

STATE OF MICHIGAN
IN THE SUPREME COURT

Coalition Protecting Auto No-Fault (CPAN), et
al.

Plaintiff-Appellant,

v.

The Michigan Catastrophic Claims Association
(MCCA),

Defendant-Appellee.

Supreme Court Case No. 150001

Court Of Appeals Case No. 314310

Ingham County Circuit Court
Case Nos. 12-68-CZ, 12-659-CZ
(consolidated)

Brain Injury Association of Michigan
(BIAMI), et al.

Plaintiff-Appellant,

v.

The Michigan Catastrophic Claims Association
(MCCA),

Defendant-Appellee..

**THE APPEAL INVOLVES A RULING
THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE
OR REGULATION, OR OTHER STATE
GOVERNMENTAL ACTION IS
INVALID**

Joanne Geha Swanson (P33594)
KERR, RUSSELL AND WEBER, PLC
Attorney for CPAN Plaintiffs
500 Woodward Ave, Suite 2500
Detroit, MI 48226
(313) 961-0200

George T. Sinas (P25643)
Attorneys for CPAN Plaintiffs
Sinas, Dramis, Brake, Boughton & McIntyre, P.C.
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Noah D. Hall (P66735)
Of Counsel for CPAN Plaintiffs
Associate Professor of Law, Wayne State University
471 West Palmer Street
Detroit, MI 48202
(734) 646-1400

Lori McAllister (P39501)
Joseph K. Erhardt (P44351)
Jill M. Wheaton (P49921)
Courtney F. Kissel (P74179)
Counsel for the MCCA
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9100
Facsimile: (517) 374-9191

James R. Giddings (P13960)
Attorney for BIAMI Plaintiffs
6000 Lounsbury Road
Williamston, MI 48895
(517) 655-8077

**DEFENDANT THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR LEAVE TO
APPEAL**

DYKEMA GOSSETT, A PROFESSIONAL LIMITED LIABILITY COMPANY, 201 TOWNSEND STREET, SUITE 900, LANSING, MICHIGAN 48933

150001

FILED
SEP 23 2014
LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT..... ix

COUNTER-STATEMENT OF QUESTIONS PRESENTED..... xi

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS..... 1

 A. The History of the MCCA 1

 B. Oversight of the MCCA and Rate Regulation 4

 C. Public Act 349 of 1988 and MCCA’s Disclosure Exemption 5

 D. The Current Dispute..... 7

 E. The Circuit Court’s Decision 9

 F. The Court of Appeals’ Decision 10

ARGUMENT 12

I. STANDARD OF REVIEW 12

II. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS
CORRECTLY FOUND THAT THE MCCA’S RECORDS ARE EXEMPT
FROM FOIA 13

 A. The Plain Language of MCL 15.243 and MCL 500.134 Make Clear that All Of
The MCCA’s Records Are Exempt From Disclosure 13

 B. The Court of Appeals’ Decision Is Consistent With the Language of MCL
500.134 and Legislative Intent..... 19

III. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS
CORRECTLY REJECTED PLAINTIFFS’ ARGUMENTS THAT 1988 PA 349
VIOLATED ARTICLE IV, § § 24 AND 25 OF THE MICHIGN CONSTITUTION..... 21

 A. The Legislature Did Not Violate Article IV, § 25 When It Passed
1988 PA 349 22

 B. The Legislature Did Not Violate Article IV, § 24 When It Passed
1988 PA 349 26

IV. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY REJECTED THE CIRCUIT COURT’S EXTENSION OF *SHIVERS V ATTORNEY GENERAL* TO CREATE RIGHTS IN THIS CASE.....29

A. The Court of Appeals Properly Held that *Shivers* Is Inapplicable to this Case and Rejected the Circuit Court’s Expansion of that Holding30

B. Even if *Shivers* Applied, It Requires a Rational Basis Review, Not Strict Scrutiny33

C. Plaintiffs’ Arguments Are Based on a Misunderstanding of the MCCA35

V. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY REJECTED PLAINTIFFS’ COMMON LAW CLAIMS40

A. The Court of Appeals Correctly Found That FOIA Preempts Any Alleged Common Law Right of Plaintiffs.....40

B. Irrespective of Preemption, Michigan’s Common Law Right to Access Public Records Does Not Grant Plaintiffs a Right to the MCCA’s Records42

CONCLUSION AND RELIEF REQUESTED45

TABLE OF AUTHORITIES

Cases

Advocacy Organization for Patients and Providers v Auto Club Ins Assoc,
Case No 5:96-cv-177 (ED Mich, June 20, 1997)..... 31

Alan v County of Wayne, 388 Mich 210; 200 NW2d 628 (1972)..... 23, 24, 26, 27

Association of Businesses Advocating Tariff Equity v Michigan Public Service
Commission, 493 Mich 947; 828 NW2d 22 (2013)..... 26

Booth Newspapers, Inc v Muskegon Probate Judge,
15 Mich App 203; 166 NW2d 546 (1968)..... 41, 42

Boulton v Fenton Twp, 272 Mich App 456; 726 NW2d 733 (2006)..... 28

Burton v Tuite, 78 Mich 363; 44 NW 282 (1889)..... 41

Cady v Detroit, 289 Mich 499; 286 NW2d 805 (1939)..... 21

Corp of Barnstable v Lathey, 3 Term Rep 303 (1789)..... 43

Dominus Rex v The Fraternity of Hostman in Newcastle-Upon-Tyne, 2 Strange 1223 (KB
1745)..... 43

Geery v Hopkins, 2 Ld Raym..... 43

Gordon Sel-Way, Inc v Spence Brothers, Inc, 438 Mich 488; 475 NW2d 704 (1991)..... 33, 35

HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co, 234 Mich App 550; 595
NW2d 176 (1999)..... 28

In re Buchanan, 152 Mich App 706; 394 NW2d 78 (1986)..... 41, 42

In re Certified Question: Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims
Ass'n, 433 Mich 710; 449 NW2d 660 (1989)..... 1, 2

In re MCI Telecom Complaint, 460 Mich 396; 596 NW2d 164 (1999)..... 13

Jeffrey v Rapid American Corp, 448 Mich 178; 529 NW2d 644 (1995)..... 12

Kreiner v Fischer, 471 Mich 109; 683 NW2d 611 (2004)..... 30

Kyser v Kasson Twp, 486 Mich 514; 786 NW2d 543 (2010)..... 40

League General Ins Co v Michigan Catastrophic Claims Ass'n,
435 Mich 338; 458 NW2d 632 (1990)..... 1, 19, 41, 45

DYKEMA GOSSETT-A PROFESSIONAL LIMITED LIABILITY COMPANY-CAPITOL VIEW, 201 TOWNSEND STREET, SUITE 900-LANSING, MICHIGAN 48933

League General Ins Co v Michigan Catastrophic Claims Assoc,
165 Mich App 278; 418 NW2d 708 (1987)..... 19

Lenawee County Gas & Electric Co v City of Adrian, 209 Mich 52; 176 NW 590 (1920) ... 33, 35

Mayor of Lynn v Denton, 1 Term Rep 689 (1787) 43

Mayor of Southampton v Greaves, 8 TR 590 (1800)..... 43

Mayor of the City of Lonson and Swinland, Term Pasch 4 (1731)..... 43

McBurney v Young, 569 U.S. ___; 133 S Ct 1709 (2013)..... 43

McCormick v Carrier, 487 Mich 180; 795 NW2d 517 (2010)..... 30

Mich Ed Ass'n v Secretary of State, 489 Mich 194; 801 NW2d 35 (2011)..... 14

Michigan Canners v Agricultural Bd, 397 Mich 343; 245 NW2d 1 (1976)..... 33

Michigan Mutual Ins Co v Dowell, 204 Mich App. 81; 514 NW2d 185 (1994)..... 13

Mooahesh v Dep't of Treasury, 195 Mich App 551; 492 NW2d 246 (1992)..... 27

Nalbandian v Progressive Michigan Ins Co, 267 Mich App 7; 703 NW2d 474 (2005) 24

Nowack v Auditor General, 243 Mich 200; 219 NW 749 (1928)..... 41, 42

Oberlies v Searchmont Resort, Inc, 246 Mich App 424; 633 NW2d 408 (2001)..... 12

People ex rel Drake v Mahaney, 13 Mich 481 (1865)..... 26

People v Cynar, 252 Mich App 82; 651 NW2d 136 (2002)..... 27, 29

People v Kevorkian, 447 Mich 436; 527 NW2d 714 (1994)..... 26

People v McGraw, 484 Mich 120; 771 NW2d 655 (2009) 17

Robinson v City of Lansing, 486 Mich 1; 782 NW2d 171 (2010)..... 17

Shavers v Kelley, 402 Mich 554; 267 NW2d 72 (1978)..... passim

Shavers v Kelley, 412 Mich 1105; 315 NW2d 130 (1982)..... 30, 32, 33, 39

Shawl v Spence Bros, Inc, 280 Mich App 213; 760 NW2d 674 (2008) 27

Skidmore v Czapiga, 82 Mich App 689; 267 NW2d 150 (1978) 34

Taylor v Smithkline Beecham Corp, 468 Mich 1; 658 NW2d 127 (2003) 21

United States v Carolene Products Co, 304 US 144; 58 S Ct 778; 82 L Ed 1234 (1938) 34

<i>Wade v Dep't of Corrs</i> , 439 Mich 158; 483 NW2d 26 (1992)	12
<i>Warriner v Giles</i> , 2 Strange 954	43
<i>Wayne County Board of Comm'rs v Wayne County Airport Authority</i> , 253 Mich App 144; 658 NW2d 804 (2002).....	29
<i>Woodworth v Old Second National Bank</i> , 154 Mich 459; 117 NW 893 (1908)	42
Statutes	
MCL 8.3b.....	16
MCL 18.355a	26
MCL 29.5p.....	26
MCL 52.202(4)	26
MCL 500.3104(1)	1
MCL 125.1954	26
MCL 125.2088c(8)	26
MCL 15.231	ix
MCL 15.243	passim
MCL 15.243(1)(d).....	passim
MCL 15.243(1)(l)	25
MCL 15.243(3)	41
MCL 168.759a(11)	26
MCL 205.747(7)	26
MCL 500.1031	4
MCL 500.134.....	passim
MCL 500.134(4)	passim
MCL 500.134(6)	14, 17, 23
MCL 500.2101	30
MCL 500.2109.....	5, 36

MCL 500.2110..... 3, 36

MCL 500.3101 1

MCL 500.3104..... passim

MCL 500.3104(2)..... 2

MCL 500.3104(7)..... 37

MCL 500.3104(7)(d)..... 2, 45

MCL 500.3104(13)..... 3, 5

MCL 500.3104(14)..... 3, 5

MCL 500.3104(15)..... 5

MCL 500.3104(17), (19)..... 5

MCL 500.3104(21)..... 4, 5

MCL 500.3104(22)..... 3

MCL 500.3104(23)..... 3, 5

MCL 500.3104(25)(c)..... 2

MCL 500.3107..... 36

MCL 780.830..... 26

Rules

MCR 2.116(C)(8)..... 9, 12

MCR 2.116(C)(10)..... 9, 13

MCR 7.212(C)(7)..... ix

MCR 7.302(B) 12

MCR 7.302(B)(3)..... 12

MCR 7.302(B)(5)..... 12

Constitutional Provisions

Article IV, § 24 of the Michigan Constitution..... passim

Article IV, § 25 of the Michigan Constitution..... passim

Equal Protection and Due Process Clauses of the Michigan and United States
Constitutions 8

Other Authorities

1980 OAG 5750..... 20

1997 OAG 6942 (July 3, 1997)..... 20

House Bill 5168 (Public Act 26 of 2006) 26

House Bill No 4427 of 2009 20

House Legislative Analysis, SB 306, March 13, 1978 1

Senate Bill 468 of 2006..... 25, 26

COUNTER-STATEMENT OF ORDER APPEALED FROM
AND RELIEF SOUGHT

Despite Plaintiffs' repeated attempts to cast this case as one involving secrecy and the rejection of constitutional and statutory principles, the Court of Appeals' unanimous decision focused on—and correctly applied—the clear law and found that the MCCA's records are exempt from disclosure under the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq.* This case presents a very simple issue—whether a private, nonprofit association with a specific disclosure exemption from FOIA must nevertheless disclose its records to the Plaintiffs pursuant to a request. The response is equally as simple. The MCCA's records, which are records of an unincorporated, nonprofit, private association, are neither subject to disclosure under FOIA nor are they subject to a common law right to access public records. The Legislature clarified any potential ambiguity on this point in 1988 with the passage of 1988 PA 349 (codified as MCL 500.134) (attached as Exhibit 1, pursuant to MCR 7.212(C)(7)) which makes clear that any record belonging to the MCCA is exempt from disclosure pursuant to MCL 15.243, the part of FOIA that states that exemptions to FOIA may be created by statute. The Circuit Court, however, disregarded the plain language of, and clear legislative intent behind, MCL 500.134. Instead of following the Legislature's clear directive, the Circuit Court eviscerated the exemption in violation of the rules of statutory interpretation, and created a new right based on a misapplication of *Shavers v Kelley*, 402 Mich 554; 267 NW2d 72 (1978). The Circuit Court essentially substituted its judgment for that of the Legislature and re-wrote the applicable statute.

