STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Gadola, P.J., and Sawyer and Riordan JJ

SPENCER WOODMAN,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163382
COA: 353164
Court of Claims No. 17-000082-MZ

GEORGE JOSEPH,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163383
COA: 353165
Court of Claims No. 17-000230-MZ

/

ASSOCIATION OF PRO BONO COUNSEL'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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The Association of Pro Bono Counsel ("APBCo"), through counsel Winston & Strawn, moves for leave to submit an *amicus curiae* brief in the above-captioned case under MCR 7.312(H)(1). Given MDOC's filing of its supplemental brief on July 12, 2022, this motion for leave to submit an *amicus curiae* brief is timely and permitted by the rules of this Court. In support of its motion, APCBo states:

1. Spencer Woodman and George Joseph (together, "Plaintiffs") are independent journalists who submitted Freedom of Information Act ("FOIA") requests for video and audio footage relating to the death of Dustin Szot, an inmate at Bellamy Creek Correctional Facility. Their requests were denied by the Michigan Department of Corrections ("MDOC"). Each of the Plaintiffs filed a separate suit in the Court of Claims against the MDOC, asserting that the MDOC had improperly denied them access to the requested footage. The Court of Claims ordered the MDOC to produce the requested footage. After prevailing, Plaintiffs moved for attorneys' fees, costs, and disbursement, pursuant to MCL 15.240(6).

2. The Court of claims awarded Defendants attorneys' fees and found that the fees charged were reasonable. The Claims Order reduced the attorneys' fee award to Honigman by 90% "because [Honigman] represented Plaintiffs on a pro bono basis."

3. Both parties appealed. The Court of Appeals thus "vacate[d] the trial court's award of attorney fees and costs to plaintiffs and remand[ed] this matter to the trial court for determination whether, in the trial court's discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements." The Court of Appeals further held that "[i]f the trial court determines that plaintiffs are entitled to attorney fees in this case, ***the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees***." *Id*. (emphasis added).

4. One of the three issues on appeal is whether it is proper for the Court to consider the pro bono nature of a representation when determining a reasonable attorneys' fee award in Michigan—and, more specifically, under Michigan's FOIA statute. Defendants' attorneys maintain that this is not a proper consideration.

I. THE PROPOSED *AMICUS*

APBCo is a nonprofit membership organization comprising full-time, professional pro bono counsel and coordinators employed by major commercial law firms. APBCo works with its members to maximize the impact of law firms' pro bono work and to serve as the voice of the law firm pro bono community. APBCo has almost 300 members from more than 160 law firms, nationwide and internationally. The majority of the Am Law 100 firms employ APBCo members. APBCo is uniquely positioned to advise the Court on the practices and policies governing fee awards in cases undertaken as pro bono representations. Collectively, our members have extensive experience in litigating fee award requests and are familiar with the relevant pro bono policies and rules that our firms follow.

II. GROUNDS FOR *AMICUS CURIAE* FILING

This case presents an opportunity for the Michigan Supreme Court to clarify that the fact that a litigant is represented by pro bono counsel should not interfere with its ability to receive attorneys' fees where allowed or required by statute. APBCo is uniquely situated to inform the Court of the public policy considerations involved in this situation, and the potential impacts of Michigan becoming a state where pro bono representation is discriminated against with respect to attorneys' fees.

APBCo's proposed brief is attached as **Exhibit A**.

III. RELIEF

For the foregoing reasons, APBC respectfully requests that the Court grant its Motion for Leave to File an *Amicus Curiae* Brief and accept as filed the *Amicus Curiae* Brief in Support of Plaintiffs-Appellants attached as **Exhibit A** to this Motion.

Dated: August 5, 2022

Respectfully submitted,

Association of Pro Bono Counsel
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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I electronically filed the foregoing using the MiFile/TrueFiling System which will send notification of such filing to all registered counsel of record.

