STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v.

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee

Supreme Court Case No. 158240

Court of Appeals Docket No. 335422

Oakland County Circuit Court Case No. 15-150462-CZ

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**DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S MOTION FOR REHEARING**

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## ARGUMENT

Defendant-Appellee The City of the Village of Clarkston, pursuant to MCR 7.311(F) and MCR 2.119(F)(3), moves for rehearing of the appeal and decision rendered in this case. This action arises under the Freedom of Information Act, MCL 15.231 et seq. Three opinions were issued. The majority held that the City Attorney *is* a "public body" within the meaning of MCL 15.232(h) based upon the majority's interpretation of the *executive branch* definition in MCL 15.232(h)(i) and the *other body* definition in MCL 15.232(h)(iv) without addressing the language differences in MCL 15.232(h)(iii), the public body definition that applies to municipal corporations.[1]

Whether the City Attorney is a "public body" under MCL 15.232(h) was not an issue identified in this Court's order granting leave and was not an issue addressed by the parties. As Justice Viviano notes, it "was inserted as an alternative theory at the very end of" an amicus brief and "was injected into this case at the eleventh hour, without input from the parties or scrutiny

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[1] MCL 15.232(h) states:

> "Public body" means any of the following:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercountry, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(h).]

from the lower courts." *Bisio* (Viviano J, dissenting) at 2, 3-4. In fact, the issue was unpreserved; Plaintiff-Appellant Susan Bisio had repeatedly conceded throughout these proceedings that the city attorney *is not* a "public body." She instead (and solely) argued that because the City Attorney is an agent of Clarkston, records created and retained in the course of performing his official function were documents Clarkston was required to produce. The collective *Bisio* opinion is attached as Exhibit A.

Clarkston now seeks rehearing on the grounds specified below, which include reasons why the Court should modify its opinion. This motion should not be taken as Clarkston's substantive argument on the merits of the dispositive issue. Rather, Clarkston urges this Court to deny leave altogether. It is now obvious that this case is not appropriate for Supreme Court review because (1) the majority's dispositive ruling is contrary to the parties' mutual admission throughout these proceedings that the City Attorney *is not* a public body within the meaning of FOIA; and (2) six of seven Justices have declined to address the agency issue as to which leave was granted. If the Court does not vacate leave and its ensuing opinion, Clarkston seeks the opportunity to thoroughly research and address the "public body" issue through written and oral arguments.

## I. Multiple Procedural and Substantive Irregularities and Errors Support Clarkston's Request for Rehearing.

A party may file a motion for rehearing, setting forth the reasons the Court should modify its decision. MCR 7.311(F). "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition … must result from correction of the error." MCR 2.119(F)(3). Palpable and misleading errors have been shown here. A different disposition will result from correction of the errors.

### A. The Decision Violates Principles of Party Presentation.

Under important principles of party presentation, the issues to be decided are those framed by the parties. With exceptions that do not apply here, this Court has recognized that the Court's role is to act as a neutral arbiter of the issues raised by the parties, not advocates for arguments the parties have not presented. See e.g., *People v Worthington*, 503 Mich 863; 917 NW2d 397, 398 (2018) (Viviano J, concurring) ("it is not our role to find and develop unpreserved arguments on behalf of litigants"). If this Court, upon review of the parties' briefs and oral arguments, determined that the issues framed by the parties and ruled upon by the lower courts were not proper for Supreme Court review, it would have been prudent to deny leave. At the very least, this Court could have issued an order correcting the mistaken impression created by this Court's leave order and allowed the parties (and other interested stakeholders) to address the issue deemed dispositive by the majority.

In *Mich Gun Owners, Inc v Ann Arbor Public Schools*, "plaintiffs and their supporting amicus" raised a new issue regarding conflict preemption through supplemental briefs after the topic came up during oral argument. 502 Mich 695, 708-10; 918 NW2d 756, *reh den sub nom. Mich Open Carry, Inc v Clio Area Sch Dist*, 503 Mich 920; 920 NW2d 372 (2018). This Court did not mince words: if the issues raised by the parties do not matter then "best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties." *Mich Gun Owners*, 502 Mich at 710, n 9.