The Court of Appeals recognized the errors in the Circuit Court's opinion and correctly, unanimously, reversed in a decision attached as Exhibit 1 to the Application for Leave to Appeal ("Application"). Plaintiffs' characterization of the Court of Appeals' opinion and the actions and

role of the MCCA are not only grossly exaggerated but also legally and factually incorrect. For the reasons stated herein, this Court should deny the Application.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should this Court deny Plaintiffs' Application for Leave to Appeal where the Court of Appeals correctly found that:

A. Defendant Michigan Catastrophic Claims Association ("MCCA"), a private, non-profit association with a specific statutorily created exemption from FOIA, is not required to disclose certain records and information to Plaintiffs

B. the specific exemption encompasses all of the MCCA's records; and

C. *Shavers v Kelley* did not create new rights for Plaintiffs that are contrary to a statute on point, nor are there vague common law rights that trump a specific statute?

Plaintiffs-Appellants would answer "no."

MCCA answers "yes."

The Circuit Court would answer "no"

The Court of Appeals would answer "yes."

This Court should answer "yes."

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. The History of the MCCA.

In response to the enormous liabilities created by Michigan's Automobile No-Fault Insurance Act ("No-Fault Act"), MCL 500.3101 *et seq.*, which provides unlimited lifetime medical benefits, the Legislature created the MCCA in 1978 by adding Section 3104 to the No-Fault Act. See MCL 500.3104; *League General Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 341; 458 NW2d 632 (1990). Specifically, per this Court, the MCCA was created by the Legislature in response to concerns that the unlimited, lifetime benefits "placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims" and caused a risk of insolvency, particularly of smaller insurers. *In re Certified Question: Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 433 Mich 710, 714; 449 NW2d 660 (1989); see also *League General*, 435 Mich at 340 ("the cost of covering an insured's catastrophic losses...could be overwhelming to an individual insurance carrier"). In addition, the MCCA was created to spread the costs of catastrophic claims throughout the automobile insurance industry and increase the statistical basis for predicting the overall costs of such claims. *In re Certified Question*, 433 Mich at 714, citing House Legislative Analysis, SB 306, March 13, 1978.

The MCCA is a private, unincorporated, non-profit association. MCL 500.134; *League General*, 435 Mich at 351. Every insurer engaged in writing no-fault insurance for vehicles registered in Michigan must be a member of the MCCA as a condition of its authority to write no-fault insurance in the state. MCL 500.3104(1). The MCCA indemnifies its member insurers for their "ultimate loss[es]" sustained in personal injury protection ("PIP") benefits paid in

excess of a set amount, which increases biennially.¹ “Ultimate loss” is defined as the “actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses.” MCL 500.3104(25)(c). The MCCA does not pay benefits to insureds, and nothing in section 3104 or elsewhere in the Insurance Code authorizes insureds to look to the MCCA for payment in the event of an accident. Rather, the MCCA’s obligation is limited to indemnifying member insurance companies for losses they are obligated to pay in excess of the statutory amount. The MCCA is analogous to a reinsurer that indemnifies its insureds (i.e., the primary insurers) for losses in excess of an agreed amount under policies issued by the primary insurers. *In re Certified Question*, 433 Mich at 715.

Section 3104 requires the MCCA to assess premiums on its member insurers to fund its reimbursement obligations and operating expenses. MCL 500.3104(7)(d). The method for calculating the premiums is also established by statute:

The premium shall include an amount to cover incurred but not reported losses for the period and may be adjusted for any excess or deficient premiums from previous periods. Excesses or deficiencies from previous periods may be fully adjusted in a single period or may be adjusted over several periods in a manner provided for in the plan of operation. Each member shall be charged an amount equal to that member’s total written car years of insurance providing the security required by section 3101(1) or 3103(1), or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies. . .

Id.

Section 3104 provides that the “[p]remiums charged members by the association shall be

¹ The current level, which applies to policies issued or renewed between July 1, 2013 and June 30, 2015, is \$530,000. MCL 500.3104(2).

recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized.” MCL 500.3104(22). Thus, like other expenses, MCCA assessments may be reflected, wholly or in part, in the rates and premiums charged by member insurers to their Michigan policyholders. In developing automobile insurance rates, insurers must give “due consideration” to past and prospective expenses, leaving insurers free to make their own decisions whether (and to what extent) to include MCCA assessments and other expenses in their rates. MCL 500.2110.

The No-Fault Act provides for oversight of the MCCA. Under Section 3104, the Commissioner of Insurance² is a non-voting member of the MCCA Board of Directors and appoints all members of the Board. MCL 500.3104(13) and (14). And the Commissioner has the right to visit the MCCA and “examine any and all of the association’s affairs.” MCL 500.3104(23). In 2011, OFIR, as it generally does every four years, conducted a financial examination of the MCCA for the period July 1, 2006 through June 30, 2010. (<http://www.michigancatastrophic.com/FinancialReports/OFIRAudit/tabid/2937/Default.aspx>, (Annual Report to OFIR, p 4)). The OFIR Report of Examination is available on the MCCA’s website. (<http://www.michigancatastrophic.com/FinancialReports/OFIRAudit/tabid/2937/Default.aspx>). As part of its examination, OFIR contracted with the American Actuarial Consulting Group LLC to conduct an independent actuarial analysis of MCCA’s loss and loss adjustment expense reserves and related actuarial items. (*Id.* at 1). The independent actuarial analysis concluded that the MCCA’s carried reserves:

² Effective March 18, 2013, the Governor created the Department of Financial and Insurance Services (“DIFS”). The Office of Financial and Insurance Regulation (“OFIR”) was abolished and became part of DIFS. The Commissioner of OFIR became the Director of DIFS.

- A. Meet the requirements of the insurance laws of Michigan.
- B. Are computed in accordance with accepted loss reserving standards.
- C. Make a reasonable provision for all unpaid loss and LAE [loss adjustment expense] obligations of MCCA under the terms of its contracts and agreements.

(*Id.* at Ex. 1). OFIR's financial examination indicated no findings or recommendations. (*Id.* at 4).

The MCCA is also required to file annual statements with the Commissioner. MCL 500.3104(21).³ And the MCCA's financial statements are subject to an annual independent audit. MCL 500.3104(21). The audits performed by PricewaterhouseCoopers for the last three years are also available on the MCCA website. (<http://www.michigancatastrophic.com/FinancialReports/IndependentAuditorReports/tabid/2936/Default.aspx>). Moreover, in setting its annual premium, the MCCA relies on an independent actuary, who employs a well-accepted annuity model which projects future payment streams at the claimant level. (See MCCA's website, Annual Report, p 7). The independent actuary reports to an actuarial committee comprised solely of credentialed actuaries. (See MCCA's website, MCCA Plan of Operation, § 14.01(a)).

B. Oversight of the MCCA and Rate Regulation

In its opinion, the Court of Appeals recognized the oversight and regulatory scheme of the MCCA. (Exhibit 1 to Application, pp 9-10). Because Plaintiffs repeatedly assert that no such regulatory scheme exists (Application, pp 5, 32), the MCCA details that regulatory scheme

³ The MCCA also completes a compliance audit on an annual basis as a result of the Annual Financial Reporting Model Audit Regulation and files a Report of Internal Controls of Financial Reporting with OFIR. MCL 500.1031.

here for this Court's convenience.

- The MCCA's Board of Directors consist of 5 directors. **The DIFS Director is an ex officio member of the board.** MCL 500.3104(13)
- The **DIFS Director appoints each director** of the Board and fills any vacancies on the Board. MCL 500.3104(14).
- The Board shall meet as often as required by the Chairperson, **the DIFS Director**, or the Plan of Operation. MCL 500.3104(15).
- The DIFS Director is required to approve the Plan of Operation and any amendments. MCL 500.3104(17), (19).
- The MCCA is **subject to all the reporting, loss reserve, and investment requirements of the DIFS Director** to the same extent as would a member of the MCCA. MCL 500.3104(21).
- **The DIFS Director or an authorized representative may visit the MCCA at any time and examine "any and all of [the MCCA's] affairs.** MCL 500.3104(23).

Thus, the DIFS Director is on the Board; appoints the other directors and fills any vacancies on the Board; a prior OFIR Commissioner approved the Plan of Operation; the DIFS Director approves any amendments to that Plan; and she or her representative can come to the MCCA at any time and examine any and all of the MCCA's affairs. In fact, the DIFS Director (or an authorized representative) is authorized to, and does, attend the MCCA actuarial meeting, MCL 500.3104(23), and attends other MCCA meetings. Furthermore, as discussed below, the DIFS Director has the ability under the Essential Insurance Act to reject an insurer's rate filing that includes the MCCA's assessment amount if she believes that the rate being charged by the insurer to the policyholders is excessive, inadequate, or unfairly discriminatory. MCL 500.2109.

C. Public Act 349 of 1988 and the MCCA's Disclosure Exemption.

The Legislature amended the Insurance Code in 1988 by Public Act 349 to clarify that associations or facilities created by the Code, including the MCCA, are not "public bodies" for

many purposes, including for purposes of FOIA. 1988 PA 349 (Exhibit 1). Section 500.134 (also attached with Exhibit 1), which codified the Act, is entitled (in relevant part): “association or facility not state agency and money thereof not state money; records exempt from disclosure; premium or assessment not burdened under MCL 500.476a; ‘association or facility’ defined.” Subsection (3) states, “[a]n association or facility . . . is not a state agency and the money of an association or facility is not state money.” Subsection (4) states, “[a] record of an association or facility shall be exempted from disclosure pursuant to section 13 of [FOIA], being section 15.243 of the Michigan Compiled Laws.” And subsection (6) defines “association or facility” as “an association of insurers created under this act . . . including . . . (c) [t]he catastrophic claims association created under chapter 31.” Public Act 349 explicitly stated as its purpose:

[T]his amendatory act is intended to codify, approve, and validate the actions and long-standing practices taken by the associations and facilities mentioned in this amendatory act retroactively to the time of their original creation. It is the intent of this amendatory act to rectify the misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in League General Insurance Company v Catastrophic Claims Association, Case No. 93744, December 21, 1987, with respect to the imposition of rule promulgation requirements on the catastrophic claims association as a state agency, and to **further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency or public body.**

1988 PA 349, § 2 (emphasis added); see also Compiler’s Note to MCL 500.134.

In 2009, the Michigan House of Representatives passed a bill that would have specifically altered the FOIA exemption in MCL 500.134 and added to Section 3104 a statement that “a writing prepared, owned, used, in the possession of, or retained by the [MCCA Board of Directors] in the performance of an official function is subject to [FOIA] . . . as if the Board were a public body under [FOIA].” (House Bill No 4427 of 2009). Plaintiff Coalition Protecting Auto No-Fault (“CPAN”) supported this bill. The bill did not, however, pass the Senate and did

not become law.