Dated: August 5, 2022

Respectfully submitted,

Association of Pro Bono Counsel

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EXHIBIT A

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Gadola P.J., and Sawyer and Riordan JJ

SPENCER WOODMAN, Plaintiff-Appellant, v MICHIGAN DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	SC: 163382 COA: 353164 Court of Claims No. 17-000082-MZ
GEORGE JOSEPH, Plaintiff-Appellant, v MICHIGAN DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	SC: 163383 COA: 353165 Court of Claims No. 17-000230-MZ

ASSOCIATION OF PRO BONO COUNSEL'S AMICUS BRIEF

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I. INTRODUCTION

The Amicus Association of Pro Bono Counsel ("APBCo"), identified below, urges this Court to reverse the June 24, 2021 Order of the Court of Appeals ("Appeal Order") and the March 2, 2020 Order of the Court of Claims ("Claims Order") and hold that the pro bono nature of a representation is not an appropriate consideration when determining a reasonable attorneys' fee award.[1] To promote and facilitate pro bono work and ensure equal access to justice, the law must be clear that counsel who work on matters pro bono are still entitled to statutorily mandated fees. The Court of Appeals and Court of Claims overlooked the prevailing case law supporting the award of fees to pro bono attorneys and the crucial policy implications of such fee awards to vindicate and support equal access to justice.

As a result, the Court of Appeals wrongly concluded that courts should be allowed to consider "whether the pro bono nature of [an attorney–client] representation is a legitimate consideration in the determination of the reasonableness of the fees" awarded. Appellants' App'x 612a. This holding stands alone. Absent a reversal here, Michigan will be the sole U.S. state that considers the pro bono nature of an attorney–client representation when assessing a fee award. For the reasons set forth below, this is not—and should not be—the law. APBCo thus urges this Court to reverse the Appeal Order as to this issue and hold that courts do not have discretion to limit attorneys'-fee awards merely because the underlying representation was of a pro bono nature.

II. INTEREST AND EXPERTISE OF AMICUS CURIAE

APBCo is a nonprofit membership organization comprising full-time, professional pro bono counsel and coordinators employed by major commercial law firms. APBCo works with its

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[1] Pursuant to MCR 7.312(H)(4), APBCo states that no party, or counsel to a party to this case, drafted this brief in part or full, or made a monetary contribution intended to fund the preparation or submission of the brief.

members to maximize the impact of law firms' pro bono work and to serve as the voice of the law firm pro bono community. APBCo has almost 300 members from more than 160 law firms, nationwide and internationally. The majority of the Am Law 100 firms employ APBCo members. APBCo is uniquely positioned to advise the Court on the practices and policies governing fee awards in cases undertaken as pro bono representations. Collectively, our members have extensive experience in litigating fee award requests and are familiar with the relevant pro bono policies and rules that our firms follow.

III. FACTUAL BACKGROUND

Spencer Woodman and George Joseph (together, "Plaintiffs") are independent journalists who submitted Freedom of Information Act ("FOIA") requests for video and audio footage relating to the death of Dustin Szot, an inmate at Bellamy Creek Correctional Facility. *See* Appellants' App'x 008a (Woodman request); Appellants' App'x 066a (Joseph request). Without even reviewing the requested recordings, the Michigan Department of Corrections ("MDOC" or "Defendant") summarily denied both requests under MCL 15.243(1)(c). See Appellants' App'x 009a-010a (Woodman denial); Appellants' App'x 067a-068a (Joseph denial). Each of the Plaintiffs filed a separate suit in the Court of Claims against the MDOC, asserting that the MDOC had improperly denied them access to the requested footage. See Appellants' App'x 015a-018a (Woodman complaint); Appellants' App'x 072a-075a (Joseph complaint). The cases were consolidated.

On April 22, 2019, the Court of Claims ordered that the MDOC "must immediately disclose to plaintiff all eight of the responsive videos." Appellants' App'x 332a; see also Appellants' App'x 422a (order denying motion for reconsideration and again ordering disclosure of the responsive videos). Following the court's order, the MDOC ultimately disclosed the videos to Plaintiffs with allowed redactions.

Plaintiffs then moved for attorneys' fees, costs, and disbursement (Appellants' App'x 423a-438a), as mandated by Michigan's FOIA:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

MCL 15.240(6). By statute, therefore, an award of "reasonable attorneys' fees" is mandatory if the plaintiff prevails in full, but the fee award is discretionary if the plaintiff "prevails in part." The statute provides no exception for work performed on a pro bono basis.

