STATE OF MICHIGAN
IN THE SUPREME COURT

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SUSAN BISIO,
Plaintiff-Appellant,
v.

THE CITY OF THE VILLAGE OF CLARKSTON,
Defendant-Appellee.

Supreme Court No. 158240

Court of Appeals Case No. 335422

Oakland Circuit No. 15-150462-CZ
Honorable Leo Bowman

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INTEREST OF AMICI CURIAE[1]

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is to improve municipal government and its administration through cooperative effort. MML's membership comprises 521 Michigan local governments, and 478 of those local governments are members of the Michigan Municipal League Legal Defense Fund. MML operates the Legal Defense Fund through a board of directors, and the Legal Defense Fund represents the member local governments in significant statewide litigation.[2]

This amici curiae brief is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of MML, and the officers and directors of the Michigan Association of Municipal Attorneys: Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; John C. Schrier, city attorney, Muskegon; Ebony L. Duff, city attorney, Oak Park; Suzanne Curry Larsen, city attorney, Marquette; Amy Lusk, city attorney, Saginaw; Steven D. Mann, city attorney, Milan; James J. Murray, city attorney, Boyne City and Petoskey; Clyde J. Robinson, city attorney, Kalamazoo; Laurie Schmidt, city attorney, St. Joseph; Brenda F. Moore, MML President and mayor pro tem, Saginaw; Daniel P. Gilmartin MML CEO and Executive Director; and Christopher J. Johnson, MML General Counsel.

The Michigan Townships Association (MTA) is a Michigan non-profit corporation made up of more than 1,230 townships in Michigan (including both general law and charter

[1] Under MCR 7.312(H)(4), amici confirm that no counsel for any party authored this brief in whole or in part and that no party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Amici submit this answer in support of the City of the Village of Clarkston's motion for rehearing under MCR 7.311(F)(3), which allows an amicus that participated in the case to answer a motion for rehearing.

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townships). These townships join together to provide education and exchange information and guidance among township officials to enhance the efficient and knowledgeable administration of township government services in Michigan.

The Michigan Association of Municipal Attorneys (MAMA) is a charter entity of MML, and it provides services for Michigan municipal attorneys. MAMA provides educational programs and shares information designed for attorneys in public and private practice who counsel Michigan's local communities.

In this Court, MML and MTA filed an amici curiae brief in support of the City of the Village of Clarkston, back when this case was about whether common-law agency principles applied to the Clarkston city attorney and whether the documents Plaintiff sought were "public record" under Michigan's Freedom of Information Act. But now, even though no one addressed it before this Court or at any stage in the litigation, the *Bisio* decision turns on whether the Clarkston city attorney—or the new "office of the city attorney"—is a "public body" under FOIA.

The unexpected *Bisio* opinion raises an issue of critical significance to Michigan municipalities: the effect of *Bisio*'s unexpected holding that the definition of "public body" in the Michigan Freedom of Information Act may include local government employees not enumerated in the definition if they occupy an "office." If the Court's opinion stands, the definition of "public body" under FOIA risks substantial expansion and threatens to include as "public bod[ies]" potentially thousands of employees or consultants of MML and MTA's constituent members and would obligate them to comply with procedures meant for public *bodies* under FOIA. And *Bisio* may accomplish this without any input from the parties or amici curiae. This risk is of significant importance to amici curiae here.

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INTRODUCTION

Until this Court issued its opinion on July 24, 2020, no one involved in this case thought that the city attorney of the City of the Village of Clarkston—or his "office"—was a "public body" and therefore subject to disclosure obligations under Michigan's Freedom of Information Act. In fact, Plaintiff Susan Bisio, to her tactical advantage, had repeatedly conceded that the Clarkston city attorney was *not* a "public body" under FOIA. Her attorney put it plainly at oral argument: "Obviously he's not."

But even though this Court granted Plaintiff leave to appeal on whether Clarkston's charter-appointed attorney was an agent of the City and whether the documents she sought were "public record," the *Bisio* majority pivoted after argument. The Court held that Clarkston's city attorney occupied the "office of the city attorney," which the Court discovered in Clarkston's charter, and that this "office of the city attorney" was a "public body" under FOIA. Until that opinion, this unconventional argument had been raised only as a two-page alternative argument in an amicus brief filed by members of the press. No one, therefore, had the opportunity to respond to it.

Missing out on the chance to challenge the argument isn't just a semantic complaint. The practice of party presentation in our legal system is more than procedural window dressing—its vital role puts legal theories to the test to determine the best answers and eliminate the wrong ones. The push and pull of our adversary system, therefore, provides a critical safeguard against erroneous or misguided decisions. And input from the parties and other stakeholders—those in the best position to know—aids courts in evaluating the implications and consequences of a particular outcome.