D. The Current Dispute.

On November 22, 2011, CPAN sent the MCCA a FOIA request seeking, as to “all” open and closed claims “serviced by” the MCCA: the age of the claimant as of the date of injury, the claimant’s current age or the age when the claim was closed, and the total amount paid. (Ex. A to CPAN Amended Complaint, attached as Exhibit 9 to Application).⁴ The MCCA denied CPAN’s request in writing, stating:

The MCCA is expressly exempted from FOIA requests under MCL 500.134. Subsection (4) of that statute provides that “[a] record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws.” Subsection (6)(c) provides that “[a]s used in this section, ‘association or facility’ means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to the following: . . . (c) The catastrophic claims association created under chapter 31.” MCL 500.134(6)(c).

(Ex. B to Exhibit 9 to the Application). Although the MCCA denied CPAN’s request, it informed CPAN that it had provided the OFIR Commissioner with a summary of payments for claims reported to the MCCA as of November 17, 2011. That summary listed the number of open claims, the number of closed claims, and the total claims for various ranges of payment. (*Id.*)⁵ The MCCA did not provide OFIR with individual claim data “in order to protect the

⁴ The CPAN Plaintiffs sought to expand the scope of requested information through their Amended Complaint. (CPAN Amended Complaint, ¶ 24).

⁵ The MCCA also provides summary information regarding claims on its website, including payment distribution charts, age distribution charts, payment summary by category, independent auditor reports for the past three years, and OFIR audit reports. <http://michigancatastrophic.com>.

privacy of claimants.” (*Id.*).

CPAN filed suit in Ingham County Circuit Court alleging that the MCCA is subject to FOIA as a “public body.” (CPAN Amended Complaint, ¶ 18). After adding several individual plaintiffs and three new claims that mirrored the Brain Injury Association of Michigan (“BIAMI”) Plaintiffs’ claims (which are explained below), the CPAN Plaintiffs filed an Amended Complaint. The CPAN Plaintiffs alleged that the statutory provision that exempts the MCCA from FOIA (MCL 500.134) violates: (1) Article IV, § 24 of the Michigan Constitution, (2) Article IV, § 25 of the Michigan Constitution, and (3) the Equal Protection and Due Process Clauses of the Michigan and United States Constitutions. (*Id.*, ¶ 28). CPAN sought: an order requiring the MCCA to produce the requested documents; a declaration “that all operations of Defendant MCCA are subject to FOIA”; and sanctions and penalties under FOIA and common law. (*Id.*, pp 19-20).

On May 18, 2012, BIAMI sent a request to the MCCA for nearly identical information as CPAN. BIAMI also sought “the actuarial standards employed to establish reserves sufficient to secure payment of all such [open and closed] claims.” (Ex. A to BIAMI’s Complaint, attached as Exhibit 8 to the Application). BIAMI’s request, however, relied upon on the alleged common law right to “access [] records of activity[,]” and *did not* rely upon FOIA. (BIAMI Complaint, ¶ 22 and Ex A). BIAMI stated that to be entitled to records, it must show “some interest which is recognized by the courts[,]” which it believed it had under *Shavers v Kelley*. (*Id.*) The BIAMI Plaintiffs claimed, on one hand, that the MCCA’s records are “public records” because the MCCA is a publicly created entity and, on the other, that it is irrelevant whether the records are public or private because the common law right hinged on the interest involved, not the nature of the records. (*Id.*, ¶¶ 35-36).

On May 29, 2012, the MCCA rejected BIAMI's request. (*Id.*, Ex B). The BIAMI Plaintiffs filed suit against the MCCA alleging that they were entitled to the requested information based on an alleged common law right to access public records, and under theories of "resulting trust" and "constructive trust." (*Id.* at p 16). The CPAN Plaintiffs and the BIAMI Plaintiffs' (collectively, "Plaintiffs" or "Appellants") cases were consolidated, and the MCCA and both Plaintiffs filed cross-motions for summary disposition.⁶

E. The Circuit Court's Decision.

Following a hearing, on December 26, 2012, the Circuit Court issued its decision on the cross-motions for summary disposition, appearing to rely primarily on a theory that was not advanced by the Plaintiffs. (Exhibit 11 to the Application). In particular, the court concluded that the MCCA was a "public body" under FOIA, and that the MCCA's exemption under MCL 500.134 "does not carve out a wholesale exemption for all MCCA records, but does subject certain information to the exemption provisions of FOIA." (*Id.*, p 12). The court also stated generally that "following the rationale articulated in *Shavers v Kelley*, Michigan citizens have a right to know how the MCCA rate charged to insurers is calculated, because citizens ultimately end up paying that rate as part of the premium charged by insurers." (*Id.*, pp 12-13). The Court went on to state that "pursuant to the constitutional principles articulated in *Shavers*, the MCCA must disclose general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments in reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc." (*Id.*, p 13). The court held that the MCCA was not, however, required to

⁶ Both the MCCA and the CPAN Plaintiffs relied on MCR. 2.116(C)(8) and (C)(10), and the BIAMI Plaintiffs relied on MCR 2.116(C)(8) only.

“disclose personal information regarding individual claims or information that could reasonably lead to extrapolation of individual claimants’ names.” (*Id.*) In sum, the court denied the MCCA’s motion for summary disposition and granted in part, and denied in part, Plaintiffs’ cross-motions for summary disposition, finding that Plaintiffs are entitled to “disclosure of general rate calculation components and information” but were not entitled to records regarding individual claims. (*Id.*)

F. The Court of Appeals’ Decision.

MCCA filed an Application for Leave to Appeal, which was granted. On May 20, 2014, the Court of Appeals’ panel, consisting of Judges Owens, Gleicher, and Borrello, issued a unanimous 14-page opinion reversing the Circuit Court and remanding for entry of an order awarding summary disposition in favor of the MCCA. (Exhibit 1 to the Application). The Court of Appeals held that any and all of the MCCA’s records are exempt from FOIA under MCL 500.134.

Applying the plain language of MCL 500.134(4) and (6), we conclude that the trial court erred as a matter of law by holding that MCCA’s records were not exempt from FOIA. Here, Subsection (4) unambiguously exempts “a record of an association or facility” from disclosure and Subsection (6)(c) defines an “association or facility” to include MCCA. Thus, when read together, the subsections provide that, “a record of [MCCA] *shall be exempted* from disclosure pursuant to section 13 of [FOIA].” These provisions work in accordance with § 13 of FOIA, which permits a public body to exempt from disclosure “[r]ecords or information specifically described and exempted . . . by statute.” MCL 15.243(1)(d). **Read together, MCL 500.134(4) and (6) specifically describe and exempt MCCA’s records from disclosure. There is no ambiguity in these provisions.** Subsections (4) and (6) clearly mandate that if “a record” of MCCA is at issue, it “shall be exempted from disclosure pursuant to section 13 of [FOIA].” . . . **The statute fully exempts any and all of MCCA’s records from FOIA.**

(*Id.*, pp 5-6 (bolded emphasis added)).

The Court of Appeals also rejected Plaintiffs' arguments, not reached by the Circuit Court, that the Legislature violated Article IV, §§ 24 and 25 of the Michigan Constitution when it enacted MCL 500.134. (*Id.*, pp 7-9). In so holding, the court found that 1988 PA 349's title language satisfied Article IV, § 24's requirements and that the Legislature did not violate Article IV, § 25 when it passed 1988 PA 349 because it did not alter, revise, or amend FOIA. (*Id.*)

The Court of Appeals also rejected the Circuit Court's holding (and Plaintiffs' argument) that *Shavers* gave Plaintiffs the right to the MCCA's records. The Court of Appeals stated that *Shavers* was "inapplicable" and that the concerns articulated in *Shavers* "are non-existent in this case." (*Id.*, p 9). The court recognized that there is a detailed regulatory scheme that governs the MCCA and the premiums it charges to members. The court further stated, "*Shavers* does not stand for the broad proposition that policyholders are entitled to access every component that compromises the cost they pay for no-fault insurance. . . . Here, to the extent MCCA's premiums are passed to policyholders, unlike in *Shavers*, MCCA's premiums are subject to an extensive regulatory scheme." (*Id.*, pp 9-10).

Finally, the court rejected Plaintiffs' common law claims.⁷ It found that citizens have a common law right to access certain public records held by public entities but that the Legislature created a comprehensive statutory scheme that governs access to public records in general and the MCCA records in specific which preempts any pre-existing common law right that Plaintiffs may have had, if any. (*Id.*, p 13). The Court of Appeals reversed the Circuit Court and remanded the case for entry of an order granting summary disposition in favor of the MCCA.

⁷ The Court of Appeals also correctly rejected Plaintiffs' trust arguments. (Opinion, pp 13-14). Plaintiffs have abandoned such arguments in their Application, so the MCCA will not address them.

(*Id.* at 14).

On June 9, 2014, Plaintiffs filed a motion for reconsideration with the Court of Appeals, which was denied on July 22, 2014. Plaintiffs now seek review by this Court.

ARGUMENT

I. STANDARD OF REVIEW

An applicant for leave to appeal must show that their case satisfies one of the six grounds for review enumerated in MCR 7.302(B), which includes an issue that involves “legal principles of major significance to the state’s jurisprudence,” MCR 7.302(B)(3), or a Court of Appeals’ decision that “is clearly erroneous and will cause material injustice.” MCR 7.302(B)(5). As explained in detail below, the Court of Appeals correctly reversed the Circuit Court’s erroneous order. Plaintiffs’ only argument as to why this case satisfies MCR 7.302(B) boils down to the fact that they disagree with Legislature’s valid enactment of MCL 500.134. Plaintiffs want this Court to replace its judgment for that of the Legislature, an invitation which this Court should decline. And merely making constitutional arguments does not make a case significant enough to automatically result in review by this Court.

Whether to grant leave to appeal is within this Court’s discretion. Should the Court grant leave, this Court reviews a grant of summary disposition *de novo*. See, e.g., *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426-427; 633 NW2d 408 (2001). Under MCR 2.116(C)(8), dismissal is proper when a complaint “fail[s] to state a claim on which relief can be granted.” When deciding such a motion, the court is tasked with “test[ing] the legal sufficiency of the complaint[.]” *Wade v Dep’t of Corrs*, 439 Mich 158, 162; 483 NW2d 26 (1992). An MCR 2.116(C)(8) motion should be granted when “the claims are so clearly unenforceable as a matter of law that no

factual development could possibly justify recovery.” *Id.* at 163. In other words, assuming all of the facts alleged in the complaint are true, do they state a cognizable claim? As set forth below, Plaintiffs failed to state a claim that is enforceable as a matter of law and the MCCA was entitled to summary disposition.

Even if the Court looked beyond the Complaints, however, summary disposition would still have been appropriate under MCR 2.116(C)(10). Under this standard, the moving party is entitled to judgment as a matter of law if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); see, e.g., *Michigan Mutual Ins Co v Dowell*, 204 Mich App. 81, 85; 514 NW2d 185 (1994).

II. **LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY FOUND THAT THE MCCA’S RECORDS ARE EXEMPT FROM FOIA.**

The Court of Appeals correctly held that MCL 500.134 “fully exempts *any and all* of MCCA’s records from FOIA.” (Opinion, p 6 (emphasis in original)). Plaintiffs’ Application repeats the same erroneous arguments they made below as to why the Circuit Court was correct, but in actuality it was the Court of Appeals that correctly analyzed and applied Michigan law in reaching its conclusions. The Court of Appeals’ opinion should not be disturbed.