Plaintiffs were represented by the American Civil Liberties Union Fund of Michigan (the "ACLU") and its pro bono counsel, Honigman LLP. Both sought fees under the FOIA statute. See, e.g., Appellants' App'x 434a. In the Claims Order, the Court of Claims held that Plaintiffs "prevailed in full" in their respective cases and that both the "hourly rates charged by each of the attorneys representing Plaintiffs throughout [the] cases" and the "number of hours worked on [the] cases by each of the attorneys representing Plaintiffs" were reasonable for the type of case and comport with fees customarily charged for similar legal services. Appellants' App'x 590a-591a. Despite these findings, the Court of Claims cut Honigman's awarded fees by 90%: "Because it represented Plaintiffs on a pro bono basis, Honigman is awarded 10% of its requested attorney's fees." *Id*. 590a. The Claims Order thus substantially reduced the attorneys'-fee award to Honigman by 90% "because [Honigman] represented Plaintiffs on a pro bono basis." Appellants' App'x 590a; see also Appellants' App'x 575a at 2-3 ("[T]hose were pro bono dollars. The Court appreciates and values pro bono, but would find that the purpose here would be to compensate the parties and to discourage the department from declining to follow the Freedom of Information Act

in the future.").

The Claims Order also denied Plaintiffs' request for punitive damages. Plaintiffs appealed the fee award reduction and denial of punitive damages, and the Department of Corrections cross-appealed the limited fee award. On June 24, 2021, the Court of Appeals ruled that Plaintiffs "prevailed in part"—not "in full."[2] The Court of Appeals thus "vacate[d] the trial court's award of attorney fees and costs to plaintiffs and remand[ed] this matter to the trial court for determination whether, in the trial court's discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements." Appellants' App'x 612a. Critically, the Court of Appeals further held that "[i]f the trial court determines that plaintiffs are entitled to attorney fees in this case, ***the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees***." *Id*. (emphasis added). In other words, the Court of Appeals held that the pro bono nature of the underlying representation could be "a legitimate determination" when calculating a fee award. The Court of Appeals also affirmed the denial of punitive damages.

Plaintiffs appeal to this Court on three issues: (1) whether Plaintiffs prevailed in full on their FOIA claims and are thus statutorily entitled to attorneys' fees under MCL 15.240(6); (2) whether the Court of Claims abused its discretion when it reduced by 90% the attorney's fees awarded to Plaintiffs based solely on the pro bono nature of Honigman LLP's representation; and (3) whether the Court of Claims clearly erred in denying Plaintiffs punitive damages under MCL 15.240(7).

[2] APBCo's amicus brief is limited to the issue of whether it is appropriate to consider the pro bono status of representation when determining the amount of attorneys' fees to be awarded.

IV. ARGUMENT

We submit this amicus brief regarding the second issue on appeal to seek clarification that the pro bono nature of a representation is not an appropriate consideration when determining a reasonable attorneys'-fee award in Michigan—and, more specifically, under Michigan's FOIA statute. This conclusion is consistent with Michigan's FOIA statute, the policy implications involved, standard pro bono practices and expectations, and the overwhelming case law throughout the United States. Pro bono work is crucial for ensuring that all individuals have equal access to legal services and justice. Holding that the pro bono nature of a representation is an appropriate consideration when determining a reasonable attorneys'-fee award under Michigan's FOIA statute will be detrimental to pro bono efforts throughout the state. This holding must be reversed to bring Michigan's law in line with that of other courts and ensure that individuals in Michigan who need pro bono services have equal access to those services.

A. Michigan's FOIA statute does not address pro bono representations.

Michigan's FOIA statute states:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

MCL 15.240(6). By statute, therefore, an award of "reasonable attorneys' fees" is mandatory if the plaintiff prevails in full, but the fee award is discretionary if the plaintiff "prevails in part." In either circumstance, the statute provides no exception for work performed on a pro bono basis. In fact, the statute is unsurprisingly silent on the issue of whether pro bono fees count as attorneys' fees. Rather, the statute language broadly refers to "attorneys," not "paid attorneys" or "non-pro

bono attorneys."