In rejecting the invitation to address the new issue, this Court noted: "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Mich Gun Owners*, 502 Mich at

709-10, quoting *Greenlaw v United States*, 554 US 237, 243 (2008)); see also, *id.* at 724 (Clement J, concurring) (agreeing that the court should decline to advance an argument for the parties that the parties have not made for themselves and have expressly and unambiguously abandoned as consistent with the admonition that "'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them,'" quoting *Jefferson v Upton*, 560 US 284, 301 (2010) (Scalia, J, dissenting)); *Wilson v Taylor*, 457 Mich 232, 243 n 14; 577 NW2d 100 (1998) (Cavanagh, Michael J) ("we are content merely to conclude the task at hand, rather than continue onward toward some particular conclusion, or decide the applicability of a particular case to the facts before us, where that case was not even cited by any of the parties or amici curiae").[2]

Here, the majority violated the principles of party presentation when it rendered a dispositive ruling on an issue that the parties, by concession, had abandoned. No one argued that the City Attorney is a public body. Ms. Bisio expressly agreed, repeatedly, that the City Attorney is not a public body. Respectfully, if this Court disagreed with that admission, it should have concluded that this is not an appropriate case for a grant of leave.

Judicial admissions "'are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'" *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698, 700–01 (1996) (quoting 2 McCormick, Evidence (4th ed.), § 254, p. 142). A

[2] In *Nash v Duncan Park Comm'n*, 497 Mich 1016, 1017; 862 NW2d 417 (2015), this Court vacated the Court of Appeals' decision because the issue "was not raised below and the Court of Appeals should not have reached it sua sponte." The opinion on a sua sponte issue was also vacated in *Haddix v Majchrzycki*, 472 Mich 851; 691 NW2d 455 (2005), and remanded to the Court of Appeals for reconsideration with directions "to consider further briefing on either or both issues, if it is requested by either party."

judicial admission "is conclusive in the case," and is not subject to contradiction or explanation. *Id*. Respectfully, the Court appears to be an advocate when it overturns an important admission that influenced the parties' legal strategy and judicial decision-making throughout the proceedings.[3]

Absent a denial of leave, this Court could have issued an order advising the parties of its change of heart and allowing the parties and other interested groups and organizations to address the propriety of considering the public body issue as well as the merits. The ramifications of this decision are far-reaching. Justice Viviano described the potentially "thousands" of individuals to whom the majority's analysis might be said to apply:

> The majority's holding today portends a radical expansion of the definition of "public body" under FOIA such that it will now encompass all local officers (not just city attorneys). As the majority makes clear by citing *People v Freedland*, 308 Mich 449; 14 NW2d 62 (1944), all public officers occupy offices created by some legal authority. See *id*. at 457-458 (noting as one of the "indispensable" elements of a "public office of a civil nature" that "[i]t must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature") (quotation marks and citation omitted). It is virtually unheard of for a court to adopt an amicus's interpretation having such a widespread impact *without allowing an opportunity for input from the parties or the many thousands of local officers who will be directly affected by our decision*. The majority's mangling of the meaning of "body" and "office" will, I am afraid, have many serious consequences beyond this case. [*Bisio* dissent at 11-12 (emphasis added) (footnote omitted)].[4]

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[3] See e.g., *Bisio*, dissent at 5, n 5:

> Plaintiff has repeatedly and emphatically conceded the point and indeed even argued it herself for strategic advantage. See *Bisio v The City of The Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335422), p 6 ("Plaintiff argues that the *Breighner* Court's holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body."). Plaintiff also asserted at oral argument: "[W]e are not claiming that the city attorney is a public body. Obviously, he's not."

[4] Justice Viviano lists the categories of local officers potentially subject to FOIA in footnote 9 of the dissent.

Clarkston requests that this Court's leave order (and ensuing opinions) be vacated; alternatively full rehearing should be granted.