A. **The Plain Language of MCL 15.243 and MCL 500.134 Make Clear That All Of The MCCA’s Records Are Exempt From Disclosure.**

The Court of Appeals correctly analyzed the plain language of MCL 15.243 and MCL 500.134 and correctly applied fundamental principles of statutory interpretation. As with all questions of statutory interpretation, a court must begin its analysis with the plain language of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Here, there are two relevant statutory provisions—section 13 of FOIA, MCL 15.243 (attached as Exhibit 2);

and MCL 500.134 (of the Michigan Insurance Code). Section 13 of FOIA provides that a “public body may exempt from disclosure as a public record under this act. . . [r]ecords or information specifically described and exempted from disclosure by statute[.]” MCL 15.243(1)(d) (emphasis added). As the Court of Appeals recognized, this section of FOIA is very clear—the Legislature has the authority to describe and exempt records and information from disclosure by so stating in another statute. (Opinion, pp 5-6 (“There is no ambiguity in these provisions.”)). The Legislature exercised this power when it enacted MCL 500.134.

MCL 500.134(4) states that records “of an association or facility **shall be exempted from disclosure** pursuant to [FOIA]. . . .” And MCL 500.134(6) defines “association or facility” as, among other things, “the catastrophic claims association created under chapter 31 [MCCA].” Thus, MCL 500.134 specifically describes the records that are exempt from disclosure—the records of certain defined associations and facilities, expressly including the MCCA—and **requires** that such records be exempt from disclosure. *Mich Ed Ass’n v Secretary of State*, 489 Mich 194, 218; 801 NW2d 35 (2011) (“The use of ‘shall’ in a statute generally ‘indicates a mandatory and imperative directive.’”). The exemption is clear and unambiguous. In fact, the Legislature, when enacting MCL 500.134, made its intention explicitly clear:

[T]his amendatory act is intended to codify, approve, and validate the actions and long-standing practices taken by the associations and facilities mentioned in this amendatory act retroactively to the time of their original creation. It is the intent of this amendatory act to rectify the misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in League General Insurance Company v Catastrophic Claims Association, Case No. 93744, December 21, 1987, with respect to the imposition of rule promulgation requirements on the catastrophic claims association as a state agency, and **to further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency or public body.**

Section 2 of 1988 PA 349 (Exhibit 1) (emphasis added).

The Court of Appeals correctly recognized that the Circuit Court’s tortured interpretation of MCL 500.134 manipulated the plain language of both FOIA and MCL 500.134 in order to subject the MCCA to FOIA, contrary to the clear legislative intent. The Circuit Court first concluded that MCL 500.134 was not intended to exempt MCCA records from disclosure under FOIA because it “does not contain any specific references regarding information exempt from disclosure.” (Exhibit 11 to the Application, p 11). Plaintiffs continue to promote this argument before this Court; however, this argument ignores that MCL 500.134 specifically exempts the records of the MCCA from disclosure, as permitted by MCL 15.243(1)(d), and that no other reading of the statutes makes sense. Plaintiffs’ interpretation demands something more than the plain language of MCL 15.243, in that it demands that the Legislature detail the records or information exempt rather than name the holders of the records as exempt. (Application, pp 19-20). MCL 500.134, however, does indeed satisfy the requirements of MCL 15.243 because it describes what records are exempt from disclosure – namely, those belonging to the defined associations and facilities, including the MCCA. Indeed, it would be difficult to draft clearer language than that chosen by the Legislature to state that all of the MCCA’s records are exempt from FOIA.

Rather than rely on the plain language of the statute, Plaintiffs appear to argue that MCL 500.134 does not provide a wholesale carve out of the MCCA’s records but rather, as the Circuit Court found, “subject[s] certain information to the exemption provisions of FOIA.” (Exhibit 11 to the Application, p 12⁸; see also Application, pp 18-19⁹). Such a reading of the statute defies

⁸ The MCCA did not disagree with the Circuit Court’s conclusion that, even if the MCCA is subject to FOIA, information in the MCCA’s possession regarding individual claimants is still exempted from disclosure, it just believes that such information is exempt from disclosure, along with all other MCCA records, under 15.243(1)(d) and MCL 500.134(4). Because the Court of

all principles of statutory interpretation. First, the statute's plain language does not say that "certain information" of the MCCA is subject to the FOIA exemption provisions while other information is not; rather, the plain language makes clear that any record of the MCCA,¹⁰ as well as the records of certain other associations and facilities, "shall be exempted from disclosure[" MCL 500.134(4). As stated above, the Legislature did not state that some of the records are exempt from disclosure, it stated that any record shall be exempt from disclosure. The Court of Appeals addressed this in its opinion by noting that MCL 500.134 "mandate[s]" exemption. (Opinion, p 6).

Second, if the MCCA is subject to FOIA and MCL 500.134(4) could be read in the manner suggested by the Plaintiffs – namely, that all it does is state that some MCCA information may be exempted from disclosure under some exception in FOIA – there would be absolutely no reason for the Legislature to have included the reference to FOIA in MCL

Appeals found all of the MCCA's records to be exempt from FOIA, it did not reach this argument. (Opinion, p 9).

⁹ It is unclear from Plaintiffs' Application what they are actually arguing that MCL 500.134 means. Because Plaintiffs state that they believe the statute does not provide a wholesale exemption of the MCCA's records and that the use of "pursuant to" in the statute embraces more than just MCL 15.243(1)(d), the MCCA assumes that Plaintiffs accept the Circuit Court's analysis of MCL 500.134. (Application, pp 18-20). But the fact that Plaintiffs cannot articulate the meaning of MCL 500.134 demonstrates the infirmity of their arguments.

¹⁰ As provided in MCL 8.3b, "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number." Thus, any time a statute uses a singular word like "a," it may also be read to embrace the terms "all" or "any." In fact, the Legislature prefers the use of "a" to "any" when drafting a statute. See LSB Drafting Manual, p 70 (Nov 1986) (Exhibit 3); "Plain English in Legislative Drafting," Legislative Service Bureau (1983) (Exhibit 4). Moreover, the context of, and clear Legislative intent behind, MCL 500.134 supports the Court of Appeals' reading of the statute to exempt all of the MCCA's records from FOIA. But regardless of whether the statute is read as "a" or "any" record, the effect is the same—every record of the MCCA is exempt from disclosure, whether individually or collectively exempted.

500.134(4) because FOIA already states the exact same thing. Plaintiffs' interpretation of MCL 500.134 not only fails to give effect to its plain language by eviscerating the exemption, it also renders the provision in MCL 500.134(4) nugatory. As the Court of Appeals stated, "to conclude that only the pre-existing exemptions in § 13 [of FOIA] shielded MCCA records from disclosure renders MCL 500.134(4) and (6) nugatory. Were plaintiffs' arguments correct, the Legislature would have no reason to enact MCL 500.134." (Opinion, p 6). Furthermore, MCL 500.134 specifically refers to section 13 of FOIA, which is not just any exemption of FOIA, it is the Section that allows exemption *by another statute*. When construing a statute, courts must read the provisions in the context of the entire statute and should "avoid a construction that would render part of a statute surplusage or nugatory." *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010), quoting *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009). Plaintiffs promote doing exactly what Michigan law demands courts avoid. Rather than construe MCL 500.134 according to its plain language, the Legislature's explicit intent, and the principles of statutory interpretation, Plaintiffs ask this Court to interpret the statute so as to make entire sections nugatory. The Court of Appeals, however, correctly applied the principles of statutory interpretation and reversed the Circuit Court.

The Court of Appeals also rejected Plaintiffs' distinction between the use of "pursuant to" versus "under" (holding that "[c]ontrary to the trial court's conclusion, the phrase 'pursuant to section 13' did not affect the plain meaning of MCL 500.134(4) and (6); rather, that phrase simply indicated that the exemption worked in accordance with FOIA", Opinion, p 6). Black's Law Dictionary defines "pursuant to," in relevant part, as "[a]s authorized by; under." Black's Law Dictionary (9th edition) (emphasis added). Thus, the Court of Appeals correctly recognized that the use of the phrase "pursuant to" rather than "under" is a distinction without a difference.

The Legislature's clear intention in adding MCL 500.134(4) was to prevent the MCCA's records from being subject to disclosure under FOIA. To do so, pursuant to MCL 15.243, the Legislature described the records of certain associations and facilities that are to be exempt from disclosure.

Plaintiffs contend that the Court of Appeals' holding requires one to read MCL 15.243(1)(d) as if it read that a *public body* may be exempt from disclosure rather than public records. (Application, p 18). This is not true. MCL 15.243(1)(d) simply requires that any statutory exemption found outside of FOIA specifically describe the "records and information" exempt from disclosure. There is no limitation one way or the other on the number of records that may be exempted. If the Legislature sees fit to exempt all of the records of an entity, like the MCCA, it may do so; and if it sees fit to exempt only one record of an entity, it may do so. In the case of MCL 500.134(4), the Legislature chose to exempt every record belonging to the MCCA and like associations from disclosure. It is Plaintiffs' erroneous interpretation of the statute that requires additional language to be read into FOIA. The Court of Appeals recognized this fact and held that "[n]othing in § 13 of FOIA precludes the Legislature from exempting all records of a particular entity from FOIA and we will not read such a restriction into § 13." (Opinion, p 6).

Plaintiffs further misconstrue MCL 500.134(4) in arguing that because MCL 500.134 provides that "a record" shall be exempt from disclosure, it should be read to only encompass the singular and not the plural (i.e., that the statute does not exempt *all* of the MCCA's records). (Application, pp 18-20). The Court of Appeals, however, correctly rejected this argument as well, finding that the "minimally differing language [is] of no interpretative consequence." (Opinion, p 6). Plaintiffs' argument also ignores the rules of legislative construction and

drafting, which prefer the use of “a” to “any” when drafting a statute. See LSB Drafting Manual, p 70 (Nov 1986) (Exhibit 3); “Plain English in Legislative Drafting,” Legislative Service Bureau (1983) (Exhibit 4). But more importantly, it ignores the fact that the context of, and clear Legislative intent behind (discussed infra), MCL 500.134 supports the Court of Appeals’ reading of the statute to exempt all of the MCCA’s records from FOIA.

B. The Court of Appeals’ Decision Is Consistent With the Language of MCL 500.134 and Legislative Intent.

The legislative purpose for creating the exemption in MCL 500.134 is clearly evident from Section 2 of 1988 PA 349, which was voted on and passed by both houses of the Legislature and signed into law by the Governor. (Exhibit 1). The Legislature, recognizing that the MCCA is a non-profit, private association, wanted to ensure that the MCCA and like associations and facilities would not be treated as state agencies or public bodies for many purposes, including FOIA.

Indeed, the impetus for enacting the legislation was the Court of Appeals’ decision in *League General Ins Co v Michigan Catastrophic Claims Assoc*, 165 Mich App 278; 418 NW2d 708 (1987), which held that the MCCA was a state agency subject to the Administrative Procedures Act (“APA”). This Court reversed and recognized the MCCA as a “private association.” *League General Ins Co v Michigan Catastrophic Claims Assoc*, 435 Mich 338, 350; 458 NW2d 632 (1990). In so finding, this Court held that the MCCA’s “formation may have bestowed an incidental benefit upon the public by facilitating availability of automobile insurance [but] . . . its primary purpose was to protect smaller insurers from potentially severe financial repercussions of the no-fault act.” 435 Mich at 351.

Although *League General* specifically examined only the APA and not FOIA, the Legislature recognized the larger implications of the Court of Appeals’ treatment of the MCCA

and specifically enacted MCL 500.134 in order to “to further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency or public body.” (Exhibit 1 (emphasis added)).

Although the Court of Appeals did not cite to this language in its opinion, its holding is consistent with the Legislative intent that the MCCA and like associations may not be treated as a public bodies. Such a conclusion also comports with the general rule that private, non-profit entities are not—and should not be—subject to FOIA. *See also* 1997 OAG 6942 (July 3, 1997) (finding that a private, voluntary unincorporated association was not a “public body” under FOIA). Moreover, nonprofit corporations are generally considered private entities, not public. As explained in 1980 OAG 5750, “[n]onprofit corporations are private legal entities which operate in the nongovernmental, private sector. While nonprofit corporations often provide a variety of services to government and the public, the rendering of such services does not convert a nonprofit corporation into a public entity.”

