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.	Supreme Court No. 163382 Court of Appeals No. 353164 Court of Claims No. 17-000082-MZ
GEORGE JOSEPH, Plaintiff-Appellant, v. MICHIGAN DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	Supreme Court No. 163383 Court of Appeals No. 353165 Court of Claims No. 17-000230-MZ

AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN, MICHIGAN STATE PLANNING BODY, LEGAL SERVICES ASSOCIATION OF MICHIGAN, AND DISABILITY RIGHTS MICHIGAN

Nicholas A. Gable (P79069)
Robert F. Gillett (P29119)*
Paul D. Reingold (P27594)*
Counsel for Amici
DISABILITY RIGHTS MICHIGAN
4095 Legacy Pkwy
Lansing, MI 48911
(517) 487-1755

*Affiliate counsel

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STATEMENT OF QUESTIONS PRESENTED

(1) Whether Plaintiffs prevailed in full on their FOIA claims and are thus statutorily entitled to attorney fees under MCL 15.240(6)?

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	Yes
The Court of Appeals answered:	No

Amici answer: this Court should hold that Plaintiffs, regardless of whether they prevailed "completely" or not, are entitled to the proportion of their reasonable attorney fees that is fairly allocable to the successful portion of their case, which here is all or nearly all of their fees.

(2) Whether the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to the appellants based solely on the pro bono nature of counsel's representation, notwithstanding the Court of Claims factual findings that counsel's hourly rates and number of hours worked were reasonable?

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	No
The Court of Appeals answered:	No
Amici answer:	Yes

(3) Whether the Court of Claims clearly erred in denying Plaintiffs punitive damages under MCL 15.240(7)?

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	No
The Court of Appeals answered:	No

Amici do not address the issue.

STATEMENT OF INTEREST OF AMICI CURIAE

State Bar of Michigan

The State Bar of Michigan is a public body corporate established by law in 1935 and regulated by the Michigan Supreme Court.[1] SBM's mission is to aid in promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in Michigan. By law, all persons licensed to practice law in Michigan constitute the SBM's membership, which currently stands at over 46,000 attorney members. The SBM has identified championing access to justice and building trust and confidence in the justice system as a key goal in its Strategic Plan; it aims to achieve this goal by, among other things, expanding opportunities for SBM members to participate in pro bono partnerships with public service organizations and local/affinity bar associations.

SBM recognizes that pro bono and civil legal aid are essential to ensuring that low-income individuals have meaningful access to justice in Michigan. The ability of attorneys to secure a reasonable award of attorneys' fees in pro bono cases is critical to the viability of these programs and services, and the legal representation they provide. Further, the award of attorneys' fees deters future misconduct by requiring defendants who have acted inappropriately to pay attorneys' fees and costs permitted by applicable statutes.

SBM fears that the trial court's ruling has the potential to result in a reduction or elimination of all or most attorneys' fees awarded for successful pro bono engagements. This result would make it far more difficult for pro bono attorneys to provide legal services to their clients and result in more individuals being left unrepresented.

[1] No party and no counsel for a party has authored this brief in whole or in part, nor has any party or counsel for a party or anyone else made a monetary contribution intended to fund the preparation or submission of this brief.

Legal Services Association of Michigan

LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM's members are 12 of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.[2] All LSAM members administer pro bono ("private attorney involvement") programs, and these programs combined are the largest and most diverse pro bono programs in the state. During 2020 and 2021, LSAM member programs referred over 2,000 cases to pro bono attorneys, extending essential legal services to more Michigan residents. The efforts of pro bono counsel provided an additional 28,600 hours of legal services to low-income Michiganians, addressing legal needs that would have gone unmet without this critical support of participating pro bono counsel.

LSAM is concerned that the rule articulated by the trial court and implicitly endorsed by the Court of Appeals – i.e., that it is appropriate to reduce fees under a fee-shifting statute if the lawyer otherwise entitled to those fees has accepted the case pro bono – will have a profound impact on its members' programs. LSAM believes that it is critical that the Court consider the issues raised by this case in light of its commitment to ensuring that the justice system – including private attorneys – support access to justice for all persons.

Michigan State Planning Body

The Michigan State Planning Body (MSPB) is an unincorporated association of about 35 individuals who are leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations, and who are interested in Michigan's civil legal aid and indigent

[2] LSAM's members are the Center for Civil Justice, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

defense systems. MSPB acts as a forum for planning and coordinating the state's efforts to deliver civil and criminal legal services to the poor. Its mission is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan; these efforts include the planning for and support of pro bono programs and systems.

As a partnership between civil legal aid programs and bar and court leaders, the MSPB is aware of the role that pro bono plays in expanding access to the legal system for low-income persons and the role that fee-shifting statutes play in assuring that access. The MSPB believes that it is important that the Court hear and consider this perspective when deciding this case.

Disability Rights Michigan

Disability Rights Michigan (DRM) is the independent, private, nonprofit, and nonpartisan protection and advocacy organization authorized by federal and state law to advocate for and protect the legal rights of people with disabilities in Michigan. Designated by the governor of Michigan as this state's Protection & Advocacy System, DRM exists to protect the legal and human rights of people with developmental disabilities and mental illness. 42 USC §§ 15041 and 10801.

Many of the individuals represented by DRM have household income that makes them eligible both for Medicaid and for legal services provided through LSC-funded organizations. DRM's legal representation focuses on systemic impact litigation, in which it partners with law firms that depend on attorney fee awards to finance their pro bono participation in the litigation. *See, e.g., K.B, et al. v MDHHS, et al*, No. 18-cv-11795 (ED Mich); *McBride, et al. v Mich Dept of Corr*, No. 15-cv-11222 (ED Mich).

DRM also routinely submits requests through the Freedom of Information Act (including to MDOC, the defendant in this appeal), and relies on that statute as a complement to its access authority in fulfilling its investigative and monitoring functions. DRM is specifically designated

in the FOIA statute as an entity entitled to fee reductions. MCL 15.234(2)(b). As an agency that both frequently uses the FOIA and relies on private attorney involvement to ensure access to justice for its constituents, DRM has a strong interest in this case.

INTRODUCTION

Amici have a special interest and expertise in pro bono program administration and in increasing access to justice for those historically denied full participation in our justice system due to poverty or other characteristics such as race, gender, disability, or immigration status.

Amici will address Issues (1) and (2) in the Court's April 22 Order: whether Plaintiffs "prevailed in full," and whether the 90% reduction in fees due to the Honigman firm's role as pro bono counsel was justified. Amici will not address Issue 3.

ARGUMENT

I. REGARDLESS OF WHETHER PLAINTIFFS PREVAILED "COMPLETELY" OR "PARTIALLY," THEY SHOULD BE ENTITLED TO REASONABLE FEES THAT ARE FAIRLY ALLOCABLE TO THE SUCCESSFUL PORTION OF THEIR CASE

The trial court in this case found that Plaintiffs, who received all of the audio and video recordings that they sought and in so doing exposed an illegal statewide policy, "prevailed in full" on their FOIA claims. Appellants' App'x 572a, January 29, 2020 Hearing Tr 28:20-22. The Court of Appeals reversed this finding solely on the basis that the trial court had permitted the blurring of the faces of some guards in the (otherwise complete) videos released to Plaintiffs. Because the Court of Appeals concluded that Plaintiffs had "prevailed in part," it vacated the trial court's attorney fees award and remanded the case "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" (which the court apparently intended to mean could include low fees or no fees at all). *Woodman v Dep't of Corr*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2022 (Docket Nos. 353164 and 353165), p 4.