**B. The Decision Violates Clarkston's Due Process Rights as a Litigant.**

Due process requires that litigants have an opportunity to be heard on dispositive issues of consequence to the litigation. Here the majority subjects Clarkston to an adverse ruling with concomitant potential financial ramifications without affording Clarkston an opportunity to be heard on the dispositive issue. Further, the majority decided this case contrary to a strategic admission that had been relied upon by the parties throughout these proceedings.

Under the US and Michigan Constitution, no person may be deprived of liberty or property without due process of law. See U.S. Const. amend. XIV, Sec 1; Const 1963, art 1, § 17. Clarkston is a municipal corporation. See Charter, § 1.1(a). "[E]ach organized city shall be a body corporate." MCL 117.1. The United States Supreme Court has recognized that corporations are entitled to certain constitutional rights. See, e.g., *Citizens United v Fed Election Com'n*, 558 US 310, 365; 130 S Ct 876, 913; 175 L Ed 2d 753 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity."). Since Clarkston is a body corporate, it too is entitled to certain protections afforded by the Constitution including the right to adequate notice and an opportunity to be heard. See, e.g., *Detroit Bldg Auth v Wayne Co Treasurer*, 480 Mich 897; 738 NW2d 765 (2007) (Markman, J., concurring) ("because the city's interest was 'reasonably identifiable' under the records of the local assessor, merely posting a foreclosure notice and publishing such notice in a newspaper was not constitutionally adequate … Accordingly, the Court of Appeals erred by concluding that the treasurer 'afforded the City the required due process.'").[5]

[5] In *Detroit Bldg Authority*, the City asserted that its property interests were infringed without due process of law.

"Due process is a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009). In *Williams v Hofley Mfg Co*, 430 Mich 603, 611; 424 NW2d 278 (1988), this Court explained that "[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances,'" quoting *Logan v Zimmerman Brush Co*, 455 U.S. 422, 428 (1982). The Fourteenth Amendment's Due Process Clause "has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" 455 US at 429–430, quoting *Boddie v Connecticut*, 401 US 371, 380 (1971). Further, "to the extent that the procedure involved in this litigation would affect the ability of the defendant to present a legitimate defense, the defendant's property rights are also impaired." *Williams*, 430 Mich at 612.[6]

In *Al-Maliki*, at oral argument on defendant's motion for summary disposition based upon plaintiff's failure to satisfy the No-Fault serious impairment threshold, the trial court raised the issue of causation *sua sponte* and ultimately granted summary disposition for the failure of plaintiff to present evidence that her claimed injuries were caused by the auto accident. *Id.* at 484. On appeal, the Court of Appeals held that the basic requirements of notice and a meaningful opportunity to be heard had not been satisfied because "the trial court decided the matter on an issue not before the court at that juncture …" and was dismissive of plaintiff's attempts to respond. *Id*. at 488-89.

[6] *Williams* explained that "This Court has recognized that a defendant has a property interest in litigation because '[i]t is beyond dispute that a money judgment rendered in [the] litigation against the defendant would deprive it of property.'" *Williams*, 430 Mich at 603, quoting *Logan*, 455 US at 428. Here, FOIA poses the risk of financial implications.

The majority's *sua sponte* dispositive determination that the City Attorney is a public body under the definitional section of FOIA, without affording the parties the opportunity to address the issue, offends the principles of fair play and impartiality that litigants are entitled to expect of our judicial system. This determination affected the outcome of the appeal and will undoubtedly have untoward implications for the future. Further, it contravenes Ms. Bisio's explicit and strategic concession that the City Attorney is not a public body, a concession reached and relied upon by the parties throughout these proceedings. Party concessions and admissions are integral to a party's decision-making and litigation strategy. The unexpected thwarting of an important case-specific concession denies due process. In addition, the majority's ruling potentially subjects Clarkston to adverse consequences for a potential FOIA violation.

The majority decision also violates the due process rights of the City Attorney, who was not a named party to the underlying proceeding and is not a party to this appeal. Although the City Attorney had no independent opportunity to be heard on this issue, the majority's ruling that the City Attorney is a public body potentially subjects him to the varied obligations imposed under FOIA, thus creating an independent and direct effect.

