One outvoted re[garding] the above must simply bide the passage of time, hopeful that this hell-for-breakfast enterprise of now for then legislation by the court is transitory and that it will not—because really it cannot—go on much longer. Even a legislature could not, consistent with constitutional guaranties, do what the Court has continued to do in 1965, and does now in 1966, that is, destroy defensive rights of substance which, by law, had become vested long before the date of the legislative attempt. Too, and no matter what branch of government tries it, the result is palpably invidious discrimination, effected in favor of those who seek retrospective overthrow of laws others of their class have obeyed.
> >
> > At one time students and citizens, lay and professional, were taught that everyone is presumed to know the law, and hence is duty bound to act in accord therewith. But how may even skilled lawyers, and correspondingly skilled subordinate court judges, 'know the law' when they are taught that the law in the books is not law at all, unless upon litigatory test a bare majority of this very ordinary Supreme Court happens to like it? [*Autio*, 377 Mich at 542 (BLACK, J., dissenting)

The *Pohutski* framework is designed to ameliorate precisely this injustice, and under that framework, *Covenant* does not apply here.

CONCLUSION

Allegiance requests that this Court reverse the Court of Appeals' published opinion below; apply *Pohutski* to this Court's recent decision in *Covenant*; hold that *Covenant* has prospective application, such that it does not apply to this case; and remand this case to the Court of Appeals for further consideration of the underlying issues. Alternatively, Allegiance requests that this Court grant its application and further consider this case.

MILLER JOHNSON
Attorneys for Plaintiff/Appellant

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By /s/ Patrick M. Jaicomo
Joseph J. Gavin (P69529)
Patrick M. Jaicomo (P75705)
Business Address:
45 Ottawa Avenue, S.W. – Ste. 1100
P.O. Box 306
Grand Rapids, MI 49501-0306
Telephone: (616) 831-1700