The minor redactions (which the Plaintiffs, not having sought the identity of the guards,

did not dispute) thus triggered a dramatically different fee analysis: under current case law, plaintiffs who prevail in full are entitled to reasonable attorney fees, but plaintiffs who prevail 99% are *entitled* to nothing, because fee awards to "partly" prevailing plaintiffs are viewed as discretionary.

While Amici believe that Plaintiffs here prevailed completely by any fair measure, we urge the Court to undertake a broader review of the entitlement to attorney fees under the FOIA, namely (1) to go beyond the question of whether Plaintiffs "completely" prevailed, and (2) to reject the Court of Appeals' premise that a trial court has absolute discretion in awarding attorney fees to a plaintiff whose victory is anything less than 100% complete. This artificial dichotomy is contrary to the purpose of the statute, to precedent, and to common sense. Instead, this Court should hold that Plaintiffs are entitled to the proportion of their reasonable attorney fees that is fairly allocable to the successful portion of their case. Here, because Plaintiffs got everything they wanted, and because the legal work their lawyers did was necessary to win the case, all – or nearly all – of their fees are allocable to the successful portion of their case. Awarding anything less should be regarded as an abuse of discretion. To the extent that prior Court of Appeals decisions (in particular *Local Area Watch v City of Grand Rapids*, 262 Mich App 136 (2004) and *Estate of Nash v City of Grand Haven*, 321 Mich App 587 (2017)) are contrary to this standard, those cases should be clarified, limited, or overruled.

A. A Short Review of Michigan Courts' Interpretation of the FOIA's Attorney Fees Provision

Amici note that this Court has addressed the FOIA attorney fees provision only a handful of times since the law was passed in 1976, mostly analyzing issues not pertinent here. The low level of guidance from this Court has led to conflicting approaches in the Court of Appeals, with the now-dominant approach clashing with the intent and the language of the FOIA itself. The current approach is contrary to this Court's and the Court of Appeals' early interpretation of the

FOIA, as well as to the approach taken by state and federal courts in interpreting other fee-shifting statutes.

1. This Court's FOIA Attorney Fees Cases

The Freedom of Information Act provides, in relevant part, that

> [i]f 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.

MCL 15.240(6). The earliest – and we believe correct – interpretation of the FOIA's attorney fees provision by Justices of this Court came all the way back in 1982. *See Kestenbaum v Michigan State University*, 414 Mich 510 (1982).[3] In *Kestenbaum*, three Justices of this Court explained how its attorney fees provision should be interpreted. There a student brought a FOIA action to compel the release of a duplicate of magnetic computer tape used to produce Michigan State University's student directory. The trial court found for the plaintiff, the Court of Appeals found for MSU, and this Court affirmed by an equally divided Court (3-3). The three Justices who would have found for the plaintiff on the merits reached the issue of attorney fees, which was the first time that members of this Court had interpreted the provision. *Id*. at 563-66. The other three Justices, having found wholly in favor of the University, did not address attorney fees.

Justice Ryan, joined by Justices Levin and Kavanagh, first clarified that a finding of an arbitrary and capricious violation, or a finding that the defendant acted in good faith, has no bearing on whether a plaintiff is entitled to attorney fees. *Id*. at 564. Justice Ryan continued:

[3] The Justices interpreted an earlier but not substantively different version of this provision. The prior version read: "If a person asserting the right to inspect or to receive a copy of a public record or a portion thereof prevails in an action commenced pursuant to this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person prevails in part, the court may in its discretion award reasonable attorneys' fees, costs, and disbursements or an appropriate portion thereof." *Id*. at 563.

> It is argued that if the plaintiff only "prevails in part" the trial judge has the unfettered discretion to deny attorney fees altogether. While at first blush the statute is susceptible of that interpretation, a closer reading convinces us that the court's discretion is limited to awarding one of the two statutory alternatives; namely, "reasonable attorneys' fees, costs, and disbursements", or else "an appropriate portion thereof".
>
> The basic rule set forth in the statute is that a prevailing plaintiff is entitled to his attorney fees, costs, and disbursements.... If the plaintiff seeks disclosure of ten documents and the court orders disclosure of the ten documents, the plaintiff has prevailed and the court shall award reasonable attorney fees, costs, and disbursements.
>
> But suppose the same plaintiff sought disclosure of one more document in addition to the ten disclosed and the court upheld the denial as to this eleventh document. Must we conclude that since the plaintiff has only prevailed "in part" the trial judge can exercise his "discretion" and deny any award of attorney fees? Such an approach would be contrary to the spirit of the FOIA, since it would encourage plaintiffs to include in their FOIA suit only those requests which they are absolutely certain will prevail. Alternatively, that approach would encourage the drastic fragmentation of FOIA claims. A separate complaint would be filed for each document requested (or, in this case, each deletion or restriction on the use of the information) so that the plaintiff could prevail "in full" as to each document ultimately disclosed. Such a procedure fails to comport with judicial efficiency, legislative intent, or common sense.
>
> In the case of a plaintiff who "prevails in part", we read the statute to confer upon the court the discretion to award either the entire amount of plaintiff's reasonable attorney fees, costs, and disbursements or an appropriate portion thereof. The appropriateness of the portion awarded is not to be measured by the good faith of the defendant or the novelty of the litigation, but rather by the amount of attorney fees, costs, and disbursements fairly allocable to the successful portion of the plaintiff's case.

Id. at 564-66.[4] Because in their view the plaintiff had prevailed "on the critical point in dispute," Justices Ryan, Levin, and Kavanagh would have remanded for a determination of reasonable attorney fees. *Id*. at 566.

[4] Under the *Kestenbaum* reading, both the 1982 version and the current version of the law require that plaintiffs who prevail in part are *entitled* either to all of their reasonable attorney fees or to an "appropriate portion thereof." By adding the words "all or" to the statute (in 1997), the Legislature appears to have endorsed the *Kestenbaum* reading that plaintiffs who prevail "in part" "shall" be awarded fees, subject only to a *possible* discretionary reduction ("all or an appropriate portion") – though we could find no statutory history providing a reason for the addition of the words "all or."

In the trial court, the plaintiff in *Kestenbaum* had not gotten 100% of the material that he had originally requested. At the plaintiff's suggestion and by stipulation, certain deletions from the magnetic tape and restrictions of its use had been imposed. *Id*.[5] The important point, however – as should be the important point in this case as well – is that "the amount of attorney fees allocable to the 'denied' portion of the magnetic tape was negligible." *Id*. Accordingly, to the three Justices who interpreted the fees provision, it did not matter whether the Court concluded that the plaintiff had prevailed completely or in part (where roughly the same work was required to get what the plaintiff got in either event). *Id*.