**C. The Majority's Analysis Does Not Allow for Enforcement of its Decision.**

The majority concludes that the City Attorney is a public body with documents subject to FOIA, stating:

> We reiterate that such "public records" must be "prepared, owned, used, in the possession of, or retained by a public body" and not by a private individual or entity. In the instant case, the office of the city attorney constitutes such a "public body" because it is an "other body that is created by state or local authority" pursuant to MCL 15.232(h)(iv). Furthermore, the documents at issue are "writing[s] . . . retained" by that public body and "in the performance of an official function" under MCL 15.232(i), and they are therefore "public records" for the purposes of FOIA. [*Id.* at 15]

While the majority's conclusion appears to obligate the City Attorney to disclose the documents, it provides no legal pathway for enforcing such an order.

Michigan courts generally lack the authority to bind a person who has not been named as a party to the action. *Capitol S&L Co v Standard S&L Ass'n of Detroit*, 264 Mich 550, 553; 250 NW 309 (1933); *First Nat'l Bank of Mt Clemens v Croman*, 288 Mich 370, 375; 28 NW 912 (1939). "Michigan courts have consistently recognized that [a] court may not make '[a]n adjudication affecting' the rights of a person or entity not a party to the case." *Shouneyia v Shouneyia*, 291 Mich App 318, 323; 807 NW2d 48 (2011), citing *Capitol S&L*, 264 Mich 550, 553; see also *Spurling v Battista*, 76 Mich App 350, 353-354; 256 NW2d 788 (1977) (holding that the court did not have the power to compel a non-party to the action to pay witness fees). Judgments entered against a nonparty are generally null and void. 46 Am Jur 2d, Judgment, §86, pp 458-459; 49 CJS, Judgments, §29, pp 80-81.

The majority likewise provides no legal mechanism for directing Clarkston to produce documents possessed by another public body that has not been held to be Clarkston's agent. Six of the seven Justices declined to hold that for purposes of FOIA, the City Attorney is an agent of Clarkston. The bottom line is that the majority does not articulate a legal basis to enforce a disclosure order against the City Attorney or Clarkston, which renders the majority opinion advisory only. Courts do not "decide or declare abstract questions of right for the future guidance of suitors." *Street R Co of E Saginaw v Wildman*, 58 Mich 286, 287 (1885). This Court lacks the judicial power to opine "where [the Court's] conclusions could not be made effective by final judgment, decree, and process[.]" *Anway v Grand Rapids R Co*, 211 Mich 592, 622 (1920). Given the posture of this case, *Bisio* is not an appropriate case for Supreme Court review. For this reason as well, the order granting leave (and this Court's ensuing opinions) should be vacated.

### D. The Majority's Analysis Violates Principles of Statutory Construction and Reaches an Erroneous Result.

The majority errs in holding that the office of the city attorney is a "public body" because it is an "other body that is created by state or local authority" pursuant to MCL 15.232(h)(iv). By using the "other body" definition in MCL 15.232(h)(iv) to widen the definition of public body expressly applicable to municipal corporations in MCL 15.232(h)(iii), the majority impermissibly rewrites the statute to give it a meaning the Legislature did not intend. It applies the definition applicable to municipal corporations as if it contained the same language as the public body definition pertaining to the executive branch in MCL 15.232(h)(i), despite explicit and intentional differences in the wording of the two definitions. This construction defeats the intent of the Legislature and, as Justice Viviano observed, radically expands the definition of "public body" under FOIA.

The rules of statutory interpretation are well established. When the language of a statute is unambiguous, no further judicial construction is required or permitted. The Legislature is presumed to have intended the meaning it plainly expressed. *In re AJR*, 496 Mich 346, 352-353; 852 NW2d 760 (2014). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307, 318 (2000). A court's duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002).