The Court's *Bisio* opinion demonstrates why party presentation is a bedrock principle of our legal system. The majority's opinion relies the interpretive inference that the Clarkston city

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attorney must be a "public body" because the city attorney occupies a charter-created "office" that qualifies as an "other body" under the definition of "public body" in FOIA. But never at any stage in this litigation or at this Court have the parties had the chance to litigate that new theory. Indeed, the prevailing Plaintiff in fact repeatedly disclaimed this theory because, in her words, it was "obviously" wrong.

The Court's decision is important, and not just for the parties here and for the Clarkston city attorney. Those who may bear the brunt of the potential fallout from this Court's decision are amici here, representing hundreds of Michigan cities, villages, and townships. Yet neither Clarkston nor amici got to probe the possible ramifications of *Bisio*'s holding. No one was able to challenge and explore, for example, whether the Court's reasoning would sweep into the definition of "public body" scores of local-government employees and consultants and require them to comply with disclosure requirements and the accompanying procedural obligations the Legislature in FOIA intended to be followed only by a "public body." If, as Justice Viviano warns in his dissent, *Bisio* places countless local government officials within FOIA's ambit—for the first time in FOIA's nearly 50-year history—it will have a significant impact on potentially thousands of local government employees and consultants.

The issue this Court decided in *Bisio*—that the Clarkston city attorney occupies an "office" that is a "public body" under FOIA—was not an issue that was properly before the Court in this case. Therefore, the Court should, as Clarkston requests, vacate its opinion and leave order. Or at a minimum, the Court should permit a full rehearing of this case to allow Clarkston and amici curiae the vital opportunity to respond for the first time to the reasoning on which the majority opinion rests. These amici curiae ask the Court to grant Clarkston's motion for rehearing.

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ARGUMENT

I. The *Bisio* Opinion Fails to Respect Principles of Party Presentation and Decides An Issue Not Properly Before the Court

No one has had the opportunity to respond to the complex and new statutory theory adopted by the *Bisio* majority. "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." *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 709–10; 918 NW2d 756 (2018) (quoting *Greenlaw v United States*, 554 US 237, 243 (2008)); see also *Bisio v City of Village of Clarkston*, ___ NW2d ___, No. 158240, 2020 WL 4260397, at *11 n4 (Mich, July 24, 2020) (Viviano, J, dissenting) (quoting *United States v Sineneng-Smith*, 140 S Ct 1575, 1579 (2020) and *Greenlaw*, 554 US at 243).

The majority here, however, decided a case that *no* party had presented. No one thought they needed to address this issue because Plaintiff had expressly disclaimed—at every stage in the litigation—that the Clarkston city attorney fit any definition of a "public body" under FOIA. So not only was the argument on which the Court's decision was based not addressed by the parties and interested amici here, but everyone involved thought this issue was settled: the city attorney was *not* a "public body." As Plaintiff's counsel stated plainly during oral argument before this Court: "We are not claiming that the city attorney is a 'public body,' obviously he's not because, as you point out, the definition [of 'public body' in FOIA] doesn't include officers and employees of municipalities." See, e.g., *Ivey v Audrain Co, Missouri*, __F3d__, No. 19-2507, 2020 WL 4458776, at *4 (CA 8, August 4, 2020) ("The principle of party presentation counsels against adopting theories of a plaintiff's case that he does not advance, *much less one that he expressly disclaims*." (emphasis added) (citing *Sineneng-Smith*, 140 S Ct at 1579)).

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In other words, whether the Clarkston city attorney or his "office" is any sort of "public body" under FOIA is an issue that Plaintiff herself had taken off the table. It therefore was not a live issue before the Court in this case. The *Bisio* majority thus should not have reached beyond the case before it to decide an issue that no party had ever presented and that the Plaintiff had conceded. Whether the city attorney occupied an "office" that was—by virtue of inferential reasoning based on a different part of the "public body" definition—an "other" "public body" under the catchall provision, was not an issue properly before this Court. See, e.g., *Walterhouse v Ackley*, 459 Mich 924; 589 NW2d 780 (Table) (1998) ("The constitutional questions raised by the amici are not properly before the Court, and hence the Court does not address those matters today."). *Bisio* is a serious departure from the foundational principle of party presentation.