Justice Ryan's approach in *Kestenbaum* was consistent with that taken by courts applying other fee-shifting laws, like the federal Civil Rights Attorney's Fees Act, 42 USC § 1988 (1976), and its precursors. Both Section 1988 and the FOIA use the "private attorneys general" model to create incentives for private lawyers to enforce important rights-giving laws. As Justice Ryan observed in *Kestenbaum*, the "basic rule" of the FOIA is that a prevailing plaintiff is entitled to reasonable fees, and a standard permitting the trial court to deny "reasonable fees," or to deny all fees, to a "partially" prevailing plaintiff would be "contrary to the spirit of the FOIA." *Kestenbaum*, 414 Mich at 565. Likewise, in light of Section 1988's purpose – to ensure effective access to the judicial process – a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v Eckerhart*, 461 US 424, 429 (1983) (citing Sen Rep No 94-1011, p 4 (1976), US Code Cong & Admin News 1976, p. 5912). The basic rule of fee-shifting laws is therefore that, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id*. at 435.

[5] The Court observed that the plaintiff's stipulation had "saved considerable court time and attorney fees for both sides; such stipulations should be encouraged rather than discouraged." *Id*.

Since *Kestenbaum*, this Court has directly addressed FOIA attorney fees issues only three times. Three years after *Kestenbaum* was decided, in *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432 (1985), the Court held that the plaintiff was "entitled" to recover attorney fees, because the plaintiff's victory, while not "total," was "still a very substantial one, and [plaintiff] has obtained everything it initially sought." *Id.* at 455. It is unclear from the opinion if the Court thought it was applying the first clause of the fees provision (for a complete victory), or was agreeing with the Justices in *Kestenbaum* that the plaintiff was "entitled" to fees either way, for the work fairly allocable to its success in the case. *See* Part D, below.

In *Mich Tax Mgt Servs Co v City of Warren*, 437 Mich 506, 509-12 (1991), the Court, citing *Int'l Union*, simply held that the trial court was obligated to award attorney fees to a completely prevailing plaintiff; the majority of the Court's discussion focused on the "reasonableness" of those fees, and upheld the trial court's decision as to their reasonableness. And in *Amberg v City of Dearborn*, 497 Mich 28, 33 (2014), a unanimous Court held that a defendant's voluntary production of the requested documents after the FOIA suit had been filed but before the trial court ruled on the request did not preclude an attorney fees award. The Court made clear that "[t]o prevail in a FOIA action within the meaning of MCL 15.240(6), a court must conclude that the action was reasonably necessary to compel the disclosure [of public records] and [that] the action had a substantial causative effect on the delivery of the information." *Id*. at 34 (internal quotation marks omitted).

2. The Court of Appeals Subsequently Adopted the "Fairly Allocable" Standard

Justice Ryan's interpretation in *Kestenbaum*, unfortunately, was dicta because three of the six Justices in *Kestenbaum* never got to the issue of fees. But the very next year the Court of Appeals adopted the *Kestenbaum* framework in *Dawkins v Department of Civil Service*, 130 Mich

App 669, 674 (1983). There, citing Ryan's *Kestenbaum* opinion, the court held:

> Assuming, arguendo, that plaintiffs herein only prevailed in part, under these circumstances we find all, or virtually all, of the attorney fees, costs and disbursements are "fairly allocable to the successful portion of the plaintiff's case". Accordingly, we reverse the order of the trial court and remand for an award of attorney fees incurred during the course of the trial court proceedings and for an award of attorney fees, costs and disbursements on this appeal.

The *Dawkins* court, like the Justices in *Kestenbaum*, looked holistically at the sense of the plaintiff's case to determine what amount of fees was "fairly allocable to [its] successful portion." Using a rough estimation that favored an award of fees, the *Dawkins* Court concluded that there was no meaningful difference between a determination that the plaintiffs had prevailed "completely" or "in part," because the bulk of the attorneys' time in the litigation had been spent on what they won. This is exactly how Michigan's FOIA, like Section 1988 and other fee-shifting laws, should work.

Six years later, in *Booth Newspapers, Inc v Kalamazoo School Dist*, 181 Mich App 752, 759 (1989), the court, citing *Dawkins*, held that "[w]hen the plaintiff prevails only as to a portion of the request, the award of fees should be 'fairly allocable' to that portion." But, in so holding, the Court of Appeals went astray. It tied the amount of the fees award not to the work done to attain the overall level of success in the *plaintiff's* <u>*case*</u>, but rather to the "successful portion of the *plaintiff's* <u>*request*</u>." *Id.* In so doing, the court deviated from the *Kestenbaum/Dawkins* standard, which, like the Section 1988 standard, focused on the actual work performed and billed by the lawyers, as opposed to which specific *claims* (*i.e.*, "requests" in the FOIA context) had succeeded or failed.[6] *See* Part D, below.

[6] The plaintiff in *Booth Newspapers* had sought the release of certain records and the identities of the people concerned in the records. Because the trial court ordered only the release of the records without that personal identifying information (a central piece of the plaintiff's request), the court awarded 75% of the plaintiff's reasonable fees. *Id*. at 759-60.

Dawkins and *Booth Newspapers* have continued to be cited in unpublished decisions for the "fairly allocable" standard in the decades since they were decided. Most, if not all, of those decisions, however, have used the more restrictive "successful portion of the *request*" standard from *Booth Newspapers*. Over time this shift has gradually substituted the use of the precise fraction of the plaintiff's *request* that was obtained, rather than awarding "reasonable fees" based on the actual work performed and the necessary hours billed to become a "prevailing" party. *See, e.g.*, *Federated Publications, Inc v City of Lansing*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2000 (Docket Nos. 218331, 218332), p 5 ("the trial court awarded plaintiff sixty-one percent of its attorney fees incurred, reasoning that plaintiff was only successful in forcing defendant to disclose sixty-one percent of all documents sought."); *Adamski v Township of Addison*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2005 (Docket No. 259219), p 4 (citing but not applying the correct *Dawkins* "fairly allocable" standard); *Johnson v City of Saginaw*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2019 (Docket No. 348024), p 3 (in awarding the plaintiff 55% of her requested fees, the "trial court explained that plaintiff's breakdown of her attorney's billing did not permit the trial court to distinguish between the time spent on the successful *claim* and the time spent on the unsuccessful *claim*.") (Emphasis added.) Ex. 1.

Such a formulaic "fraction" (with the denominator the documents requested and the numerator the documents obtained) will typically bear little relationship to the work required by the lawyers to get the results obtained. In some cases it will drastically undercompensate the lawyers and in other cases it will drastically overcompensate them. In few cases will it result in "appropriate" "reasonable" fees. *See* Part D. Nor does such a standard create an incentive for

private lawyers to represent clients who otherwise cannot afford their services, to enforce important rights.

B. Over Time the "Fairly Allocable" Standard Has Devolved into an "All-or-Nothing" Approach Based on Whether the Plaintiff Prevailed Completely or Partially

Court of Appeals panels have since displaced the *Kestenbaum/Dawkins* "fairly allocable" standard – already diminished by *Booth Newspapers* and its progeny from the "work done to make the case" to the percentage of the "requests obtained" – with an even narrower standard. The focus has shifted from the amount of "reasonable fees fairly allocable" to one that examines whether the plaintiff has prevailed "completely" (and is therefore entitled to all fees) or has prevailed only "in part" (and is therefore entitled only to whatever amount the trial court, in its discretion, decides is appropriate, which can include low fees or no fees).[7] Now some courts (as here) minutely examine whether the plaintiff prevailed 100% or whether the plaintiff's victory was only 99%. If the victory is determined to be anything less than 100%, the trial court, under this standard, has the discretion to award the plaintiff low or no attorney fees, despite the fact that doing so for a significant victory can hardly be considered an "appropriate portion of reasonable attorney fees." This is error of a high order, given the text of the statute, its interpretation as outlined above, and the history of fee-shifting statutes generally.