When a statute specifically defines a given term, that definition alone controls. *Addison Township v Barnhart*, 495 Mich 90, 98; 845 NW2d 88 (2014). And, when the Legislature uses language in one definition that does not appear in another definition, the Court must infer that a different meaning is intended. See *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552

(2017) ("The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional."); see also, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp. 57–58 ("[T]he limitations of a text—what a text chooses not to do—are as much a part of its 'purpose' as its affirmative dispositions."). Importantly, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76, 80 (1993) (citing *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989); *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157-159; 189 NW 1006 (1922)).

The majority violates these principles of statutory construction by giving the definition of public body applicable to municipal corporations under MCL 15.232(h)(iii) a meaning that the statutory language does not impart. Remarkably, although the plain meaning of MCL 15.232(h)(iii) controls, the majority does not discuss MCL 15.232(h)(iii) in any significant detail. The bulk of the majority's statutory analysis is devoted to the use of certain words and exclusions in the executive branch definition in MCL 15.232(h)(i) and the "other body" definition in MCL 15.232(h)(iv).

This unusual approach shows that, contrary to the principal rule of statutory construction, the majority did not read the plain language of MCL 15.232(h)(iii) to determine its scope. It found the words it needed to reach its result in the executive branch and other body definitions, MCL 15.232(h)(i) and MCL 15.232(h)(iv). The Legislature could have included those words in MCL 15.232(h)(iii) but did not. As written, the definition governing municipal corporations is much narrower than the executive branch definition, but the majority now gives them parallel scope. The majority's approach defeats the Legislature's intent in creating specific definitions for different

levels of government and displaces the Legislature's authority to decide what is and what is not a "public body." The following step-by-step summary of the majority's analysis shows the above errors.

1. The majority concludes that a "single officer or individual" may be a public body under MCL 15.232(h)(iii) by relying on words in MCL 15.232(h)(i) – a state officer or employee – that do not appear in MCL 15.232(h)(iii):

> As we recognized in *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), "the ordinary definition of 'body' " includes definitions such as " 'a group of individuals regarded as an entity' and 'a number of persons, concepts, or things regarded collectively; a group.' " *Id*. at 129-130 & n 10, quoting *The American Heritage Dictionary of the English Language* (New College ed). That is, the term "public body" suggests a "collective entity." See *id*. at 129. However, *MCL 15.232(h) provides that a single officer or individual may, in particular circumstances, be considered a "public body" for purposes of FOIA. See MCL 15.232(h)(i) (providing that "public body" includes "[a] state officer [or] employee"*). [*Bisio, p* 7 (emphasis added)]

2. In similar fashion, the majority concludes that a "single *office*" may be a public body under MCL 15.232(h)(iii) based upon unique language in MCL 15.232(h)(i) that excludes certain executive branch offices from the definition:

> But more importantly, *MCL 15.232(h) indicates that a single office may also be considered a "public body" for purposes of FOIA*. MCL 15.232(h)(i) provides that "public body" means a "state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government . . . ," while MCL 15.232(h)(i) further provides that, notwithstanding these terms, "public body" does not include "the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof." It is thus noteworthy that MCL 15.232(h)(i) separately excludes "the governor [and] lieutenant governor," as well as "the executive office of the governor [and] lieutenant governor." *By expressly distinguishing between the individual state officers-- the governor and the lieutenant governor-- and the executive offices of those officers, the Legislature, we believe, has communicated that those individual officers are, for purposes of FOIA, separate and distinct entities from their respective "offices.*"
>
> Furthermore, because the Legislature apparently believed that the governor and lieutenant governor should not be included within the definition of "public body," it expressly provided that those two officers were to be excluded from the

> definition. MCL 15.232(h)(i) provides that "public body" includes "[a] state officer," and obviously, the governor and lieutenant governor are both state officers. Therefore, if the Legislature had not expressly excluded the governor and the lieutenant governor from the definition of "public body," these two officers would certainly have been included within the definition. [*Id*. at 8-9 (emphasis added)]

3. The majority speculates about the Legislature's intent in excluding the executive officer of the governor or lieutenant governor from the executive branch public body definition in MCL 15.232(h)(i) and then concludes that the exclusion "must" "presumptively" mean that an "office" [of apparently anyone serving in government, and ultimately for this case the Clarkston City Attorney], can be a public body. Once again, the language that led to the majority's presumption was omitted from MCL 15.232(h)(iii):