The Legislature’s intent to ensure that the MCCA not be treated as a public body for many purposes, including FOIA (even if the MCCA meets the statutory definition of public body under FOIA), is exceedingly clear. But to emphasize this point, in 2009, there was an effort in the Michigan House of Representatives to essentially remove the FOIA exemption in MCL 500.134 and add to MCL 500.3104 a statement that “a writing prepared, owned, used, in the possession of, or retained by the [MCCA Board of Directors] in the performance of an official function is subject to [FOIA] . . . as if the Board were a public body under [FOIA].” (See House Bill No 4427 of 2009). CPAN supported this bill. The bill *did not* pass the Senate and *did not* become law. Thus, as recently as 2009, the Legislature recognized and intended that the MCCA’s records continue to not be subject to disclosure and that the MCCA is not a public body

for FOIA purposes.

Stated simply, the Legislature, in recognizing that the MCCA is a *private*, nonprofit association, specifically enacted a statute to ensure that the MCCA's records would not be subject to disclosure. The Court of Appeals corrected the Circuit Court's faulty analysis and reversed, to comport with the Legislative intent. This Court should deny Plaintiffs' Application..

III. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY REJECTED PLAINTIFFS' ARGUMENTS THAT 1988 PA 349 VIOLATED ARTICLE IV, §§ 24 AND 25 OF THE MICHIGAN CONSTITUTION.

The Court of Appeals' rejection of Plaintiffs' constitutional challenges to MCL 500.134(4)¹¹ was entirely correct. (Opinion, pp 6-8). As this Court is well aware, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003); Opinion, p 7. Thus, MCL 500.134, which expressly exempts the MCCA's records from the FOIA, is presumed constitutional.

Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.

Cady v Detroit, 289 Mich 499, 505; 286 NW2d 805 (1939). Plaintiffs fail to provide *any* reason to overcome the strong presumption of constitutionality, let alone the requisite "clearly apparent" reasons. The Court of Appeals correctly held that MCL 500.134 violated neither Article IV, § 25 nor Article IV, § 24.

¹¹ Presumably, Plaintiffs challenge Public Act 349 of 1988 as unconstitutional, which is codified as MCL 500.134.

A. The Legislature Did Not Violate Article IV, § 25 When It Passed 1988 PA 349.

Plaintiffs claim that the Legislature violated Article IV, § 25 of the Michigan Constitution when it passed 1988 PA 349/MCL 500.134 because the statute amended FOIA without amending and republishing FOIA itself. The Court of Appeals quickly dismissed Plaintiffs' arguments in this regard because it recognized that Plaintiffs' conclusion is based on a false premise. (Opinion, p 7). Article IV, § 25 prohibits the Legislature from *revising, altering, or amending* a statute by reference to its title only. Const 1963, art 4, § 25. It does not prohibit the Legislature from providing in a statute that exceptions to that statute may be provided for in other statutes, as FOIA expressly states. In other words, the Constitution does not prohibit the action taken by the Legislature when it passed the MCCA exemption. (Opinion at p 7 ("MCL 500.134 did not revise, alter or amend FOIA. Rather, FOIA contemplates statutory exemptions.")). In fact, the Legislative Drafting Manual, produced by the Michigan Legislative Service Bureau, specifically includes FOIA in its discussion of Article IV, § 25 as an example of a statute that need **not** be amended when an exemption is provided for by a separate statute. (LSB Drafting Manual, p 130 (Sept 11, 2009) (Exhibit 5)). This alone should end the inquiry and shows that the Court of Appeals was correct in rejecting Plaintiffs' argument that there is an Article IV, § 25 violation.

The reason why FOIA need not be amended when the Legislature enacts a separate statutory exemption is simple—FOIA, more specifically, MCL 15.243(1)(d), provides that a "public body may exempt from disclosure as a public record under this act. . . **[r]ecords or information specifically described and exempted from disclosure by statute[.]**" (Emphasis added). Thus, as the Court of Appeals held, the "Legislature drafted FOIA in a manner to allow future statutory exemptions without the need to revise or amend FOIA." (Opinion, p 7).

Like it has done in countless other circumstances, the Legislature in MCL 500.134(4) exercised its authority under MCL 15.243 to exempt the records of the MCCA (among others) from FOIA in a separate statute. Namely, MCL 500.134(4) states that records “of an association or facility shall be exempted for disclosure pursuant to [FOIA]...” And MCL 500.134(6) defines “association or facility” as among other things, “the catastrophic claims association created under chapter 31 [MCCA].” The exemption provided in MCL 500.134 does not change the wording of, modify, or reexamine—i.e., amend, alter, or revise¹²—FOIA. It merely does what FOIA says a statute can do.

Plaintiffs provide an overview of the case law on Article IV, § 25. (Application, pp 24-26). But they fail to recognize that the cases they cite are inapplicable because this case involves FOIA, which, as discussed above, expressly provides that other statutes may provide for exemptions from disclosure. *Alan v County of Wayne*, 388 Mich 210, 268; 200 NW2d 628 (1972), heavily relied on by Plaintiffs, actually proves the MCCA’s point. The *Alan* Court began its Article IV, § 25 analysis by noting that, directly the opposite of the case here, certain sections of the Public Act at issue “preclude[d] its amendment by the operation of other statutes.” *Id.* The *Alan* Court’s analysis recognized that the situation presented in this case (*i.e.*, expressly providing that other statutes may contain exemptions) would resolve the Article IV, § 25 issues; however, the statute in *Alan* specifically prohibited such action. This fact alone makes the rest of the analysis in *Alan* irrelevant.¹³

¹² “Amend” is defined in Black’s Law Dictionary as “to change the wording of, to formally alter by striking out, inserting, or substituting words.” An alteration is “an act done to an instrument whereby its meaning or language is changed[.]” A revision is a “reexamination or careful analysis for correction or improvement . . . [a]n altered version of a work.” Black’s Law Dictionary (9th ed).

¹³ Moreover, the challenged statute in *Alan* incorporated the original statute by reference

Similarly, the statute at issue in *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005), also did not provide for exceptions. There, the original statute simply provided that two insurance eligibility points may be calculated against a driver for violating any speed limit by 10 mph or less. 267 Mich App at 9. Thus, when the Legislature amended the vehicle code and added a provision that prohibited the imposition of any insurance eligibility points for 10 mph speed limit violations, without amending, reenacting, or republishing the original statute, the Court found that the later statute violated Article IV, § 25. The statutes in *Nalbandian* are not analogous to the statutes here. Again, FOIA provides that other statutes may exempt records and information from disclosure under the Act. There is therefore no conflict when another statute, such as MCL 500.134, does exactly that. FOIA was not amended—by reference or by implication—when the Legislature passed the MCCA exemption (or, for that matter, the numerous other times in which the Legislature provided for FOIA exemptions in the dozens of other statutes found in the Michigan Compiled Laws, as discussed below).

Not only does the plain language of Article IV, § 25 demonstrate that it has not been violated (because the MCCA exemption did not amend, alter, or revise FOIA as held by the Court of Appeals), but the underlying policy behind Article IV, § 25 also supports such a conclusion. The harm to be avoided through Article IV, § 25 is deceit. There is no deceit here. FOIA very clearly provides that other statutes may provide exemption from disclosure, and numerous other statutes do precisely that. Nothing is hidden from the public.

and then proceeded to amend several sections of the original statute. *Alan*, 388 Mich at 287. The facts in *Alan* are clearly different than those presented here.

In support of their argument that the MCCA exemption violates Article IV, § 25, Plaintiffs claim that Senate Bill 468, passed in 2006, illustrates how to properly amend FOIA. (Application, fn 10). The MCCA does not disagree, but Senate Bill 468 is inapplicable because that Bill clearly *amended* Section 15(1)(l) of FOIA *by adding words* to a FOIA subsection. Specifically, the Bill's goal was to include protected health information, as defined under federal law, to the list of medical facts or evaluations that would reveal an individual's identity which are exempted from disclosure under FOIA. Thus, the Legislature added the phrase in capital letters below to MCL 15.243(1)(l):

(l) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, **INCLUDING PROTECTED HEALTH INFORMATION, AS DEFINED IN 45 CFR 160.103.**

With Senate Bill 468, the Legislature amended FOIA (specifically, MCL 15.243(1)(l)). But the Legislature did not amend any section or subsection of FOIA when it passed the MCCA exemption. Instead, as discussed above, FOIA provides in MCL 15.243(1)(d) that other statutes may provide for exemptions, and the Legislature included such an exemption for the MCCA in MCL 500.134. Plaintiffs' example clearly illustrates the difference between when a statute is amended, altered, or revised (and thus, when it needs to be re-enacted and published), and when it is not. Senate Bill 468 clearly amended, altered, or revised FOIA; the MCCA exemption in 1988 PA 349 did not.

In fact, if this Court finds that the Legislature violated Article IV, § 25 by passing the MCCA exemption, then dozens of other statutes are also unconstitutional, including every other statute outside of FOIA that provides for a FOIA exemption. For instance, House Bill 5168

(Public Act 26 of 2006¹⁴) amended the Public Health Code to provide that an applicant for health professional licensure shall submit fingerprints to the State police and to the Federal Bureau of Investigation for a criminal background check, and the information obtained is exempt from disclosure under FOIA. The Legislature has taken similar action in a variety of statutes.¹⁵ **If the passage of the MCCA exemption violated Article IV, § 25, then so did the passage of all of these statutes.** Plaintiffs fail to address this fact in their Application. Such a result cannot stand. The Constitution—and Article IV, § 25—must be construed in a reasonable manner. *Alan*, 388 Mich at 277, citing *People ex rel Drake v Mahaney*, 13 Mich 481 (1865).¹⁶

B. The Legislature Did Not Violate Article IV, § 24 When It Passed 1988 PA 349.

Plaintiffs' attempt to demonstrate that the Legislature violated Article IV, § 24 in passing the MCCA exemption (Application, pp 26-29) fails miserably. There are three types of Article IV, § 24 challenges: (1) a title-body challenge; (2) a multiple-object challenge; and (3) a change of purpose challenge. *See, e.g., People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994).

¹⁴ It is notable that this Public Act was passed in the same year as Senate Bill 468, discussed above. Clearly the Legislature knew when it needed to re-publish FOIA and when it did not.

¹⁵ *See, e.g.,* MCL 18.355a (exempting information that identifies victims of sexual abuse); MCL 28.292(8) (exempting organ donor information), MCL 29.5p (exempting information obtained regarding hazardous chemicals in the workplace); MCL 52.202(4) (exempting medical records and other documents obtained during a medical examiner's investigation); MCL 125.1954 (exempting certain proprietary information related to the Michigan Strategic Fund); MCL 125.2088c(8) (exempting investment fiduciaries working with the Michigan Strategic Fund); MCL 168.759a(11) (exempting electronic mail addresses by an absent uniformed or overseas voter); MCL 205.747(7) (exempting certain mediation information); and MCL 780.830 (exempting victim's address and telephone numbers maintained by courts or sheriffs).

¹⁶ Even if this Court believes that Article IV, § 25 may be implicated here, despite all of the above, this Court recently found that if an act is complete in itself (in our case, the Insurance Code), then Article IV, § 25 is not violated. *Association of Businesses Advocating Tariff Equity v Michigan Public Service Commission*, 493 Mich 947; 828 NW2d 22 (2013).

Plaintiffs fail to articulate how the Court of Appeals erred with respect to the proper test for such challenges but rather contend that the Court of Appeals “summarily dismiss[ed]” Plaintiffs’ arguments and “erroneously relied upon a phrase” in the title to conclude that there is no Article IV, § 24 violation. (Application, p 27). Plaintiffs’ arguments are without merit.