Thus, in *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 151 (2004), the Court of Appeals held that trial courts have discretion to award no attorney fees to a partly prevailing party. The *Local Area Watch* court did not even address the "fairly allocable" standard. To the

[7] For example, the shift appears in cases like *Yarbrough v Department of Corrections*, 199 Mich App 180 (1993). There the court cited *Booth Newspapers* for the proposition that a trial court has the discretion to award any amount of fees, a proposition which neither the statute nor the "fairly allocable" standard of *Kestenbaum*, *Dawkins*, and *Booth Newspapers* supports. Likewise, the court cited *Dawkins* for the same proposition in *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 131 (1990). Again, *Dawkins* does not support that holding.

contrary, it held that attorney fees *must* be awarded at all "only when a party prevails completely." *Id*. at 150. The cases that the court cited, however, do not support that conclusion. As noted above, the first case, *Michigan Tax Mgt Services Co*, 437 Mich 506 (1991), held only that the plaintiff had prevailed "completely" and thus was entitled to fees. And the second, *Int'l Union,* 422 Mich 432 (1985), can be read as *contrary* to the *Local Area Watch* court's conclusion, given that there the plaintiff was "entitled" to attorney fees despite an apparently less than "total" victory.

The holding of *Local Area Watch* was expanded in *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587 (2017). In that case the Court of Appeals cemented the *Local Area Watch* holding that an award of fees to a partly prevailing plaintiff is *completely* discretionary, notwithstanding the overlap of the work done (between successful and unsuccessful requests) or the extent to which the fees are "fairly allocable to the successful portion" of the plaintiff's case. The Court of Appeals in *Nash* said, "*Local Area Watch*, which was decided in 2004, is binding precedent, MCR 7.215(J)(I) [sic], and there is no merit to the argument that a trial court cannot exercise its discretion to determine that a plaintiff that prevails only partially in a FOIA action is not entitled to any attorney fees." *Id*. at 606. (In other words, parsing the triple negative, a court can award zero fees to a partially prevailing plaintiff.) Although the plaintiff had partly prevailed, the Court of Appeals affirmed the trial court's determination not to award attorney fees. *Id*. at 608. The court, without discussion, rejected both *Dawkins* and *Booth Newspapers*, solely on the basis that those cases were decided before 1990 and therefore were no longer binding precedent pursuant to MCR 7.215(J)(1) (which makes only Court of Appeals decisions published on or after November 1, 1990, binding precedent). *Id*. at 607.[8]

[8] The court also, following *Local Area Watch* but contrary to the view expressed in *Kestenbaum*, held that the reasonableness of the defendant's actions is a proper consideration in the trial court's exercise of discretion. *Id*. at 608.

Confronted with this inconsistency, at least one Court of Appeals panel has attempted to reconcile *Local Area Watch* with the earlier cases that applied the "fairly allocable" standard. In *Katayama v City of Troy*, a panel relied on *Booth Newspapers* to hold that fees should be fairly allocable to the successful portion of the plaintiff's request. Unpublished per curiam decision, issued December 10, 2015 (Docket No. 323459), p 3, attached as Ex. 2. Noting immediately after its citation of *Booth Newspapers* that "[w]e have also held a trial court may award no attorney fees where a plaintiff succeeds with regard to only a very small part of his claim," *id*., the court reasoned that the holding of *Local Area Watch* had resulted from the plaintiff there obtaining only a few requested documents and not prevailing "on its central claim." *Id*. Applying the *Booth Newspapers* "fairly allocable" standard, the court determined that, because the trial court had ordered disclosure of four of the five records sought, the plaintiff had substantially prevailed on his claim and so the decision to award no fees was an abuse of discretion. *Id*.

C. The Court of Appeals' Decision in this Case

The present case takes the *Local Area Watch* and *Nash* standard to its absurd, yet predictable, result. Plaintiffs here obtained all audio recordings and all eight videos that they requested. Their lawsuit, and virtually all of the time the attorneys put into it, were reasonably necessary to compel disclosure and had more than a "substantial causative effect on the delivery of the information"; indeed, it was the *only* causative effect on the delivery of the information. *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 289 (2005); *Amberg*, 497 Mich at 34 (2014). Because Defendants were permitted to redact minor details in the videos – details that Plaintiffs never specifically sought and whose redaction Plaintiffs did not dispute – and because, pursuant to *Local Area Watch* and *Nash*, the decision to award attorney fees at all is entirely within the trial court's discretion when a plaintiff prevails "in part," the Court of Appeals vacated the trial court's

attorney fees award and remanded the case "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" (which the court apparently intended to mean could include low fees or no fees at all). *Woodman v Dep't of Corr*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2022 (Docket Nos. 353164 and 353165), p 4. Thus, on remand, the trial court will have complete discretion to determine that these Plaintiffs, who got everything they wanted in this action, and whose lawyers' time would have been nearly the same with or without the redactions, should be awarded low fees (or even no fees) because their victory was some small fraction less than 100% complete. This Court should make clear that such a reading is not permitted, or is an abuse of discretion.

Amici wish to emphasize three points from this history. First, Defendants are requesting that this Court explicitly adopt the *Local Area Watch / Nash* interpretation of the FOIA. Defendants argue that whether to award fees when a party partially prevails "is entrusted to the sound discretion of the trial court," and that this includes the discretion to conclude that a plaintiff who prevails only partially "is not entitled to any attorney fees." Defendant's Supplemental Brief, p 22. But if trial courts can award zero to 100% of the attorney fees, that creates a "standardless" discretion, with no measure to guide its use in the trial courts, *or* to review it for abuse in the appellate courts.

Second, Defendant's repeated call for unfettered trial court discretion in determining fees for partially prevailing plaintiffs (including the discretion as to which factors to consider – e.g., to use the fact that plaintiff's lawyers are pro bono lawyers to reduce fees) is not a workable standard. Defendant's standard will result in identically situated plaintiffs – who achieved the same level of success in the case and worked a similar number of hours – receiving wildly different fees from court to court. Amici submit that equal treatment under the law, including consistent application

of statutes, is among the highest values of our system of justice. Amici believe that this Court has a responsibility to provide guidance to the lower courts, and urge the Court to do so in this case.

Third, while Defendant's argument is supported by *Local Area Watch* and *Nash*, it arguably conflicts with the precedent from this Court – including *Int'l Union* (which held that a plaintiff whose victory was not "total" was still "entitled" to fees), and *Amberg* (which held that fees should be awarded when the plaintiff's action was "necessary to compel disclosure" and "had "a causative effect on the delivery of the information".) This Court should affirm these earlier opinions, not overrule them.