> Yet the reason for expressly providing that the definition of "public body" does not include "the executive office of the governor or lieutenant governor" *is less obvious or apparent*. Those two executive offices do not seem to constitute a "state officer," "employee," "agency," "department," "division," "bureau," "board," "commission," "council," or "authority." MCL 15.232(h)(i). Therefore, *it must be* that "the executive office of the governor or lieutenant governor" is *presumptively* an "other body" under MCL 15.232(h)(i). That is, if the Legislature had not expressly provided that the respective executive offices of the governor and lieutenant governor are excluded from the definition of "public body," then they would presumably have been included within the definition because they are necessarily and logically "other bodies." A contrary interpretation of MCL 15.232(h)(i)-- that the respective executive offices of the governor and lieutenant are not a "state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government"-- would render the exclusory language pertaining to those offices surplusage because it would simply be unnecessary to exclude from coverage those offices that would not otherwise be included within the definition of "public body." [*Id.* at 9-10 (emphasis added)]

The majority's conclusion that the executive offices of the governor and lieutenant governor "must be" considered "other bod[ies]" so the exclusory language will not be surplusage overlooks the terms "department, division," and "authority," each of which could include a state-level executive office. In fact, the majority notes *Webster's* definition of office includes a "position of *authority*[.]" *Id*. at 9, fn 8 (emphasis added). The only way for the Legislature to effectively

exempt the governor and everyone working under the governor while not exempting executive branch departments and agencies (like the Michigan State Police) was to exclude the governor's office (a "department, division," or "authority" within the executive branch of government) and its employees from the definition. It means nothing more than that.

4. Upon completing its lengthy analysis of MCL 15.232(h)(i), one would expect the majority to turn to the language of MCL 15.232(h)(iii) to determine whether the majority's executive branch observations could be applied to municipal corporations. The majority did not do so. The majority instead extracted support for the notion that an "office" can be a public body from the "other body" provision in MCL 15.232(h)(iv) and its exclusion of the office of the county clerk when acting for the circuit court (although, unlike the executive branch definition in subsection (i), the municipal branch definition in subsection (iii) does not include an "other body" catchall):

> Our understanding of "other body" in MCL 15.232(h)(i) as including an "office" is consistent with MCL 15.232(h)(iv). Under MCL 15.232(h)(iv), "public body" signifies "*[a]ny other body* that is created by state or local authority or is primarily funded by or through state or local authority," but "the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body." (Emphasis added.) As with the express exclusion of the executive offices of the governor and lieutenant governor within MCL 15.232(h)(i), the express exclusion of "the office of the county clerk . . . when acting in the capacity of clerk to the circuit court" in MCL 15.232(h)(iv) indicates that the office of the county clerk would be included within the definition of "public body" absent that exclusion. And because MCL 15.232(h)(iv) refers only to "[a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority," it must be that the office of the county clerk constitutes such an "other body." Put simply, MCL 15.232(h)(iv), as with MCL 15.232(h)(i), *indicates that an "other body" in each provision includes an "office*." [*Id*. at 10-11 (emphasis added)]

Contrary to the majority's presumption that the "the office of the county clerk" must be an "other body" under MCL 15.232(h)(iv), it is plainly a "department, . . . or agency" of a county under MCL 15.232(h)(iii). MCL 45.562 created the county clerk position along with the positions

of sheriff, treasurer, prosecuting attorney, drain commissioner, and road commission. All of the positions enumerated in MCL 45.562 (except the clerk when acting as the court clerk) are within the ambit of MCL 15.232(h)(iii) because each of them are, and always have been, "a board, department, commission, council, or agency" of the county. Thus, the majority was not compelled to conclude that the exclusion of the "judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court" means that the "office of the county clerk" must be an "other body" under FOIA.