In their supplemental brief, MDOC argues that the statute gives wide discretion to the Court to determine what is "reasonable" under the statute and, thus, that the statute allows for a court to consider the pro bono nature of representation. MDOC Supp. Brief at 37-45. The Claims Order itself highlights that the reasonableness of fees and the effect of representation being pro bono are two separate issues. Specifically, the Court of Claims' first finding was that "[t]he hourly rates charged by each of the attorneys representing Plaintiffs throughout these cases (including the attorneys at Honigman LLP [] and the [ACLU]) are reasonable hourly rates and comport with fees customarily charged in the locality for similar legal services." Appellants' App'x 590a. The Court of Claims' second finding was that "[t]he number of hours worked on these cases by each of the attorneys representing Plaintiffs (including the attorneys at Honigman and the ACLU) were not unreasonable for the prosecution of these cases." *Id*. *Only after holding that the fees were reasonable* did the Court of Claims acknowledge the fact that Honigman "represented Plaintiffs on a pro bono basis" and use that as a rationale for cutting costs by 90%. *Id*.

The Court did not discuss the pro bono representation in the context of reasonableness. Nor should it. Michigan courts consider the following factors when assessing reasonableness within the context of the Michigan FOIA statute: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services; (2) the difficulty of the case—i.e., the novelty and difficulty of the questions involved—and the skill requisite to perform the legal service properly; (3) the amount in question and the results obtained; (4) the expenses incurred; (5) the nature and length of the professional relationship with the client; (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer; (7) the time limitations imposed by the client or by the circumstances; and (8) whether the fee is

fixed or contingent. E.g., *Johnson v City of Saginaw*, unpublished opinion of the Court of Appeals of Michigan, issued Dec. 17, 2019 (Case No. 348024); 2019 WL 6888663, at *3. "If the trial court considers an additional factor, it should expressly state the factor and justify the relevance and use of the additional factor." *Id*. The Court of Claims did not discuss the pro bono nature of representation when determining reasonableness and did not justify the relevance and use of this fact as an additional factor.

Given that the Court of Claims held that Plaintiffs prevailed in full, the statute required an award of reasonable fees. The statute did not leave this issue to the discretion of the judge based on the pro bono nature of the representation, but only left discretion in determining whether fees were reasonable.

Given the policy considerations and overwhelming case law discussed below, the pro bono characterization of representation is not a proper consideration when determining reasonableness. Of course, a court's discretion regarding the award of attorneys' fees is not limitless. See, e.g., *Guest Servs Co of VA v Ratta*, unpublished opinion of the Circuit Court of Virginia, Fairfax County, issued July 13, 1992 (Case No. 101281); 1992 WL 884799, at *2 (noting that "[t]he Court's discretion is not without bounds" where a statute provided that allowance of costs was left largely in the discretion of the trial court); *Schmitt v LaRose*, unpublished opinion of the United States Court of Appeals, Sixth Circuit, issued June 15, 2021 (Case No. 20-4025); 2021 WL 4592524, at *2 (stating, in the context of 42 U.S.C. § 1988, that "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits"); *Martin v Franklin Captial Corp*, 546 US 132, 139 (2005) (stating, in the context of 28 U.S.C. § 1447, that "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws

discretion is rarely without limits").

B. Both the prospect and the ultimate granting of fee awards to pro bono counsel are critical for equal access to justice.

Pro bono counsel's eligibility for and receipt of fee awards are crucial in promoting equal access to justice—they ensure that pro bono and private representation is equally effective and supports the work of legal services organizations. The policies underlying fee awards apply equally to pro bono and non–pro bono representations. Along with encouraging enforcement of legal rights by "private attorney generals," the prospect of a fee award helps resolve disputes more efficiently by incentivizing litigants to act rationally, assess their positions, and strategize in ways they might not if they did not face the possibility of having to eventually pay fees. See, e.g., *What Counts?*[3] at 12. For example, requiring a defendant to face a fee award may discourage strategies to delay the proceeding and similar obstructive tactics (e.g., frivolous motions). This policy also provides leverage to resolve matters more expeditiously. See, e.g., *Rickels v City o/s Bend, Ind*, 33 F3d 785, 787 (CA 7 1994) (explaining that fee shifting "encourages [the] voluntary resolution [of disputes] and curtails the ability of litigants to use legal processes to heap detriments on adversaries . . . without regard to the merits of the claims").