D. This Court Should Adopt the *Kestenbaum/Dawkins* "Fairly Allocable" Standard, Which Is Consistent with the Plain Language of the Act and with Other Fee-Shifting Laws

In short, we think Justices Ryan, Levin, and Kavanagh got it right in *Kestenbaum* back in 1982, and the Court of Appeals got it right when it adopted their reasoning in *Dawkins* in 1983.

> In the case of a plaintiff who "prevails in part", we read the statute to confer upon the court the discretion to award *either* the entire amount of plaintiff's reasonable attorney fees, costs, and disbursements or an appropriate portion thereof. The appropriateness of the portion awarded is … to be measured by the … amount of attorney fees, costs, and disbursements fairly allocable to the successful portion of the plaintiff's case.

Kestenbaum, 414 Mich at 565-66 (emphasis added). The *Kestenbaum* Justices and the *Dawkins* court both read the FOIA's attorney fees provision to mean that courts "s*hall* award reasonable attorneys' fees, costs, and disbursements" to a prevailing plaintiff under MCL 15.240(6), whether the plaintiff prevails completely or "in part" (emphasis added). The award is mandatory with respect to a plaintiff who "prevails in part" because that plaintiff, too, has *prevailed*, which is the sole prerequisite for a fee award.[9] Fees are then awarded subject only to the court's discretion to

[9] Unlike the federal FOIA, the Michigan FOIA does not require a plaintiff to "substantially" prevail to be awarded fees. *See Laracey v Fin Institutions Bureau*, 163 Mich App 437, 442-43 (1987); *Mich Tax Mgt Services*, 437 Mich at 509, n 2 (1991).

reduce the amount to "all or an appropriate portion" of "reasonable attorneys' fees" (that would have been awarded to a completely prevailing plaintiff) – but no less.[10]

This reading – giving the trial court only two options with respect to prevailing plaintiffs – also harmonizes the purpose of the FOIA's attorney fees provision with its plain language. "Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning." *Bitterman v Village of Oakley*, 309 Mich App 53, 71 (2015). "Appropriate" means "suitable or right for a particular situation . . . ."[11] And "reasonable" fees are addressed in how to calculate the award. The same as under federal fee-shifting laws, when determining attorney fees under Michigan's laws, the starting point is a reasonable hourly rate "multiplied by the reasonable number of hours expended in the case." *Smith v Khouri*, 481 Mich 519, 530-31 (2008); *Prins v Mich State Police*, 299 Mich App 634, 645 (2013) (applying *Smith* to the Michigan FOIA). *See* Section II.

Indeed, even if the Court were to read the FOIA's fees provision as granting discretion to a trial court to award no fees, it is hard to see how a trial court could do so – without it being an abuse of discretion – but for an extreme outlier case (like a near-total loss on the "prevailing" question, or some major abuse of the judicial process by the plaintiff). The text itself suggests that the trial court cannot award even a partly prevailing plaintiff an *in*appropriate portion, or *un*reasonable fees, or *deny* fees altogether, absent such a spectrum-edge exception.[12]

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[10] In the very recent case of *James Township v Rice*, __ Mich __, Docket No 163053 (June 22, 2022), this Court used the FOIA's attorney fees provision as a counterpoint to the materially different fees provision of the Right to Farm Act (RTFA), MCL 286.473b. *Id.*, at *7, n 15. But the Court did so without the benefit of the FOIA history, case law, and discussion above. Amici believe that the dicta in *James Township* misreads the FOIA – and that the better reading is that described here.

[11] https://dictionary.cambridge.org/us/dictionary/english/appropriate

[12] It is only in such outlier cases that a recovery of attorney fees against an unsuccessful plaintiff might be appropriate, if such a reading of the statute is even possible. The better reading of the

Footnote continued on next page.

1. FOIA Should Be Interpreted Liberally in Plaintiffs' Favor

The FOIA is to be construed "liberally to enforce its stated objectives." *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 732-34 (1987) (finding that plaintiff prevailed completely and was entitled to fees even though defendant had disposed of the requested documents and plaintiff got none of the requested information, but "was successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA"); *Amberg*, 497 Mich 28, 33, n 4 (2014) (where a public body withholds documents in violation of the FOIA, plaintiffs "should not bear the *additional* burden of shouldering the cost of a lawsuit to obtain that access," even where the agency produced the documents after the lawsuit was filed but before the lawsuit was decided); *Hartzell v Mayville Community School Dist*, 183 Mich App 782, 789-90 (1990) (plaintiff prevailed and was entitled to fees where the lawsuit had a "causative effect on the disclosure of the nonexistence of the requested document."). As *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 641 (1998), noted:

> The statute has in common with the state's liberal discovery rules that it came into existence as a manifestation of the trend to disclose information that previously had generally been kept secret. The FOIA embodies this state's strong public policy

statute is that the phrase "if a person or public body prevails in part," while inartfully drafted, merely states the obvious: if the plaintiff prevails in part, then perforce the public body also prevails in part. Context makes this clear. The final sentence of Part 6, which describes where fees shall be assessed, refers only to the "public body." Amici also note that, like the "all or" language addressed above, the insertion of the words "or public body" into the 1997 law went unmentioned in the statutory history of the amendment. This, too, suggests that no structural change – as to who could get fees – was intended.

Even if the statute could be interpreted to allow the public body to recover fees, the FOIA's purpose mandates that plaintiffs and the public body be treated differently with respect to attorney fees. Such is generally the case with fee shifting statutes. For example, the ADA's attorney fees provision simply provides that a prevailing party may, in the court's discretion, recover fees. However, although both defendants and plaintiffs may "prevail" and therefore recover fees under the ADA, the standard for awarding fees to defendants is significantly higher: an award of fees to a defendant is appropriate only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation . . ." *Michigan Flyer LLC v Wayne County Airport Authority*, 860 F 3d 425, 433 (CA 6, 2017) (citing *Christiansburg Garment Co v EEOC*, 434 US 412, 421–22 (1978). The purpose of this heightened standard is to reduce the "chilling effect on a plaintiff who seeks to enforce his/her . . . rights." *Id*. A similar heightened standard is necessary in the Michigan FOIA context.

> favoring public access to government information, recognizing the need that citizens be informed as they exercise their role in a democracy, and the need to hold public officials accountable for the manner in which they discharge their duties.

2. Fees Should Be Based on the Work Done to Attain the Level of Success Achieved

Where fee shifting is the engine that drives the FOIA, which in turn accomplishes the policy goal of ensuring public access to information, the "appropriate portion" of a fee award should mean the amount, giving the plaintiff the benefit of the doubt, of the reasonable hours worked to achieve the overall results obtained. That is how nearly all federal fee-shifting laws are applied. As the Supreme Court explained in *Hensley*, 461 US at 435, in most cases

> [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

See also Hanrahan v Hampton, 446 US 754, 758 n 4 (1980) (noting that Section 1988 "was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k), and § 402 of the Voting Rights Act Amendments of 1975").