Party presentation is not just procedural theater. Its vital role in our adversarial system is to protect against error. "[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error[.]" *Mackey v Montrym*, 443 US 1, 13 (1979); see *id.* ("[A] primary function of legal process is to minimize the risk of erroneous decisions." (citations omitted)). As Justice Levin once explained: "The adversary system disciplines the judicial inquiry and serves to crystallize the difficult choices with which we generally find ourselves confronted. When an issue is not presented in the form of a keenly contested and discrete controversy, a court is denied a valuable resource that contributes both to the legitimacy and wisdom of its judgment." *People v Butler*, 413 Mich 377, 393–94; 319 NW2d 540 (1982) (Levin, *J*, concurring); see also *Lassiter v Dept of Soc Services of Durham Co, NC*, 452 US 18, 28 (1981) ("[A]s our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests[.]").

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But this Court decided *Bisio* without any open-air debate about its unexpected conclusion. The majority's interpretation of MCL 15.232(h) has never been "keenly contested," and this Court did not have the "valuable resource" of party presentation to aid it in clarifying the legal theory on which *Bisio* was ultimately decided. See *Butler*, 413 Mich at 393–94. Further, the need for adversarial testing is even more important where, as here, the Court's statutory interpretation is anything but plain and straightforward and its outcome has the potential for sweeping impact beyond the parties in this case. Amici curiae here are likely to find themselves, at the very least, litigating the breadth of *Bisio*'s applicability as it affects scores of their local-government employees and consultants. Yet neither these amici curiae nor Clarkston have had the opportunity to weigh in.

Because Plaintiff repeatedly acknowledged that the Clarkston city attorney was *not* a "public body" under FOIA, the "issue" whether the city attorney was by definition a "public body" is not and has never been an issue before this Court in this case. Leave to appeal, therefore, is inappropriate, see MCR 7.305(B), and this Court should vacate the *Bisio* opinion and its leave order. At the least, the Court should grant Clarkston's request for a full rehearing, see MCR 7.311(F), and give Clarkston and the local-government stakeholders that amici represent here the opportunity to address this case's brand-new and unexpected cast. To allow Clarkston and amici to present arguments would ensure that the adversarial system serves its crucial function to protect against error. Given the potential breadth of the Court's ruling here—and the potential for lower courts to misapply it to the tune of even broader consequences—this Court should at least grant full rehearing. When faced with the potential risk created by the untested rationale in this Court's opinion, granting Clarkston's alternative request for rehearing is a small tradeoff.

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II. There Are Far-Reaching Errors in the *Bisio* Majority Opinion that Should Be Further Explored on Rehearing.

By reaching an issue not presented by the parties, the *Bisio* majority left Clarkston, the Clarkson city attorney, and potentially hundreds of municipalities who are amici here unexpectedly in the lurch. Full adversarial debate over whether the Clarkston charter created an "office of the city attorney" that is a "public body" under FOIA would have revealed multiple missteps in the majority's statutory reasoning. The Court should vacate the *Bisio* opinion and leave order or grant full rehearing in order to prevent palpable error. See MCR 7.311(F); MCR 2.119(F)(3). At the very least, the majority's reasoning is up for debate—debate not yet had on this question, and this Court should grant full rehearing.

This Court has repeatedly held: "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Spectrum Health Hosps. v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117, 124 (2012) (quoting *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011)).

On its face, the *Bisio* majority's statutory reasoning is neither "reasonably . . . inferred" from the statutory text nor apparent from the "plain and ordinary meaning" of the statute. To begin with, the majority's statutory analysis begins at a provision that has little, if any, relevance to the dispute here: the subsection of the "public body" definition listing *state*-level entities. See MCL 15.232(h)(i) ("'Public body' means any of the following . . . 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

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governor, the executive office of the governor or lieutenant governor, or employees thereof."). The Court's opinion starts with the premise that, because MCL 15.232(h)(i)—which deals only with state-level entities—explicitly includes a "state officer" and explicitly excludes "the executive office of the governor or lieutenant governor, this necessarily means that (1) any single officer may be a "public body" and (2) the executive office of the governor needed an explicit carve-out because an executive office would have otherwise qualified as an "other body" under MCL 15.232(h)(i)'s catchall term and that "other body" necessarily includes an "office." *Bisio*, op at *6.

But the majority did not pause there to analyze whether the list of state-level "public bod[ies]" in MCL 15.232(h)(i) bears any contextual significance outside state-level entities. Skipping over MCL 15.232(h)(iii)—the subsection in which the Legislature has actually defined which *local*-government entities are "public bod[ies]" under FOIA—the majority opinion jumps down to MCL 15.232(h)(iv), the general catchall provision for "[a]ny other body that is created by state or local authority" except for, primarily, "the office of the county clerk." The majority finally concludes that, like in MCL 15.232(h)(i), a local-level "office" is an "other body" under MCL 15.232(h)(iv) and can include a "single office." *Bisio*, op at *6.