Taking fees off the table in cases involving pro bono counsel skews the incentives and sends the wrong message to defendants. Under the Court of Claim's reasoning, parties represented by pro bono counsel would have less leverage than, and face a distinct disadvantage compared to, those who can afford counsel; and the ultimate effect would frustrate the intent of fee- and cost-recovery statutes and unfairly reward the adjudged wrongdoer. The availability of fee awards

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[3] Law Firm Pro Bono Project, *What Counts?*, Pro Bono Institute, available at <http://www.probonoinst.org/wp-content/uploads/Whatcounts2019-6-11.pdf> (last visited July 19, 2022) ("*What Counts?*").

for pro bono counsel promotes fair and equal representation for indigent and affluent parties alike.

To be sure, attorneys engaged in pro bono activities are generally considered to work for free. In practice, this would not materially change. Law firms typically donate most, if not all, of fee awards to legal services organizations—which is Honigman's intent here—to help fund and facilitate the availability of critical legal services to indigent or low-income individuals and communities. The Pro Bono Institute ("PBI") strongly encourages such redistribution of fee awards in pro bono cases to legal services organizations, thus furthering public-service goals of the legal profession. Commentary to Statement of Principles[4] at 7; cf. ABA Formal Op. 93-374 (1993) (finding that it is not ethically improper for a lawyer who undertakes pro bono litigation to agree in advance to share court-awarded fees with the referring nonprofit organization).

Specifically, it is common for APBCo members' firms to donate at least some portion of their fee awards, and legal services organizations have come to depend on these recovered fees as a crucial source of revenue as their funding from other sources has been cut or otherwise declined. See, e.g., Commentary to Statement of Principles at 3 ("Studies routinely report that more than 80% of the civil legal needs of the poor are not presently being met. The resources and expertise of leading law firms should be brought to bear to assist the most vulnerable of our citizens in securing their rights."); Lawyers Trust Fund of Illinois, *Legal Aid*, available at <http://ltf.org/legal-aid/> (explaining that "demand for legal services continues to exceed supply") (last visited July 29, 2022); Press Release, Chicago Bar Foundation, Investing in Justice Campaign Sets New Record, Leverages Hundreds of Thousands More (May 30, 2019), available at

[4] Law Firm Pro Bono Challenge® Commentary to Statement of Principles, Pro Bono Institute 7, available at <http://www.probonoinst.org/wp-content/uploads/Law-Firm-Challenge-Commentary-2017-1.pdf> (commenting on Principle 7) (last visited July 19, 2022) ("Commentary to Statement of Principles").

<https://chicagobarfoundation.org/blog/press-releases/investing-in-justice-campaign-sets-new-record-leverages-hundreds-of-thousands-more/> (noting that "more than half of low-income and disadvantaged people in the Chicago area" cannot obtain "crucial legal help due to a shortage of legal aid resources"). It is no surprise that the ACLU and Honigman, organizations known for their longstanding traditions of exceptional pro bono work, sought fees here, and that Honigman intends to donate any award back to legal-aid services.

Fee awards serve another important purpose in cases where the pro bono attorney works for a smaller law firm that may not be able to offer pro bono services without the possibility of recovering fees following an eventual success. In these circumstances, the awarded fees may not be directly donated back to legal-aid services, but the awarded fees increase the number of attorneys and law firms that are able to provide crucial pro bono services.

As explained in more detail in Plaintiffs' briefing, Plaintiffs are entitled to attorneys' fees under the relevant statutory language. The Court of Claims did not dispute this. Instead, it stripped Plaintiffs of a full fee award solely because Plaintiffs' attorneys from Honigman provided their representation pro bono. Such a holding restricts fair access to justice, both by preventing equal leverage in advocacy by pro bono and paid counsel and by restricting the amount of money that is put back into the system to help increase the availability of legal services.

There is no reason to disallow Honigman's recovery of a full fee award based on reasonable fees and costs incurred in prosecuting this action simply because it undertook this representation on a pro bono basis. The statute does not support such a decision. Nor do the principles articulated above.

C. The standards for pro bono services encourage law firms to seek and accept fee awards, regardless of the status of being "pro bono dollars."

Consistent with the principles discussed above, under widely accepted standards for pro

bono services, large law firms are explicitly encouraged to seek and accept statutory fee awards, even where their fees were "pro bono dollars," the term used by the Court of Claims (Appellants' App'x 575a).