5. After concluding that an officer and an office can be a public body, the majority applied "this understanding of MCL 15.232(h)" to "the relationship between defendant and its city attorney," *id*. at 11-14, without addressing

- the relevant language of MCL 15.232(h)(iii),
- the way in which the language of MCL 15.232(h)(iii) differed from MCL 15.232(h)(i),
- the significance of the omitted words "officer," "employee," and "other body," or
- why the Legislature would have created specific definitions for local governmental units and the executive branch if it intended the meaning to be the same.

The majority relied upon one provision of the Clarkston city charter to conclude that the City Attorney was an administrative officer and found two unrelated uses of the word "office" in another part of the city charter that it used to conclude that administrative officers "occupy 'offices' within the institutional defendant." The majority never acknowledged that the public body definition in MCL 15.232(h)(iii), unlike the public body definition in MCL 15.232(h)(i), does not

include "officers" or "employees" or any reference to an "office." *Id*. at 11-12.[7] As Justice Viviano points out, "[f]inding that local officers constitute public bodies under Subdivision (iv) would, in essence, undo the Legislature's exclusion of those officers from Subdivision (iii). Because 'officer' was expressly listed in MCL 15.232(h)(i), it could not be added to MCL 15.232(h)(iv) by use of the catchall phrase "[a]ny other body" with regard to local governmental units." *Bisio* dissent at 7, fn 7.

Beyond the errors in the majority's statutory analysis, the majority's "office of the city attorney" analysis is wrong. There is no dispute that the charter includes "the City Attorney" in the list of "administrative officers of the City[.]" Charter § 5.1(a). Nor is there any dispute that the person selected as city attorney must generally advise City Council, act as Clarkston's legal

[7] Justice Viviano pointed to this deficiency in the majority's analysis, but still, the majority failed to address it. Justice Viviano states:

> Defendant has argued throughout this case that the city attorney is not himself a "public body" under FOIA, and plaintiff has repeatedly and emphatically conceded the point and indeed even argued it herself for strategic advantage. See *Bisio v The City of The Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335422), p 6 ("Plaintiff argues that the *Breighner* Court's holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body."). Plaintiff also asserted at oral argument: *"[W]e are not claiming that the city attorney is a public body. Obviously, he's not. Because as you point out, the definition doesn't include officers and employees of municipalities.*" In light of the plain language of the statute and the parties' repeated concessions, the Court of Appeals' position is hardly remarkable. See *Bisio*, unpub op at 5 ("The *definition of 'public body' provided by MCL 15.232[(h)(iii)] does not include officers or employees acting on behalf of cities, townships, and villages. By contrast, MCL 15.232[(h)(i)], which provides the definition of 'public body' relevant to the executive branch of state government, does include officers and employees acting on behalf of the public body. Had the Legislature so intended, it could have included officers or employees, or agents, in the definition of public body that pertains to cities, townships, and villages. That it did not indicates the Legislature's intent to limit 'public body' in § 232[(h)(iii)] to the governing bodies of the entities listed*.") [*Bisio* dissent at 5, n 5 (emphasis added)].

advisor, advise City officers (like the City Manager) through written opinions, and prosecute ordinance violations. *Id* at § 5.6(a). But the majority's reliance on charter sections regarding how appointments are made to conclude that the charter "creates the 'office of the city attorney'" goes too far. The phrase "office of the city attorney" appears nowhere in the charter. There is no physical office on City property that Mr. Ryan uses to fulfill his obligations to Clarkston. The charter does not contemplate more than one person working as city attorney, and the charter does not give the appointed city attorney the ability to hire or otherwise expand the supposed "office."[8]

The facts in this case show that this City Attorney, under the terms of this particular charter, is not a public body. Here, there simply is no "office of city attorney." Instead, there is Mr. Ryan, who Clarkston hired to fulfill certain tasks as indicated in the charter. Mr. Ryan is neither "created by" nor "primarily funded by" Clarkston because he is a human being and his income is derived from serving multiple clients – not just Clarkston. Additionally, Mr. Ryan's role is distinguishable from other Clarkston administrative officers as well as other cities' law departments. Compare Clarkston Charter, § 5.6 to City of Detroit Charter, § 705-201, *et seq*. (available at: https://detroitmi.gov/sites/detroitmi.localhost/files/2018-05/2_29_2012_CharterDocument_2_1_WITHOUT_COMMENTARY_1.pdf)