First, the Court of Appeals did not “summarily dismiss[]” Plaintiffs’ arguments. The Court of Appeals spent nearly 2 of the 14 pages of its opinion addressing Plaintiffs’ Article IV, § 24 argument. (Opinion, pp 26-29). And the Court of Appeals properly analyzed and rejected Plaintiffs’ title-body challenge.¹⁷

The test for whether a title-body violation exists is whether the title of the act gives the Legislature and the public *fair notice* of the challenged provision. *People v Cynar*, 252 Mich App 82, 84-85; 651 NW2d 136 (2002). A violation of the notice provision occurs only when “the subjects are so diverse in nature that they have no necessary connection.” *Id.* at 85 (quoting *Mooahesh v Dep’t of Treasury*, 195 Mich App 551, 559; 492 NW2d 246 (1992)). The title does not, as Plaintiffs suggest, have to be an index that details every single provision in the act. (Application, p 28).¹⁸ In fact, to the contrary, this Court has recognized in cases post-*Alan* that the title does not need to be an index. *See, e.g., People v Cynar, supra* at 84 (“[T]he title of an

¹⁷ Although Plaintiffs do not articulate which type of challenge is presented here, the only possible type is a title-body challenge. Plaintiffs did not make a multiple-object argument before the Court of Appeals. (Opinion, p 8). And the Court of Appeals recognized that Plaintiffs did not present a “cognizable argument” with respect to their change of purpose challenge and thus found that Plaintiffs had abandoned that argument on appeal. (*Id.*) Even if Plaintiffs did present such a challenge, it would ultimately fail. Plaintiffs ignored the plain language of the Constitutional section at issue and failed to argue anywhere before the Court of Appeals that 1988 PA 349 was amended *on its passage through either house* so as to change the bill’s original purpose as required for a change of purpose challenge.

¹⁸ In support of their argument, Plaintiffs cite to the concurring opinion in *Alan*, which does not have precedential value as it is not an opinion of the Court. *See, e.g., Shawl v Spence Bros, Inc*, 280 Mich App 213, 225 n 18; 760 NW2d 674 (2008).

act need not be an index to all the provisions of the act.”), quoting *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 559; 595 NW2d 176 (1999); *Boulton v Fenton Twp*, 272 Mich App 456, 464; 726 NW2d 733 (2006).

The title of 1988 PA 349, in relevant part, reads as follows:

An act to amend section 134 of Act No. 218 of the Public Acts of 1956, entitled as amended “An act to . . . to provide for their [insurance and surety companies and associations] rights, powers, and immunities and to prescribe the conditions on which companies and associations organized, existing, or authorized under this act may exercise their powers[.]”

Plaintiffs contend that the use of the phrase “rights, powers, and immunities” in 1988 PA 349 is not sufficient for title purposes. An examination of the definitions of the terms used shows that Plaintiffs’ argument is meritless and certainly does not overcome the high burden required to declare a statute unconstitutional. Under Black’s Law Dictionary (9th edition), a “right” is defined, in relevant part, as “a power, privilege, or immunity secured to a person by law; a legally enforceable claim that another will or will not do a given act[.]” “Power” is defined as “[t]he ability to act or not act . . . [t]he legal right or authorization to act or not to act[.]” And “immunity” is defined as “[a]ny exemption from a duty, liability, or service of process; esp, such an exemption granted to a public official or governmental unit.”

The title’s proclamation that the act addresses the rights, powers, and immunities of associations involved in the insurance business gives more than fair notice to the public and to the Legislature that the statute grants certain associations under the Insurance Code certain immunities (e.g., the records of such associations are immune from disclosure). The right of the MCCA—a private association, which is authorized under the Insurance Code—to exempt information and records from FOIA disclosure is a power and an immunity. The Court of Appeals properly held that the title and the body are “not so diverse in nature” that they have no

necessary connection. (Opinion, p 9, citing *Cynar*, 252 Mich App at 85 (holding that a statute providing for governmental immunity under certain circumstances did not violate Article IV, § 24 because such immunity was an “attribute” of civil liability)).

In fact, the connection between 1988 PA 349’s title and the body of the act is closer than that found in *Wayne County Board of Comm’rs v Wayne County Airport Authority*, 253 Mich App 144; 658 NW2d 804 (2002), which the court found did not violate Article IV, § 24. The court held that the challenged provisions—which provided for the Wayne County Airport Authority to issue self-liquidating bonds to assist in operating the airport—was sufficiently related to the title because the title referenced the Authority’s ability to manage an airport, which necessarily included financial matters. 253 Mich App at 188. Thus, issuing bonds to operate an airport was not so diverse in nature from the ability to manage an airport, and therefore, there was no violation of Article IV, § 24. Here, the title of the act says that it provides for the rights, powers, and immunities of associations; and the legal definitions of those terms can all be easily applied to embrace an exemption from a disclosure obligation under FOIA. This case presents an even clearer example than that in *Wayne County* of when Article IV, § 24 is not violated. The MCCA’s statutory exemption from FOIA is valid and does not offend the Constitution. The Court of Appeals correctly rejected Plaintiffs’ arguments to the contrary.

IV. **LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY REJECTED THE CIRCUIT COURT’S EXTENSION OF *SHAVERS V ATTORNEY GENERAL* TO CREATE RIGHTS IN THIS CASE.**

Plaintiffs continue to erroneously promote an extension of the holding in *Shavers v Kelley*, 402 Mich 554; 267 NW2d 72 (1978), that not only misinterprets the actual holding of this Court but also misstates the facts. The Court of Appeals properly rejected Plaintiffs’ claims that *Shavers* created a right for them to obtain documents to which they were not legally entitled.

In sum, *Shavers* is inapplicable in this case where the Essential Insurance Act corrected the constitutional deficiencies identified in *Shavers*, where *Shavers* did not stand for the broad proposition that policyholders have the right to access every component that comprises their insurance rates, and where, unlike in *Shavers*, there is an effective regulatory scheme in place that governs MCCA and the procedures MCCA utilizes to determine its premiums. Accordingly, the trial court erred as a matter of law in holding that plaintiffs had a right to access MCCA's records pursuant to *Shavers*.

(Opinion, p 10).

A. **The Court of Appeals Properly Held that *Shavers* Is Inapplicable to this Case and Rejected the Circuit Court's Expansion of That Holding.**

Despite the Circuit Court's ruling and Plaintiffs' contention, *Shavers* does not extend to all cases that have some relationship to personal automobile insurance policies. Even setting aside the sweeping contention that the Judicial Branch may delegate legislative power (which it does not possess) to the Executive Branch, *Shavers* does not support the Circuit Court's proposition that in *Shavers*, this Court delegated open-ended authority to the courts to override specific legislative directives to ensure that rates are "fair and equitable." *Shavers* held that either legislation or administrative rules were needed to define when a rate is "excessive, inadequate or unfairly discriminatory." 402 Mich at 580. The Legislature responded by adopting the Essential Insurance Act, which defined those terms. MCL 500.2101 *et. seq.* This Court thereafter approved this legislative response and held that the constitutional deficiencies were corrected. *Shavers v Kelley*, 412 Mich 1105; 315 NW2d 130 (1982) ("*Shavers II*"); *Kreiner v Fischer*, 471 Mich 109, 115-116; 683 NW2d 611 (2004), overruled on other grounds, *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010).

The Circuit Court extended *Shavers* to hold that because Michigan's citizens "fund" the MCCA's reserves (an incorrect statement, as explained below) the citizens have a financial interest in the rate calculation process and how it is conducted, which the Circuit Court then

concluded allowed Plaintiffs access to the MCCA's records (except for documents otherwise exempt under MCL 15.243 such as those of a personal nature) despite the express statutory exemption for all MCCA records. (Exhibit 11 to Application, pp 12-13). The Court of Appeals rejected the Circuit Court's creation of this alleged right and held that *Shavers* was inapplicable in this case. (Opinion, pp 9-10).

Subsequent decisions have made clear that the interest articulated in *Shavers* does not extend to all circumstances involving the No-Fault Act. For instance, in *Advocacy Organization for Patients and Providers v Auto Club Ins Assoc*, Case No 5:96-cv-177 (ED Mich, June 20, 1997) (Exhibit 6), *aff'd* on other grounds, 176 F3d 315 (CA6, 1999), the court noted that the interests protected in *Shavers* do not extend to every instance where the No-Fault Act may be implicated and dismissed the alleged due process claims. *Id.* at *5-6 (finding that the issue before the court "does not implicate issues which are similar to an individual's ability to get no-fault insurance, and consequently to drive [under *Shavers*].").

The same is true here. The FOIA exemption in MCL 500.134 does not impair a Michigan's citizen's ability to drive or obtain affordable insurance. In fact, the MCCA premium is charged to member insurers, not to policyholders. Although member insurers may recognize the MCCA premium in their rates, they are not required to do so. Nor does the ability to obtain information from the MCCA alter the statutorily set premium calculations under Section 3104. The MCCA expense is but one factor considered by insurers—like all others—and the Court has already held the protections of the amended Insurance Code are sufficient for constitutional purposes. This case presents no constitutionally-protected interest implicated by Plaintiffs' inability to obtain any information about the MCCA, let alone information beyond that already publicly available (including the amount of the annual assessment, the OFIR financial

examination, the actuarial analysis contracted by OFIR, and the independent PricewaterhouseCoopers annual audits).

The right identified in *Shavers* was related to due process claims when challenging the constitutionality of the No-Fault Act, which nobody is challenging here. Moreover, as recognized by the Court of Appeals, *Shavers* was specifically concerned that the process under the No Fault Act ensure fair and equitable rates, and the Essential Insurance Act alleviated those concerns. *Shavers II, supra*. That Act continues to provide insureds with a process to ensure that insurance is provided at fair and equitable rates. If Plaintiffs disagree with their rates, they should follow the process spelled out in Chapter 21 of the Act.

In fact, if Plaintiffs are truly concerned that they are unable to determine whether their insurances rates are fair and equitable because of the inclusion of the MCCA assessment by their insurers in their rates, they have a few options. First, they can challenge the rate filing of their insurer under the Essential Insurance Act. They can express their concerns over the rate to the DIFS Director. If the DIFS Director, who, as explained in detail above, is heavily involved with the MCCA, had any concerns over the amount of the MCCA assessment, she could disapprove a rate filing under the Essential Insurance Act for an insurer that chooses to reflect such amounts in their rate. MCL 500.2106-.2108. And Plaintiffs may challenge the constitutionality of the No-Fault Act as provided under *Shavers*.

What Plaintiffs cannot do is simply cite to *Shavers* as granting an all-encompassing right for every vehicle owner in the State to have access to records and information that were specifically exempted from disclosure by the Legislature in a statute enacted years after the *Shavers* decisions. Specifically, MCL 500.134 was enacted ten years after *Shavers* was decided. The Legislature is presumed to have been aware at that time of *Shavers* and the rights it created,

yet it deemed the MCCA's records to be immune from disclosure. See, e.g., *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 505-06; 475 NW2d 704 (1991); *Lenawee County Gas & Electric Co v City of Adrian*, 209 Mich 52, 64; 176 NW 590 (1920) ("Laws are assumed to be enacted by the legislative body with some knowledge of, and regard to, existing laws upon the same subject and decisions by the court of last resort in reference to them."). The Circuit Court erred by granting rights to Plaintiffs based on a misapplication of a case after the Legislature specifically stated that no such right existed. The Court of Appeals corrected the Circuit Court's error and its decision should be left to stand.

Finally, Plaintiffs continue to emphasize that this Court in *Shavers II* did not prohibit future attacks on the constitutionality of the No-Fault law. (Application, pp 31-32). No one disputes this fact. *Plaintiffs fail to acknowledge, however, that this case does not present such a challenge to the No-Fault Act.* This case involves FOIA and MCL 500.134, neither of which are part of the No-Fault Act. If Plaintiffs want to bring such an action, *Shavers II* does not prohibit it. This, however, is not that case. To the extent that Plaintiffs argue that MCL 500.3104 is unconstitutional, MCL 500.3104 was enacted prior to this Court's decision in *Shavers II*, where it held that the constitutional deficiencies identified in *Shavers* were corrected. Thus, such an argument would be without merit.