In determining "reasonable fees" under federal laws, the trial courts are instructed to do "rough justice," and not "act as 'green-eyeshade accountants' and 'achieve auditing perfection.'" *Northeast Ohio Coalition for the Homeless v Husted*, 831 F3d 686, 703 (CA 6, 2016) (quoting *Fox v Vice*, 563 US 826, 838 (2011)). This means that a trial court can rely on estimates based on its "overall sense of the suit," *id*., with the understanding that fees should *not* be awarded "only for claims that bore no relation to the grant of relief or were otherwise frivolous." *Hescott v City of Saginaw*, 757 F3d 518, 526 (CA 6, 2014) (cleaned up). The amount of fees "fairly allocable to the

successful portion" of a plaintiff's FOIA case should be determined in the same way, based on the reasonable work performed to get the successful result obtained.

The trial court's exercise of discretion in making this determination cannot be a mere "document request fraction," where the court simply compares the number of requests made to the number of items received. Such an approach does not "fairly allocate" the plaintiff's fees to the overall result. For example, suppose three of ten documents requested by a plaintiff fall close to the edge of a FOIA exemption, whereas the other seven documents do not. Suppose that those first three documents also contain the central information sought by the plaintiff, and are each many pages long, whereas the other seven documents are short and contain only marginally important information. If the lawyers spend the majority of their time litigating the complex exemption questions related to the first three documents and end up getting all three of them, but do not get any of the other seven, would it be reasonable to conclude that the "successful portion" of the plaintiff's case was only 30%? Certainly not. Nor would it be reasonable to conclude that the lawyers had won 70% of the case if they had obtained only the other seven documents. Yet that is what often happens today.

Even in a situation where all ten documents sought are more or less equal in exemption complexity, value, and length, getting three of ten documents does not automatically make 30% of the attorney's fees "fairly allocable" to those three documents. To bring a FOIA action, the attorney must interview the client, review the potential defendant's response to the request, assess the merit of potential claims or arguments, research the applicable law, draft a complaint and briefs, possibly engage in discovery, and appear in court for motions and hearings. The lawyers' total time spent obtaining the three documents – because of the necessary overlap – will almost always be more than 30% of the total reasonable hours invested in the case. *See Hescott,* 757 F3d at 526.

And what if the attorneys recover only those three documents, but in the process expose and end a statewide policy of illegally denying FOIA requests? Such an outcome, given the FOIA's policy goal of ensuring the public's access to information and its "private attorney general enforcement mechanism," is surely worth more than 30% of their reasonable fees. Indeed, Plaintiffs' revealing Defendant's illegal FOIA policy in this case merits consideration independent of the fraction of requested information that they got (which, in any event, was all of the information they requested).[13]

This standard furthers the purpose of the FOIA's attorney fees provision and, in turn, the FOIA itself. If the Court of Appeals' conclusion, that a trial court has discretion to award low or no attorney fees simply because it determines that a plaintiff prevailed less than 100%, is allowed to stand, litigants and lawyers will be discouraged from bringing these actions, and the important public policies identified by the legislature when it enacted the FOIA will suffer. This Court should expressly adopt the standard described 40 years ago in *Kestenbaum* and adopted in *Dawkins* as the only standard consistent with the language and spirit of the FOIA. At the least, the Court should make clear that, as to *all* prevailing plaintiffs in FOIA cases, lower courts abuse their discretion if they fail to award "all or an appropriate portion of reasonable attorneys' fees" based on the actual work performed and hours billed, in light of the overall results obtained.

E. Applying the "Fairly Allocable" Standard, Plaintiffs Here Are Entitled to Reasonable Fees Regardless of Whether Their Victory Was Technically "Complete" or "Partial"

This case demonstrates the practicality and sense of the *Kestenbaum/Dawkins* "fairly allocable" standard. Under that standard, Plaintiffs no longer live or die by whether they prevailed

[13] We do not suggest that the MDOC's bad faith should be a factor in the amount of fees, but rather that in this case part of the "win" was exposing (and presumably ending) an illegal agency policy, to the public's benefit.

"completely" or "in part." Either way, they are ***entitled*** to whatever amount of their fees is fairly allocable to the successful portion of their ***case***. Here, even if the trial court were to decide that the redactions mattered substantively, and that Plaintiffs therefore got less than 100% of what they wanted, that finding should have a negligible effect on the fee award, in light of what Plaintiffs got and the legal work required to get it. *See Kestenbaum*, 414 Mich at 566. In this way, Plaintiffs' "appropriate portion" of attorney fees is predictably and fairly tied to the overall results that they obtained in the litigation. Anything far off 100% of their reasonable fees would be an abuse of discretion.

This result is also consistent with this Court's early holding in *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432 (1985). In finding that the plaintiff was "entitled" to recover attorney fees, this Court there noted that the plaintiff's victory, while not "total," was "still a very substantial one, and [the plaintiff] has obtained everything it initially sought." *Id*. at 455 This was true despite the fact that the Court of Appeals had imposed use restrictions on the disclosed information. Put differently, regardless of whether the Court applied the first or second part of the attorney fees provision, the negligible limitations on the plaintiff's success did not bar an award of fees (or make it a zero to 100% discretionary decision).

The limitations in *Int'l Union*, much like the "redactions" here, pertained to identification of security guards, which in both cases the plaintiffs did not contest. *Id*. at 455, n. 47 (in relation to its observation that the union "arguably . . . did not prevail completely," the Court directed attention to footnote 43, where it said, *inter alia*, that the union never objected to the use restrictions and their validity was not determined.) So too here: the negligible limitations (if they can be called that) on Plaintiffs' victory were not disputed, and they, like the plaintiff in *Int'l Union*, are therefore entitled to all or nearly all of their reasonable attorney fees.

II. THE TRIAL COURT ERRED BY REDUCING HONIGMAN'S FEE 90% BECAUSE THE CASE WAS DONE PRO BONO, AND THE COURT OF APPEALS COMPOUNDED THE ERROR BY DIRECTING THE TRIAL COURT ON REMAND TO CONSIDER THE PRO BONO NATURE OF THE CASE

A. The Justice Gap in the United States

The civil legal system has a dramatic impact on low income people. The federal Legal Services Corporation (LSC) estimates that 74% of low income households have at least one civil legal problem each year. LSC, "Justice Gap Report," April 2022.[14] These problems cross many legal areas, with the highest volume of cases involving consumer disputes, access to health care, income support programs, and housing problems. *Id.* Because many legal problems are directly poverty-related, these problems tend to snowball: 39% of low income households experience five or more legal problems per year. *Id*. Typically there is no right to counsel in civil legal cases; to the extent that such rights have been recognized, they cover a tiny fraction of the millions of legal problems facing low income people each year.

Until the beginning of the 20th century, private lawyers (often through court-sponsored assignment programs) provided representation for the poor. Reginal Heber Smith, *Justice and the Poor*, New York, Carnegie Foundation for the Advancement of Teaching (1919). This obligation arose from the earliest versions of the lawyer's oath.[15] Although the term "pro bono" was not widely used, the system for providing access to the courts for low income people was, in effect, a 100% pro bono system.

[14] https://justicegap.lsc.gov/the-report/, at p 8.

[15] The "duty to serve the poor" is first noted in the French lawyer's oath from 1534. In the United States, the most recognized early oath was the Field Code, proposed by David Dudley Field in 1848 and adopted initially by the state of New York and later by "at least 17 states." The Field Code required lawyers "never to reject, for considerations personal to myself, the cause of the defenseless or the oppressed." Carol Rice Andrews, "The Lawyer's Oath, Both Ancient and Modern," 22 Geo J Legal Ethics 3 (2009) at pp 16-17 and pp 31-32.