APBCo members run pro bono practices at large law firms. To ensure consistency across the legal industry in terms of how pro bono is defined, these law firms follow the same standards, particularly those set out by the Pro Bono Institute ("PBI"). For example, law firms rely on the Law Firm Pro Bono Challenge® Statement,[5] the additional Commentary to the Statement of Principles,[6] and PBI's published guidance on what counts as pro bono.[7] As explained below, those standards not only allow but encourage law firms to seek fees in appropriate cases.

PBI defines "pro bono" as follows:

> [A]ctivities of the firm undertaken *normally without expectation of fee and not in the course of ordinary commercial practice* and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties or public rights; and (iii) the provision of legal assistance to charitable,

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[5] Law Firm Pro Bono Challenge® Statement, Pro Bono Institute, available at <http://www.probonoinst.org/wp-content/uploads/2022-Law-Firm-Challenge-Statement-of-Principles-PDF.pdf> (last visited July 19, 2022) ("Challenge Statement"); see also Law Firm Pro Bono Challenge® Initiative, Pro Bono Institute, available at <www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge/> (last visited July 19, 2022) (the Law Firm Pro Bono Challenge® Initiative is an aspirational pro bono standard for large law firms developed by law firm leaders and corporate general counsel).

[6] Law Firm Pro Bono Challenge® Commentary to Statement of Principles, Pro Bono Institute, available at <http://www.probonoinst.org/wp-content/uploads/Law-Firm-Challenge-Commentary-2017-1.pdf> (last visited July 19, 2022) ("Commentary to the Statement").

[7] PBI's *What Counts?* compilation of questions and answers further interprets the Law Firm Pro Bono Challenge® Statement of Principles and provides guidance to PBI's member firms, APBCo members, and the entire law firm pro bono community on how to evaluate particular sorts of matters that a law firm might consider undertaking as pro bono publico matters. See generally *What Counts?*

> religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

Challenge Statement at Principle 7 (emphasis added).

Notably, the definition specifies that pro bono work is work done "without *expectation of* fee" rather than "without fee." At the heart of PBI's definition of "pro bono" and related guidance is a strong interest in ensuring that law firm pro bono work furthers the public interest. PBI focuses particularly on the well-being and representation of those members of the public who could not seek redress for violations of their rights absent private law firms' willingness to take their cases on a pro bono basis. Pro bono efforts at large law firms are thus first and foremost directed at addressing "the unmet legal needs of the poor and disadvantaged in the communities we serve." *Id*. at 1; see also *id*. at 3 ("[Firms'] pro bono activities should be particularly focused on providing access to the justice system for persons otherwise unable to afford it.").

With this goal in mind, when considering whether it is appropriate to recover fees and costs in pro bono cases, large law firms consult PBI's guidance. On this issue, *What Counts?* specifically advises that "[t]he Challenge definition is *designed to encourage* law firms to seek awards of attorneys' fees in appropriate pro bono cases." *What Counts?* at 12 (emphasis added); see also *id*. ("If the firm originally accepted the matter in question on a pro bono basis, then an award of attorneys' fees will not change it from being a pro bono matter."). *What Counts?* explains:

> In handling cases in the public interest, law firms are acting as "private attorneys general," enforcing legal rights, promoting access to justice for those who would otherwise be unable to press their suits, and uncovering and deterring unlawful behavior. *Seeking attorneys' fees, as well as damages or equitable relief, on behalf of pro bono clients increases the disincentives and deterrence benefits of these cases by making defendants who have acted unlawfully pay the full costs associated with their behavior.*

> *Accordingly, firms are encouraged to seek attorneys' fees and to request compensation at the usual and customary billing rates.*

What Counts? at 12 (emphasis added); see also *Rodriguez v Taylor*, 569 F2d 1231, 1245 (3d Cir 1977) ("The award of fees to legal aid offices and other groups furnishing pro bono publico representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel."); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U III L Rev 183, 205 (2003) ("Attorney's fees are the fuel that drives the private attorney general engine."). Accordingly, a great many of APBCo members' firms seek to recover fees and costs in pro bono matters when they are entitled to do so by statute.