B. Even if *Shavers* Applied, It Requires a Rational Basis Review, Not Strict Scrutiny.

The Circuit Court implied in its order that challenged legislation should be reviewed using a strict scrutiny analysis. (Exhibit 11 to the Application, p 6). This conclusion is clearly erroneous. "[I]t is axiomatic that the challenged legislative judgment is accorded a presumption of constitutionality." *Shavers*, 402 Mich at 613, citing *Michigan Cannery v Agricultural Bd*, 397 Mich 343; 245 NW2d 1 (1976). A court's inquiry "must be restricted to the issue whether any

state of facts either known or which could reasonably be assumed affords support for it.” *Id.*, citing *United States v Carolene Products Co*, 304 US 144; 58 S Ct 778; 82 L Ed 1234 (1938).

Plaintiffs’ claims that MCL 500.134 violates the equal protection and due process clauses did not attempt to satisfy the required allegations for such claims. Rather, Plaintiffs relied on the broad “interest” allegedly created by *Shavers* to challenge the constitutionality of MCL 500.134. This argument apparently resounded with the Circuit Court, which held that Plaintiffs had a right to certain MCCA documents “pursuant to the constitutional principles articulated in *Shavers*.” (Exhibit 11 to the Application at p 13.) As explained *supra*, the “interest” recognized in *Shavers* is not implicated in this case. Moreover, even if the equal protection and due process clauses were properly implicated (which they are not), in order to make a claim, Plaintiffs would have to: (1) overcome a presumption of constitutionality by showing that the legislative judgment was without rational basis, and then (2) show that the challenged statutory classifications were not reasonably related to a legitimate governmental interest. *Shavers*, at 618-19. Plaintiffs did not meet this high burden.

Further, even if *Shavers* did apply, then the rational basis test it applied must also control. *Shavers*, at 613-14. There was clearly a rational basis for the Legislature to pass 1988 PA 349, which amended the Insurance Code to clarify the non-public nature of certain associations created by that Code, including the MCCA. Section 2 of the Act states there was a misconception as to the legal status of certain entities. Designating an entity as a “public body” or a “state agency” has legal consequences that the Legislature sought to avoid. Indeed, the possibility of such an argument was presumably the reason behind the Act’s passage. See *Skidmore v Czapiga*, 82 Mich App 689, 691; 267 NW2d 150 (1978) (“the Legislature when enacting or amending a statute must be presumed to have knowledge of existing statutes and

laws.”).

The statute was also reasonably related to a permissible legislative objective—to avoid State control and regulation over a private association. Given the requisite highly deferential standard, the Circuit Court erred by failing to accord the proper standard to the challenged legislation. Furthermore, as stated above, the Legislature is presumed to be aware of Michigan case law. See, e.g., *Gordon Sel-Way, Inc; Lenawee County Gas & Electric Co.* Thus, the Legislature, being fully aware of the *Shavers*’ decisions, passed 1988 PA 349. Obviously, the Legislature did not consider its action to violate any constitutionally protected right of access to records created by *Shavers*.

C. Plaintiffs’ Arguments Are Based on a Misunderstanding of the MCCA.

Plaintiffs contend that this case involves the very same concerns as those in *Shavers* because they need the requested information in order to determine if the MCCA assessment is fair and equitable. (Application, pp 30-31). This argument is based not only on a misunderstanding and misapplication of *Shavers*, as explained above, but also on a misunderstanding of the MCCA. As required by statute, the MCCA is entirely funded by the private insurers that make up its membership—the MCCA does not collect monies from policyholders; it collects assessments from its member insurers. MCL 500.3104. The Court of Appeals correctly acknowledged this fact. (Opinion, p 9).

Not only is the MCCA not funded by policyholders, it does not make payments to claimants or policyholders—rather, it makes payments to member insurers to reimburse them for certain claims paid by the member to its policyholders. Nor does the MCCA adjust catastrophic claims or limit payments to claimants or policyholders. Insurers have contractual and statutory duties to pay PIP benefits, regardless of whether they receive MCCA indemnification. Section 3104 of the No-Fault Act did not make the liabilities of the MCCA’s members public liabilities

for which taxpayers bear the ultimate responsibility. Rather, the member insurers' liabilities are private ones. Even after the Legislature created the MCCA to spread the liabilities stemming from catastrophic claims throughout the industry according to market share, the Legislature did not relieve the insurance companies from these liabilities. In other words, whether the MCCA exists or not, insureds will receive their PIP benefits from their insurer.

The scope of Plaintiffs' claims that individual policyholders have a constitutional right to all the information concerning each component of their insurance premium is breathtaking. For example, an insurer is required to reimburse medical providers for the reasonable cost of necessary medical care. MCL 500.3107. Likewise, insurers are required to pay for property damage to vehicles (subject to the limits purchased), at rates that are set by auto repair shops, not insurers. Even the cost of office supplies creates an expense which a no-fault insurer is permitted to consider when calculating its rates. *See generally* MCL 500.2109 and 500.2110. All of these various expenses are considered when an insurer calculates its rates. If, as Plaintiffs argue, there is a constitutional right for every Michigan driver to know each and every element and actuarial calculation that goes into the development of their auto insurance rates, no insurer writing business in this State could avoid opening up its private books and records to the public. Moreover, the vendors that provide goods or services to the insurers, the costs of which are taken into consideration when the insurer sets its rates, such as the doctors, the repair shops, the office supply shops (and the list could go on) would likewise be required to open their books and records such that every element of what goes into the costs that affect the calculation of insurance premiums is laid bare for public inspection. Nothing in *Shavers* suggests that this Court viewed the Michigan Constitution as creating a constitutional right of this magnitude. Yet it is precisely this analysis that Plaintiffs ask this Court to use to override the clear statutory

language exempting the MCCA from FOIA. The Court of Appeals properly analyzed *Shavers* and found that a policyholder “is not entitled to access every component that compromises the cost they pay for no-fault insurance.” (Opinion, pp 9-10).

In addition, even though *Shavers* is inapplicable, the Court of Appeals went further to find that even if it were to somehow apply, the concerns articulated by the *Shavers* Court (i.e., fair and equitable rates) are not present in this case. (Opinion, pp 9-10). As noted above, the MCCA’s premiums are not rates. But even beyond that point, as the Court of Appeals recognized, the MCCA’s premiums are part of a detailed regulatory scheme. Despite Plaintiffs’ arguments to the contrary, there is a regulatory and oversight scheme in place that regulates how the MCCA charges its members. As described above, the MCCA’s premium is set according to MCL 500.3104(7).

In a manner provided for in the plan of operation, calculate and charge to members of the association a total premium sufficient to cover the expected losses and expenses of the association that the association will likely incur during the period for which the premium is applicable. The premium shall include an amount to cover incurred but not reported losses for the period and may be adjusted for any excess or deficient premiums from previous periods. Excesses or deficiencies from previous periods may be fully adjusted in a single period or may be adjusted over several periods in a manner provided for in the plan of operation. Each member shall be charged an amount equal to that member’s total written car years of insurance providing the security required by section 3101(1) or 3103(1), or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies. A member shall be charged a premium for a historic vehicle that is insured with the member of 20% of the premium charged for a car insured with the member.

The Plan of Operation, which was approved by the former OFIR Commissioner (and subsequent amendments were approved by former and current Commissioners as well) and

adopted in accordance with MCL 500.3104, further details how premiums will be calculated. (MCCA Plan of Operation, § 9.01). In addition, the DIFS Director, who sits as an ex officio member of the MCCA's Board, attends MCCA Board meetings and Actuarial Committee meetings, including actuarial meetings, or sends an authorized representative where the assessment is discussed and set. Finally, the DIFS Director has the right to disapprove an insurer's rate filing that includes such amounts, if she finds the rate excessive. There is ample oversight and regulation over the MCCA, but Plaintiffs do not acknowledge this, presumably because their goal is not to recognize the legitimacy of the MCCA's exemption, but to get this Court to do what Plaintiffs could not get the Legislature to do -- grant them unfettered access to the MCCA's records.

Indeed, Plaintiffs spend four pages in their Application expounding upon the information unavailable to them which, they claim, shows that the MCCA is "secretive" and that policyholders cannot determine whether their rates are fair and equitable. (Application, pp 33-37). Plaintiffs' arguments fail. First, as explained *ad nauseam*, this case does not present a challenge under the No-Fault Act to the process of determining whether insurance rates are fair and equitable. This is a FOIA case. If the Plaintiffs wish to challenge their insurance rates, then they should do so under the Essential Insurance Act.

Second, even though the information listed by Plaintiffs is ultimately irrelevant to the legal claims in this case, the MCCA wants it to be clear that it is not being "secretive" but rather, is complying with a legislative mandate under MCL 500.134. And even though the MCCA is not required to disclose its records under MCL 500.134, it provides a plethora of information to the public, including information the Plaintiffs (wrongfully) contend is not disclosed. For example, Plaintiffs argue that the MCCA does not disclose its past payment patterns.

(Application, p 36). In fact, page 35 of the MCCA's annual statement, which is available on the MCCA's website, provides such information.¹⁹ Plaintiffs also allege that the MCCA does not disclose the calculation of the present value of disbursements. (Application, p 35). Again, this is not true. The MCCA's annual statement provides data on the present value reserves as well as information on the MCCA's discount rate and the economic assumptions used to obtain that rate, which is used to calculate the present value of the reserves. (See MCCA's 2013 Annual Statement, pp 14.2, 14.3, 14.11, and 14.12).

In sum, Plaintiffs argue that without the information requested in their FOIA requests to the MCCA, they are unable to determine whether the MCCA's premium is fair as protected by *Shavers* and that the Court of Appeals could not have "fairly concluded" that the MCCA provides sufficient information to satisfy such concerns. (Application, pp 36-37). Plaintiffs' argument ignores the following facts. First, this Court concluded that the constitutional concerns of *Shavers* were alleviated by the Essential Insurance Act. Second, this case does not involve a challenge to insurance rates or a constitutional challenge to the No-Fault Act as contemplated by *Shavers* or *Shavers II*. Third, the MCCA's assessment, which is charged to and paid by insurers, not policyholders, is not an insurance rate, and is regulated and overseen by the Insurance Code and the DIFS Director. And finally, much of the information Plaintiffs claim they need to determine whether the MCCA assessment is fair is indeed available to the public. Plaintiffs ask this Court to extend the narrow holding of *Shavers* beyond its breaking point. The Court of Appeal properly rejected such arguments, and this Court should deny Plaintiffs' Application.

¹⁹ The MCCA's 2013 annual statement is available on the MCCA's website at <http://michigancatastrophic.com/LinkClick.aspx?fileticket=x%2f%2b2JRhOvPg%3d&tabid=2935>. The 2014 annual statement is due to the DIFS Director on October 1, 2014.

V. **LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY REJECTED PLAINTIFFS' COMMON LAW CLAIMS.**

Plaintiffs' Application once again ignores the Court of Appeals' thoughtful analysis of their common law claims and argues that they were "brushed aside" with irrelevant discussion. (Application, p 38). Those "irrelevant discussion[s]", however, included an analysis of the statutes at issue and relevant case law (Opinion, pp 11-13), and once again, the Court of Appeals reached the proper conclusion.

A. **The Court of Appeals Correctly Found That FOIA Preempts Any Alleged Common Law Right of Plaintiffs.**

The Court of Appeals found that Michigan's FOIA provides a comprehensive statutory scheme that governs requests for public records and also provides for statutory exemptions for certain types of information. (Opinion, p 12). From this conclusion, the court held that it would be "illogical" to find that this comprehensive scheme has no effect on Plaintiffs' arguments and that MCL 500.134 preempts any common law right that Plaintiffs may have to such documents. (*Id.* at 12-13).