The influx of impoverished immigrants into America's cities, however, overwhelmed the "voluntary system." Heber Smith, at p 220. In the early 20th century, legal aid societies grew up in many cities. Heber Smith, at pp 134-140. These early programs were created by charities, local government, bar associations, and law schools. Heber Smith, at p 169.

Over the course of the 20th century, additional legal aid programs were created. By 1965, "virtually every major city in the United States had some kind of legal aid program," and there were 236 programs across the country. Alan Houseman and Linda Perle, "Securing Justice for All, A Brief History of Civil Legal Assistance" (2018).[16] In 1964, the federal Office of Economic Opportunity (OEO) was created through Pub L 88-452. Houseman and Perle, at p 11. Two years later, the first national legal services program was created through amendments to the OEO Act. *Id*. The federal LSC Act was passed eight years later. 42 USC 2966 (1974).

Despite these efforts to expand the number of attorneys serving the poor, the vast majority of the legal needs of the poor remains unmet. The April 2022 LSC study found that 92% of the legal problems experienced by low income persons received inadequate legal assistance or no legal assistance at all. Justice Gap Report, at p 8.

B. The Role of Pro Bono in Lessening the Justice Gap

The legal aid system in the United States grew out of the bar's 19th century systems for providing counsel for the poor. From the outset, however, that system was built on partnerships between organized legal aid programs and the private bar. *See* Heber Smith, at pp 226-230 ("There is a direct relationship between legal aid organizations and members of the bar, both as individual attorneys and as a collective body.").

> The legal aid societies need leadership, moral support, and financial support. [This support is] essential to the well-being of every legal aid organization. One fact

[16] https://www.clasp.org/wp-content/uploads/2022/01/2018_securingequaljustice.pdf, at p 8.

> which very forcibly strikes the observer of the work in different cities is that legal aid success or failure goes hand in hand with good or bad support from the bar.

Heber Smith, at p 234. In response to Heber Smith's study, in 1920 the American Bar Association created the Special Committee on Legal Aid Work. That committee, now called the Standing Committee on Legal Aid and Indigent Defense (SCLAID), continues to meet. It is the ABA's oldest still-extant standing committee.[17]

As legal aid programs transformed from local societies to a federally funded and regulated and coordinated program, this historical relationship was formalized. Beginning in the early 1980s, the ABA and LSC "made significant effort . . . to involve private attorneys in the delivery of civil legal services." Houseman and Perle, at p 26. The mandate that legal aid programs significantly involve the private bar in their delivery models is codified at 45 CFR 1614: "Private attorney involvement shall be an integral part of a total local program . . . This [regulation] is designed to ensure that recipients of LSC funds involve private attorneys . . . in the delivery of legal information and legal assistance to eligible clients." 45 CFR 1614.1. The regulation mandates that LSC grantees "devote an amount equal to at least . . . 12.5% of the recipient's [annual grant] to the involvement of private attorneys . . ." 45 CFR 1614.2.

This program mandate is mirrored on the private attorney side by the ABA's Model Rule of Professional Conduct 6.1, which states that every "lawyer should aspire to render at least (50) hours of pro bono public legal services per year." Some version of the ABA model rule has been adopted by every state except Texas.[18] Michigan's pro bono rule (MRPC 6.1) is modeled on the 1983 version of the ABA rule.

[17] https://www.americanbar.org/groups/legal_aid_indigent_defense/about-us/sclaid-100/a-century-of-sclaid/

[18] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-6-1.pdf

The State Bar of Michigan has long been recognized as a leader in its support of pro bono efforts by its members. The bar's representative assembly first adopted its voluntary pro bono standard in 1990, and that standard has been updated since then as Michigan's pro bono programs have matured.[19] The bar's extensive programs to encourage and support pro bono efforts are summarized on the bar's "A Lawyer Helps" webpage.[20]

Springing from these mutual obligations and buttressed by over 40 years of collaborative work, every legal aid program has an established system for involving private volunteer lawyers in its service delivery system. And virtually every bar association (national, state, local, or specialty) has an established system for engaging and supporting its local legal aid program.

C. The Role of the Court in Assuring Access to Justice

In the last decade, there has been a growing recognition that assuring equal access to the justice system is not just an obligation of individual attorneys but an obligation of the court system itself. This leadership comes from the highest level of the judiciary. *See, e.g.,* Conference of Chief Justices – Conference of State Court Administrators Joint Resolution 5 (2015) (recognizing that "the Judicial Branch has the primary leadership responsibility to ensure access" and supporting the "aspirational goal of 100 percent access to effective assistance" for essential civil legal needs.)

The Michigan Supreme Court has long been a recognized leader in these national efforts. In announcing the Court's Language Access Court Rules in 2013, Chief Justice Robert Young, Jr. noted that the rule implemented the Court's goal of "ensur[ing] that every court in our state will provide meaningful access to our legal system for those who need it."[21] This Court has consistently

[19] https://www.michbar.org/programs/atj/voluntarystds

[20] https://www.michbar.org/alawyerhelps/probonoservmi

[21] *Legal News,* September 13, 2013. Available at http://www.legalnews.com/detroit/1380368/. Last visited July 7, 2022.

provided leadership in access to justice, as evidenced by its support for a series of programs and administrative rules that increase access to the court system for low-income and pro se litigants, which include its partnership with Michigan Legal Help,[22] realistic and meaningful fee waiver policies,[23] the Cell Phone Court Rule,[24] the Justice For All Commission,[25] and others. Many Court efforts, and the ethical considerations at play in the Court's leadership in these efforts, are summarized in a recent law review article by the Chief Justice. McCormack, Bridget Mary, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L. JOURNAL 125 (2021).

Amici are not suggesting that the Court's commitment to access to justice should change how it reads the law. But as Justice McCormack recognizes, judges are "critical witnesses" who have a unique perspective on how the system operates.[26] *Id.* Both the Court's commitment to "100% access" and its understanding of the role of pro bono in providing that access can inform its understanding of the intent of fee shifting statutes like the provision at issue here.

D. The Role of Fee-Shifting Statutes in Increasing Access to Justice

The traditional "American rule" is that parties to litigation pay for their own attorneys, win or lose. The classic exception to the rule, and the most influential of fee-shifting laws, is the federal Civil Rights Attorney's Fees Act, 42 USC § 1988 (1976). As the Senate Report on that bill noted, fee-shifting is essential if laws granting key rights "are not to become mere hollow pronouncements which the average citizen cannot enforce." Sen Rep No 94-011, at 6 (1976). Sen. Ted

[22] https://michiganlegalhelp.org/

[23] *See* MCR 2.002.

[24] *See* MCR 8.115(C).

[25] https://www.courts.michigan.gov/administration/special-initiatives/justice-for-all-commission/

[26] "Judges have high-quality and unique information about the system they oversee . . . As direct witnesses to the daily experiences of people navigating legal problems, judges have critical information about what reforms are needed, as well as ideas on how such reforms can be implemented." *Id*.