PBI has also issued specific commentary recognizing additional instances in which law firms' acceptance of a fee award does not disqualify a matter from being counted as pro bono. For example, "[p]ost-conviction capital appeals, . . . where firms contribute thousands of hours without compensation but may receive the limited fees available to counsel under the Criminal Justice Act, are clearly pro bono cases for persons of limited means." Commentary to the Statement at 6-7.

PBI's commentary also notes that fee awards "in an employment discrimination or environmental protection case originally taken on by a firm as a pro bono matter and not in the course of the firm's ordinary commercial practice would not disqualify such services from inclusion as pro bono work." *Id*. at 7; see also *People v Smith*, 2015 Ill App (1st) 123708-U, ¶ 27 (explaining that pro bono representation "is not necessarily limited to free legal services") (citing *Black's Law Dictionary* 1240-41 (8th ed 2004)). And in such cases, PBI "strongly encourage[s] [the firms receiving fees] to contribute an appropriate portion of those fees to organizations or projects that provide services to persons of limited means." Commentary to Statement at 7.

An award of attorneys' fees in this case is equally appropriate. Plaintiffs are typical, appropriate pro bono clients. Honigman lawyers acted as "private attorneys general" when they

challenged the State of Michigan's practices and made their clients the "prevailing party" in the litigation. The Court of Claims' comment in this case that Honigman's fees were "pro bono dollars" (Appellants' App'x 575a) reflects a misunderstanding of the relationship between pro bono work and fee-shifting statutes. "Pro bono dollars" are not an exception to fee-shifting statutes. Denying a fee award merely on the basis of a pro bono representation is inconsistent with the statute itself (which does not make pro bono representation a statutory exception) as well as relevant pro bono standards and guidance. Plaintiffs' counsel should have received 100%—not just 10%—of fees found to be recoverable and reasonable.

D. Michigan would be the only state to allow courts to consider the pro bono nature of a representation when awarding mandated legal fees.

Michigan's FOIA statute mandates an award of "reasonable attorneys' fees" if a plaintiff prevails in full and allows for a discretionary fee award if a plaintiff "prevails in part." In either circumstance, for the reasons discussed above, it is inappropriate to consider the pro bono nature of representation when deciding a fee award.

With regard to mandated fees, Michigan would stand alone in holding that a court can rely on the pro bono nature of a representation to deny or reduce mandated attorneys' fees. Given the policy implications, industry standards, and definitions discussed above, courts across the U.S., including the U.S. Supreme Court, have consistently agreed that "where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee." *Blanchard v Bergeron*, 489 US 87, 94 (1989); see also, e.g., *Blum v Stenson*, 465 US 886, 894 (1984) ("Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."); *Scotia Assocs v Bond*, 484 NYS2d 479, 484 (Civ Ct 1985) (granting attorneys' fees despite arguments that fees had not been "accrued" because counsel was working on a pro

bono basis); *Miller v Wilfong*, 121 Nev 619, 622; 119 P3d 727, 729 (2005) (concluding "that a party is not precluded from recovering attorney fees solely because his or her counsel served in a pro bono capacity"); *Henriquez v Henriquez*, 185 Md App 465, 484; 971 A2d 345, 356-57 (Md App 2009), aff'd, 413 Md 287; 992 A2d 446 (2010) (holding that courts can "award reasonable attorney's fees in a case where a party is represented by a non-profit legal services organization, or a pro bono attorney"; stating that "there are [] important policy considerations that weigh in favor of allowing courts to award attorney's fees to a non-profit legal services organization, or a pro bono attorney"; and explaining that the court is "join[ing] the majority of jurisdictions that have ruled on this issue"); *Turner v Comm'r of Social Security*, 680 F3d 721, 724 (CA 6, 2012) ("Indeed, it is 'well-settled' that the existence of an unsatisfied contingency or pro bono representation agreement does not preclude a fee award, even where the statute limits fees to those 'incurred' by the plaintiff in that action."); *Brinn v Tidewater Transp Dist Comm*, 242 F3d 227, 234-35 (CA 4, 2001) ("[C]ourts have consistently held that entities providing pro bono representation may receive attorney's fees where appropriate, even though they did not expect payment from the client and, in some cases, received public funding.").