There are a number of errors—or, at minimum, weak links—in the Court's reasoning. First, as Clarkston points out in its motion, there is no firm statutory ground for the majority's premise that "it must be" true that the executive office of the governor falls into the catchall "other body" in MCL 15.232(h)(i). (Motion for Rehearing at 13-14.) Despite the Court's declaration that the "executive office" "must be" an "other body," the Court explains in the next sentence: "Those two executive offices *do not* seem to constitute a 'state officer,' 'employee,' 'agency,' 'department,' 'division,' 'bureau,' 'board,' 'commission,' 'council,' or 'authority.'"

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Bisio, op at *6 (emphasis added). The majority opinion, however, never examines why the executive office of the governor is not—in fact, cannot be—a "division," or a "department," or an "authority" in the executive branch of the state government under MCL 15.232(h)(i), meaning that it would fall into that category and not into the "other body" catchall. Indeed, on the face of the statutory language alone there would seem a good case that the "executive office of the governor or lieutenant governor" plainly qualifies as an "authority . . . in the executive branch of the state government." See MCL 15.232(h)(i). But no one has yet had the chance to argue that point to this Court.

The same is true of the majority's next interpretive step: "Our understanding of 'other body' in MCL 15.232(h)(i) as including an 'office' is consistent with MCL 15.232(h)(iv)." *Bisio*, op at *7. The majority explains that like "the express exclusion of the executive offices of the governor" the "express exclusion of 'the office of the county clerk'" means that "office," generally, is necessarily included in the "other body" catchall. *Id.* ("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.'"). But that jump is anything but simple and straightforward. The exclusion of the "office of the county clerk" expressly contemplates a plural body, "the office of the county clerk *and its employees*." (Emphasis added.) Nothing about that unique statutory carve-out suggests that "other body" must include anything that could conceivably be an "office" of some sort—let alone that an "office" covers a private attorney hired by the city to serve as its city attorney. (See Motion for Rehearing 8-9; observing that the "office of the county clerk" is likely a "department" under MCL 15.232(h)(iii)).

Further, the majority's opinion neglects any significant consideration of the provision that actually deals with which local-level entities are "public bod[ies]," MCL 15.232(h)(iii): "A

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county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof." Unlike MCL 15.232(h)(i), which deals with state-level entities, the local-level provision has nothing at all to say about an "office" or an "officer" or "employee," and it certainly doesn't include it in the definition of "public body." See also *Bisio*, op at *12 n7 (Viviano, *J.*, dissenting) ("The next two subdivisions, MCL 15.232(h)(ii) and (h)(iii), relating to the legislative branch of state government and local governmental units, respectively, do not include any individuals." (citation omitted)).

Justice Viviano's dissent identifies another pitfall in the majority's holding. See *Bisio*, op at *12–13. Justice Viviano emphasizes the *collective* nature of a "public body." *Id.* (citing *Herald Co v City of Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000) ("As used in the [Open Meetings Act] the term 'public body' connotes a collective entity.")). He explains: "The statutory context also makes it clear that, as it pertains to local governmental units, an individual does not qualify as an other 'body' under Subdivision (iv)." *Id.*

Further, not only is the statutory interpretation in the majority opinion off the mark, but the Court's application of its statutory conclusion to Clarkston's charter is also wrong. The majority opinion, relying on disjointed provisions in the city charter, concludes that the charter "creates the 'office of the city attorney.'" *Bisio*, op at *7. But again, as Justice Viviano explains, to the extent that Clarkston's City Charter creates an "office" of the city attorney, it is an "office" "filled by a solitary officer." *Bisio*, op at *14. This, Justice Viviano points out, is a substantially different scenario than the type of "executive office" contemplated by FOIA in MCL 15.232(h)(i), which is staffed by numerous employees. *Id.* The majority, however, simply assumes equivalency between the "executive office" of the governor or the "office of the county

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clerk and its employees"—and the work of a private attorney working as the city attorney as an administrative officer of Clarkston.

In short, the *Bisio* majority makes several wrong turns. At the least, the Court's statutory interpretation and application here is up for serious debate. But because the Court decided this case on the basis of an alternative theory suggested only in an amicus brief, that debate has yet to be had at all. In other words, anything less than plain clarity on the interpretation that the "office of the city attorney" exists in the Clarkston charter and that it qualifies as a "public body" under FOIA weighs in favor of rehearing.