As recognized by the Court of Appeals, the Legislature has specifically preempted any common law right that may apply. Where legislation provides "'in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions,' then there is a legislative intention that a statute preempt common law." *Kyser v Kasson Twp*, 486 Mich 514, 539; 786 NW2d 543 (2010) (cites omitted). The Legislature clearly designated specific limitations and exceptions to the common law right to access documents through MCL 500.134. Thus, even if the common law right applied to the MCCA, which the MCCA believes it does not because this Court has declared it to be a private association,²⁰ the Legislature

²⁰ Although the Court of Appeals assumed that the MCCA was a "public body" for

specifically exempted the MCCA from disclosure requirements. Indeed, why would there even be a need for FOIA if all public records are open to the public as a common law right? Plaintiffs' interpretation renders the whole act surplusage.

Plaintiffs argue that the Court of Appeals erred by ignoring the plain language of FOIA, which states that: "This Act does not authorize the withholding of information **otherwise required by law to be made available** to the public[.]" MCL 15.243(3) (emphasis added). According to Plaintiffs, this language along with FOIA's purpose suggests that FOIA does not preempt common law access. (Application, p 46). This argument is clearly in error. As mentioned above, if true, FOIA would be completely unnecessary since anyone could access such documents regardless of FOIA or its statutory exemptions. But moreover, Plaintiffs ignore that the quoted language in fact reflects the Legislature's intent and understanding that FOIA (and its exemptions) authorizes the withholding of information, which is why it used the language "otherwise required by law." MCL 500.134 specifically exempts the MCCA's records from disclosure; the records are not otherwise required to be disclosed.

purposes of FOIA (Opinion, p 4), this Court has declared that "[t]aken as a whole, the characteristics of the MCCA lead us to recognize it as a *private association*." *League General*, 435 Mich at 350(emphasis added). Thus, even if MCL 500.134 did not preempt the common law, as it does, the MCCA's records would not be subject to a common law right of access, which Michigan courts have repeatedly held applies only to *public* records. *Nowack*, 243 Mich at 208 ("plaintiff as a citizen and taxpayer has a common law right to inspect the public records . . . to determine if public money is being properly expended"); *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203, 205; 166 NW2d 546 (1968) (the "fundamental rule in Michigan . . . is that citizens have the general right of free access to, and public inspection of, public records."); *Burton v Tuite*, 78 Mich 363, 375-76; 44 NW 282 (1889) (referring to "public records"); and *In re Buchanan*, 152 Mich App 706, 712; 394 NW2d 78 (1986) ("Michigan has long recognized a common law right to access to public records."). Moreover, as explained by the *Nowack* Court, the common law right to inspect public records "can be enforced only by mandamus proceedings brought by the Attorney General" or by an individual that demonstrates that he or she has "some special interest, not possessed by the general public." *Nowack*, 243 Mich at 208. As discussed herein, Plaintiffs failed to articulate any "special interest, not possessed by the general public."

B. Irrespective of Preemption, Michigan's Common Law Right to Access Public Records Does Not Grant Plaintiffs a Right to the MCCA's Records.

Plaintiffs contend that the Court of Appeals misunderstood their argument and attempt to clarify their position by stating that their "straightforward claim" is that, at common law, any person is permitted to inspect any record of any entity—private or public—so long as they can show an "interest" distinct from that of the general public. (Application, p 39). The Court of Appeals correctly held that Plaintiffs' arguments were without merit.

Plaintiffs appear to backtrack from their own arguments before the Court of Appeals and now argue that the main case they relied on for their common law arguments, *Nowack v Auditor General*, 243 Mich 200, 203-04; 219 NW 749 (1928), was used only to show the nature of the interest required at common law to enable one to secure access to records. (Application, p 39). The idea, however, that any private entity or individual can access any private association or corporation's records is simply absurd—and is not supported by the cases Plaintiffs cite.²¹

Nowack, as recognized by the Court of Appeals, applied to *public* records, not those of a private association. (Opinion, p 12). The Court of Appeals correctly found that *Nowack* does

²¹ In support of this supposed argument, Plaintiffs cite to three cases in addition to *Nowack* (which as the Court of Appeals recognized involved public records): *Woodworth v Old Second National Bank*, 154 Mich 459; 117 NW 893 (1908); *In re Buchanan*, 152 Mich App 706, 713-14; 394 NW2d 78 (1986); and *Booth*, 15 Mich App 203; 166 NW2d 546 (1968). None of these cases support Plaintiffs' position. *Woodworth*, despite Plaintiffs' claims to the contrary, involved a stockholder attempting to access records from the directors of a bank. Plaintiffs failed to provide the entirety of a quote from this case, which made clear that it did involve stockholders. The remaining portion of the quote on page 40 of the Application states that: "and the directors of the bank having made relator a stockholder, director, and president of this corporation, and he having the same interest in it that any of them had, and none of them having paid value for their stock, they do not now stand in position to deny his rights **as a stockholder of that corporation.**" *Woodworth* at 468 (emphasis added). The interest of a shareholder—i.e., an owner—to review records of a corporation, has no analogy here. Plaintiffs do not own the MCCA, or even pay premiums to it. *In re Buchanan* and *Booth Newspapers* both involved *public records* where there was no specific FOIA exemption.

not provide Plaintiffs with a right to access private documents. (*Id.*). The absurdity of Plaintiffs' "common law" claims is also demonstrated by the recent United States Supreme Court decision in *McBurney v Young*, 569 U.S. ___; 133 S Ct 1709 (2013). The Court rejected the petitioner's claimed constitutional right to obtain information under Virginia FOIA laws, and further held that "no such right was recognized at common law." *Id.* at *1718, 1720. Addressing the common law right of access to public documents, the Court noted that such a right has never been unlimited and broad. *Id.* This logic applies here, where Plaintiffs seek to extend a purported common law right to access *public* documents to the records of a *private* association.

Plaintiffs argue to this Court that many early English cases recognize the right they claim to have. This is not true. Three of the cases cited by Plaintiffs (*Mayor of Lynn v Denton*, 1 Term Rep 689 (1787); *Corp of Barnstable v Lathey*, 3 Term Rep 303 (1789); and *Mayor of the City of Lonson and Swinland*, Term Pasch 4 (1731)), involved the proposition that parties to litigation were entitled to access to so-called "private" documents in the course of pending litigation (which is not the fact pattern presented here). To the extent that these cases could even be analogized to this case, they were evidently expressly overruled by *Mayor of Southampton v Greaves*, 8 TR 590 (1800) (Exhibit 7), in which the court, similar to the *McBurney* Court, recognized that strangers did not have access to such documents. Plaintiffs' other three remaining cases which supposedly support their position also fail. *Dominus Rex v The Fraternity of Hostman in Newcastle-Upon-Tyne*, 2 Strange 1223 (KB 1745) was a stockholder case, which does not apply here, as Plaintiffs do not own shares in the MCCA or even pay premiums to it. Finally *Warriner v Giles*, 2 Strange 954 (which also involved public records, not private), and *Geery v Hopkins*, 2 Ld Raym, involved inspection of entries relating to litigation. Plaintiffs seek the MCCA's records unconnected to any litigation. Simply put, there is no

common law right that grants Plaintiffs access to the MCCA's records (even if MCL 500.134 did not specifically exempt the MCCA's records from disclosure, which it does).

Plaintiffs attempt to circumvent the dispositive facts that (1) MCL 500.134 clearly bars their requests and (2) there is no applicable common law right by Plaintiffs claiming that they have "special interests." (Application, p 39-40). The so-called "special interests" are: (1) the private economic interest of auto policy ratepayers, which they claim is recognized in *Shavers* and (2) the "special private economic and personal interest of catastrophically injured victims to be assured that the adequacy and continuity of care will not be jeopardized[.]" (Application, p 40). Neither theory withstands scrutiny, particularly given that no case cited Plaintiffs stands for the proposition that any special interest would give the right to access the MCCA's records.

As to Plaintiffs' first claimed "special interest," as explained both above, *Shavers* does not provide Plaintiffs with the right being claimed. The right identified in *Shavers* was related to due process and equal protection claims when challenging the constitutionality of the No-Fault Act, which nobody is challenging here. Plaintiffs cannot simply cite to *Shavers* as granting an all-encompassing right for every vehicle owner in the State to have access to records and information that were specifically exempted from disclosure in a statute enacted ten years after the *Shavers* decisions. Nor can *Shavers* be reasonably extended to conclude that policyholders are entitled to challenge the legality of a FOIA exemption so that they may access the records of a private association. The Legislature is presumed to have been aware of *Shavers* and the rights it created at the time it enacted the MCCA FOIA exception, yet and still it deemed the MCCA's records to be immune from disclosure. Put another way, Plaintiffs cannot claim that an alleged general right of access created by *Shavers* trumps a statute that was enacted years later specifically stating there is no such right.

In addition to Plaintiffs' misplaced reliance on *Shavers*, they mischaracterize the relationship between the MCCA and policyholders. The MCCA is entirely funded by private insurers. The MCCA does not collect monies from policyholders; it collects premiums from its member insurers. The MCCA charges premiums to members to cover the MCCA's indemnification obligations and expenses. MCL 500.3104(7)(d). This Court in *League General* stated that the MCCA's "formation may have bestowed an incidental benefit upon the public by facilitating availability of automobile insurance [but] . . . its primary purpose was to protect smaller insurers from potentially severe financial repercussions of the no-fault act." 435 Mich at 351. Plaintiffs' alleged "special interest" first creates a legal relationship where none exists, and then claims legal rights based on that self-created relationship.

Plaintiffs' second purported "special interest" also does not exist. The MCCA does not make payments to claimants or policyholders. And the MCCA does not adjust catastrophic claims or limit payments to claimants or policyholders. **Insurers have contractual and statutory duties to pay PIP benefits, regardless whether they receive MCCA indemnification.** It is the member insurers that bear the responsibility of paying PIP benefits to persons injured in motor vehicle accidents. The fact that the member insurer may then seek reimbursement from the MCCA should be of no concern to the policyholder. Thus, regardless of the financial health of the MCCA, catastrophically injured victims' claims will be covered by their insurer.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs' conclusion reveals their true intentions. Rather than focus on the legal issues, Plaintiffs expound upon the alleged secrecy of the MCCA and exaggerate the consequences of the Court of Appeals' decision. Perhaps this use of hyperbole is because Plaintiffs cannot avoid the simple facts, which show the correctness of the Court of Appeals' decision. The Legislature

DYKEMA GOSSETT & A PROFESSIONAL LIMITED LIABILITY COMPANY-CAPITOL VIEW, 201 TOWNSEND STREET, SUITE 900, LANSING, MICHIGAN 48933

validly enacted MCL 500.134, which exempted all of the MCCA's records from disclosure under FOIA. The enactment of this statutory provision complied with all constitutional requirements; complied with *Shavers*; and preempted any purported common law interest that Plaintiffs could potentially argue ever existed. If Plaintiffs truly believe that their insurance rates are unfair or inequitable because insurers choose to include the amount of the premium they pay to the MCCA in those rates, then Plaintiffs are not without a remedy in that they have recourse under the Essential Insurance Act. The MCCA is not hiding behind a shroud of secrecy; it is merely complying with the Legislature's mandate that the records of the MCCA (and like associations) be exempt from disclosure. (Indeed, the MCCA has done far more than it is required to do by making a great deal of information publicly available). And to the extent Plaintiffs don't like this legislative mandate, their remedy lies in the ballot box, as any change to the MCCA FOIA exemption must come from the Legislature, not the Courts. For the reasons stated herein, Defendant-Appellant MCCA request that this Court deny leave to appeal.

Respectfully submitted,
DYKEMA GOSSETT PLLC

By: Lori McAllister
Lori McAllister (P39501)
Joseph K. Erhardt (P44351)
Jill M. Wheaton (P49921)
Courtney F. Kissel (P74179)
Attorneys for MCCA
Dykema Gossett PLLC
Capitol View
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9100
Facsimile: (517) 374-9191

Dated: September 23, 2014
LAN01361398.4
ID\CEF - 018940\0103