In FOIA cases, courts have consistently held that fees are appropriate where the attorney was working on a pro bono basis and have explained that "[g]ranting attorneys' fees in these circumstances, where Plaintiff is represented pro bono and where her request benefits others, would further the purposes of FOIA." *Reyes v US Nat'l Archives & Records Admin*, 356 F Supp 3d 155, 166 (DDC, 2018); see also, e.g., *Powell v US Dept of Justice*, 569 F Supp 1192, 1204 (ND Cal 1983) (granting attorneys' fees and multiplying those fees by 1.5 where counsel worked on a pro bono basis, noting that "it is difficult to obtain counsel in FOIA cases [and f]requently, litigants who are unable to obtain counsel appear in propria persona and consume undue amounts of the

court's and the Government's time"); *Mattachine Society of Washington, DC v US Dept of Justice*, 406 F Supp 3d 64, 70 (DDC, 2019) ("[I]t is worth mentioning that even though McDermott performed its work for Mattachine pro bono, that is not a bar to recovering attorneys' fees, as courts frequently award costs and fees in pro bono cases."); *Sheppard v US Dept of Justice*, unpublished opinion of the United States District Court for the Western District of Missouri, issued Sept. 21, 2021 (Case No. 4:17-cv-1037-NKL); 2021 WL 4304218, at *4 (granting fees where counsel worked on a pro bono basis, explaining that "[r]ejecting [the plaintiff's] request for attorney's fees could, and likely would, discourage other attorneys from making a similar commitment to represent FOIA requesters who cannot afford to fund years of litigation against the Government").

If the Court were to find that Plaintiffs prevailed in full in this case, Michigan would stand alone in allowing for a reduction in fees based solely on pro bono status. The rationale behind the Court of Claims' decision to deny fees to Plaintiffs, and the Court of Appeals' decision to make a mandatory fee award discretionary, because a fee award purportedly would be based on mere "pro bono dollars," is inconsistent with not only the statute itself but also case law throughout the country. Reversal is necessary because the holdings below are not only anomalous but highly detrimental to pro bono work in Michigan. Because other courts that have addressed this issue make clear that pro bono litigants can recover statutorily mandated fee awards in their jurisdictions, allowing the Court of Appeals' decision below to stand would have a particularly chilling effect on Michigan litigants who are in need of pro bono services.

In their supplemental brief, MDOC admits that the wealth of case law confirms that the pro bono nature of representation does not stand as a bar to being awarded fees. MDOC instead focuses on the discretionary nature of attorneys' fees and argues that the case law stands for the

proposition that courts may, in their discretion, decide to limit fees on the basis of pro bono representation. This argument in not persuasive. First, as discussed above, a court's discretion is not unlimited, and the pro bono status of representation is an inappropriate consideration. MDOC provides no case law supporting its argument that it should be proper to limit attorneys' fees based on the pro bono status of representation alone. Second, if the Court were to find that Plaintiffs prevailed in full, the statute does not allow for court discretion based on the pro bono representation status. Finally, MDOC ignores cited cases holding that fee awards should not vary based on a pro bono representation. See, e.g., *Blum v Stenson*, 465 US 886, 894 (1984) ("Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."). MDOC's arguments rely only on general statements that the court has discretion and may consider factors outside those enumerating the statutes. Given the sensitive nature of pro bono work and the underlying public policies, these general statements are insufficient to permit a reduction in fees solely based on work being done pro bono.

Should the Court conclude that Plaintiffs prevailed only in part, we acknowledge that the statute allows for discretion. But again, that discretion is not limitless. Given the policy implications stated above, the Court should remand with instructions that the pro bono nature of an attorney–client relationship is not a permissible reason to deny or reduce a fee award.

This Court should reverse the lower-court decisions, bringing Michigan's law in line with that of other courts and ensuring that individuals in Michigan who need pro bono services have equal access to those services.

V. CONCLUSION

For these reasons, the Association of Pro Bono Counsel respectfully urges this Court to reverse the June 24, 2021 Appeal Order and the March 2, 2020 Claims Order and hold that the pro bono nature of a representation is not an appropriate consideration when determining a reasonable attorneys'-fee award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I electronically filed the foregoing using the MiFile/TrueFiling System which will send notification of such filing to all registered counsel of record.

Dated: August 5, 2022

Respectfully submitted,

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