Further, the impact of the Court's decision to issue an opinion based entirely on an untried theory predicated on an issue conceded by Plaintiff is likely to be felt by far more than just the parties here.[3] The Court's complex interpretation and application of FOIA's "public body" definition may have broad impact that could upend the way FOIA has been applied to local governments and their employees and consultants for decades. Justice Viviano's dissent cautions: "Under the majority's reasoning, any legal authority creating an officer position ipso facto creates an office subject to FOIA." *Id.* at *14. If Justice Viviano's prediction proves to be true, and *Bisio* is interpreted by lower courts to drastically expand the scope of "public bod[ies]" under FOIA, the brunt of that judicial expansion will be borne by the officers, employees, and consultants of Michigan municipalities and townships—amici's members here.

As Justice Viviano points out in his dissent, there is a substantial risk that *Bisio* will be applied broadly—perhaps far more broadly than this Court intended. *Bisio*, op at 14 n9. "The

[3] And, as Clarkston argues, the Court's opinion, in holding that the Clarkston "office of the city attorney" is a "public body" under FOIA obligates the city attorney to publicly disclose certain documents under FOIA. But it is Clarkston—not the newly formed "office of the city attorney"—to whom Plaintiff issued her request. (Motion for Rehearing 8-9.) This is yet another hiccup in the majority's opinion.

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new categories of local officers subject to FOIA as public bodies would appear to include, at a minimum, county officials (such as county executives, prosecutors, clerks, treasurers, and county commission members); local government officials (such as mayors, city council members, supervisors, trustees, clerks, treasurers, city attorneys, city assessors, city managers, and police and fire chiefs); and thousands of police officers, deputy sheriffs, assistant prosecutors, and assistant attorneys general." *Id.* (citing *People v Coutu*, 459 Mich 348, 357-58; 589 NW2d 458 (1999)). If, as Justice Viviano warns, *Bisio* places countless local government officials within FOIA's ambit—for the first time in FOIA's nearly 50-year history—it will have a significant impact on potentially thousands of local-government employees.

The practical import of that risk is that single-person roles in local governments or "offices" supposedly created by city charters may suddenly find themselves as "public bod[ies]"—and therefore subject to the types of procedures "public bod[ies]" must follow under FOIA. For example, MCL 15.234(4) requires a "public body" to "establish procedures and guidelines to implement [FOIA]" and requires the "public body" to "create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit requests to the public body," among other detailed procedures and requirements. And MCL 15.236(1) requires "[a] public body" . . . under the control of a city"—which might now include an "office of the city attorney"—to "designate an individual as the public body's FOIA coordinator." These procedures are sensible requirements for the entities enumerated in MCL 15.232(h), which include, among others, agencies, departments, councils, and commissions. These procedures make sense for the "state officer" listed in MCL 15.232(h)(i)—a person who, by virtue of their role in state-level government, is well-resourced and well-positioned to comply with FOIA's substantial procedural requirements. But single employees of local governments

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fill very different roles, operate under very different circumstances, and have very different resources at their disposal. In this case, for example, the Court's majority opinion subjects Mr. Ryan, a private attorney hired by Clarkston, to the burdensome procedural requirements of FOIA.

The existence of these detailed procedural requirements for public *bodies* further shakes the unsteady foundation on which the *Bisio* majority rests. Amici curiae respectfully submit that a potentially sweeping change to this 50-year old interpretation of FOIA is one for the Legislature. But at a minimum, that kind of watershed interpretive shift—one with the potentially far-reaching application—should not be a decision made only behind the closed chambers' doors.

In sum, FOIA has never before been interpreted to extend as far as *Bisio* takes it, and the majority's statutory interpretation fails to show that the Legislature intended it to do so all along. At the least, Clarkston and interested parties should have the opportunity to fully brief and argue the statutory interpretation and application issues presented here, as well as fully explore the potential ramifications and impact a result like *Bisio* might have statewide. And, as Justice Viviano noted specifically, input from amici curiae MML and MTA in particular is critical to this question. See *Bisio*, op at *14 n10 ("There are many groups who I am sure would like to provide input on this issue, including the Michigan Municipal League and the Michigan Townships Association, who filed a joint amicus brief in this case in our Court but have not had an opportunity to address this point since the MPA's amicus brief was filed on the same day.").

CONCLUSION

Amici Curiae ask the Court to grant The City of The Village of Clarkston's motion for rehearing and (1) vacate the leave order and the *Bisio* opinions, or (2) grant full rehearing.

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Dated: August 28, 2020

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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