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[8] The charter references to "office" that the majority relies upon only describe the official position held by the officer, as Justice Viviano points out,

> [I]t is an office only in the sense that the position is occupied by an officer. It is unlike, say, the Executive Office of the Governor, which includes various divisions and other offices within it, all staffed with employees in addition to any "officer." See, for example, *House Speaker v Governor*, 443 Mich 560, 589 n 35; 506 NW2d 190 (1993); see also MCL 10.151 ("The Office of Regulatory Reform is created within the Executive Office of the Governor."). The City Charter gives the city attorney no such trappings. Thus, it simply cannot be disputed that while the charter established the position of city attorney as an administrative officer of the city having certain public duties, it did not create a collective entity or department to assist him in performing them. [*Bisio* dissent at 10-11].

For example, both the City of Detroit Law Department and the Clarkston City Manager have physical offices on city property, use official city email addresses, and are listed under "departments" on their respective city websites. See https://detroitmi.gov/departments/law-department (last accessed August 11, 2020); see also http://villageofclarkston.org/2148/City-Managers-Office (last accessed August 11, 2020). Mr. Ryan uses a private email address, maintains a private office (not on City property), and the City Attorney is not listed as a department on Clarkston's website.

The attorney at issue here is analogous to the attorney in *Hoffman v Bay City School District*, 137 Mich App 333; 357 NW2d 686 (1984). In *Hoffman*, a school board retained an attorney to investigate the district's business and finance department. The plaintiff sought certain documents through FOIA that the attorney used as part of the investigation but had not been distributed to the school board. The investigatory file was not subject to FOIA because it was in the possession of the private attorney and it was not distributed to the school board. *Id.* at 339. The fact that the attorney was paid by a public body and did work at its request "did not transform" the documents at issue into records subject to FOIA disclosure. *Id.* at 338.

6. The majority draws other erroneous conclusions. For example, it purports to hold not that the City Attorney is himself a public body but that the "office of the city attorney" is the pertinent public body. But here, the City Attorney is a private attorney and has no "office" other than himself. There is nothing like a law department or corporation counsel's office. See *Herald Co v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000), where this Court noted that "public body" connotes a collective entity. See also *Bisio* dissent at 5-6 (collecting authorities which give body a collective, aggregate meaning).

To summarize, the majority disregarded the established rules of statutory construction in conducting its analysis and reached the wrong result. If the leave order and this Court's opinions are not vacated, a full rehearing should be granted.

### E. This Splintered Decision on an Issue of Such Far-Reaching Importance Should be Reheard with Party Participation.

The three opinions issued by this Court represent diametrically opposing views of the law which governs this important FOIA issue. The majority adopted the "public body" theory addressed above. The agency issue was addressed in a concurring opinion authored by Justice McCormack, who concluded that common-law agency principles applied to FOIA and the City Attorney's documents. Justice Viviano dissented, disagreeing with the "public body" theory adopted by the majority, noting the parties' concession that the City Attorney is not a public body, and further concluding that an individual cannot be a public body under MCL 15.232(h)(iv). Justice Viviano also disagreed with Justice McCormack's agency analysis.

This splintered resolution, the manner in which it was reached, and what it portends for the future reflect the shortcomings in a judicial process that excludes the parties whose very interests are at stake. In fairness, the parties should be permitted to address the dispositive issue.

For all of these reasons, The City of the Village of Clarkston respectfully requests that this Court (1) vacate the leave order and the opinions of this Court, allowing the Court of Appeals decision to stand or (2) grant full rehearing.

Respectfully submitted,

**KERR, RUSSELL AND WEBER, PLC**

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Dated: August 14, 2020

## CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on August 14, 2020 she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

*/s/ Cynthia J. Villeneuve*
Cynthia J. Villeneuve