Kennedy, who sponsored the amended version of the Fees Act, put it this way: "Long experience has demonstrated . . . that Government enforcement alone cannot accomplish [compliance with such laws].… Fee shifting provides a mechanism which can give [these laws] full effect . . . at no added cost to the Government." 122 Cong Rec 31, 472 (1976).[27] Enforcement litigation "is thus private in form only," because if plaintiffs obtain relief, they do so not for themselves alone but also as "'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority." *Newman v Piggie Park Enterprises, Inc,* 390 US 400, 401-02 (1968) (per curiam). Absent fee-shifting, the courthouse doors would be barred to those who cannot pay for private counsel, especially in cases seeking only modest damages or equitable relief, where the potential return is too low to entice private lawyers to take the case.

The Fees Act passed by big majorities in the House and Senate. *See* Jeffrey S. Brand, The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees, 69 TEX L REV 291, 309–15, 364 n 422 (1990) (noting that the more than 300 pages of statutory history contained almost no disagreement). Based on that history, Brand identifies the Fees Act's four intended "benchmarks" as (1) attracting lawyers for private enforcement; (2) increasing the number of enforcement actions by increasing access to such lawyers; (3) ensuring competitive

[27] Perhaps the most eloquent statement of the bill's purpose was made by its original sponsor: "The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all. Although some of these laws can be enforced by the Justice Department or other federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of law.... But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire nation, not just the individual citizen, suffers." 122 Cong Rec 33, 313 (1976) (statement of Sen. Tunney).

rates to accomplish (1) and (2); and (4) promoting close supervision of fee issues by the trial courts. *Id.*

In the decades since 1976, Congress and state legislatures have passed fee-shifting laws across a wide range of important rights, which include getting public information from government entities under Freedom of Information Acts. Such laws implicitly adopt the "private attorneys general" rationale of the Fees Act, whereby "prevailing parties" are awarded "reasonable attorney fees and costs."

Fee-shifting laws are an important dimension for almost every pro bono program because they incentivize lawyers to accept pro bono cases that they might otherwise not accept. As a general rule, fee-shifting statutes apply to more complex litigation, often against governmental entities or large corporations with deep resources and sophisticated counsel. Many firms are more likely to accept complex pro bono cases when there is some possibility of compensation at the end of the case. Both legal aid programs and private counsel are acutely aware of the possibility of fees when they screen and refer cases (on the program side) or accept cases (on the law firm side).

The Pro Bono Institute, a nonprofit organization whose mission is to assist law firms in complying with the ethical rule regarding pro bono, has specifically addressed the relationship between fee-shifting statutes and pro bono work. Pro Bono Institute, "What Counts? A Compilation of Questions and Answers Interpreting Law Firm Pro Bono Challenge Statement of Principles" (2019).[28] The institute makes clear that, if a law firm accepts a case as a pro bono case, a later fee award "will not change it from being a pro bono matter." *Id*., at p 12. Indeed, the institute expressly *encourages* firms to seek fees for their pro bono work:

In handling cases in the public interest, law firms are acting as "private attorneys

[28] http://www.probonoinst.org/wp-content/uploads/Law-Firm-Challenge-Commentary-2017-1.pdf; http://www.probonoinst.org/wp-content/uploads/Whatcounts2019-6-11.pdf

> 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 their usual and customary billing rates. *Id.*

Assuring that firms that accept public interest cases on a pro bono basis are fairly compensated if the case is subject to a fee-shifting statute and if the pro bono client prevails is an important benefit to almost all pro bono programs. Permitting courts to devalue this work – as the trial court and Court of Appeals did in this case – will make it less likely that programs will be able to refer and that firms will be able accept difficult cases, and thus will undermine access to justice in Michigan in addition to undermining the purpose of the FOIA.

E. The 90% Reduction Is Not Supported by the Statute or by Case Law

Once the *entitlement* to fees is determined, the case law describing the process for *calculating* fees is reasonably straightforward. The "touchstone in the determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is reasonableness." *Prins v Mich State Police*, 299 Mich App 634, 642 (2013). As noted above, in determining a reasonable fee, the court "should begin its analysis by determining the fee customarily charged in the locality for similar legal services" and "this number should be multiplied by the reasonable number of hours expended on the case." *Smith v Khouri*, 481 Mich 519, 530 (2008).[29] *Smith* also recognizes that courts may consider several other factors to determine whether an adjustment up or down is appropriate. *Id.* at 529-30. *See also Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016).[30] While the *Smith-Pirgu* factors suggest that a fee *increase* might be appropriate in fee-shifting cases like the case at

[29] In the case at bar, despite Defendants' arguments to the contrary, the trial court found that hours and rates requested by Plaintiffs' counsel "were not unreasonable." Appellants' Appendix 590a, Fee Order, Para. 2-3.

[30] *Prins* held that the *Smith* principles apply to FOIA cases. 299 Mich App at 645.

bar (to reflect the risk of getting no fees at all for a loss), they do not include a fee reduction for pro bono cases. *Smith*, 481 Mich at 530.

Similarly, the FOIA itself contains no authorization for a court to reduce a prevailing party's fees if the case is a pro bono case. The statute makes the award of fees mandatory without reference to the relationship between the person requesting the record and their attorney: "If a person . . . prevails in an action commenced under this section . . . the Court shall award reasonable attorneys' fees . . . ." MCL 15.240(6). Indeed, an authorization not to award fees in pro bono cases would run counter to the purpose of the FOIA's attorney fees provision. See Section I, *supra*.

The argument that pro bono representation justifies a reduction in fees to a prevailing plaintiff has been explicitly rejected by the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit. In *Blanchard v Bergeron*, the U.S. Supreme Court made clear 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). Looking at the language of federal fee-shifting statutes, the Court noted that "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." *Blum v Stenson*, 465 US 886, 894 (1984). And nearly thirty years later, in *Turner v Commissioner of Social Sec*, 680 F3d 721, 724 (CA 6, 2012), the Sixth Circuit observed that "it is 'well settled' that the existence of [a] . . . 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."[31] Because the Michigan FOIA should be interpreted the same way as the federal fee provisions at issue in those cases, the result should be the same here.

[31] Plaintiffs' brief summarizes the cases in detail, so Amici will not repeat them. *See* Plaintiffs' Supplemental Brief, at pp 19-22.

Amici are not aware of any Michigan appellate decision to the contrary, and both state and federal courts routinely award attorneys' fees without regard to the "pro bono nature" of the representation. *See* Plaintiffs' Supplemental Brief at pp 19-24. Moreover, *Laracey v Financial Institutions Bureau*, 163 Mich App 437 (1987), which Defendant has cited, is not to the contrary, because that case concerned only the question of whether an attorney proceeding as a *pro se* plaintiff was entitled to attorney fees. None of the rationales for the rule that *pro se* plaintiffs cannot recover attorney fees warrants denial of fees in this context, where Plaintiffs were represented by attorneys (even if acting pro bono). First, fee-shifting statutes are designed to remove the financial barrier that deters potential litigants from bringing meritorious actions, and attorney fees are no barrier to attorneys who wish to litigate their own cases. Second, while fee shifting statutes can advance the goal of avoiding unnecessary litigation by encouraging potential litigants to seek legal advice before filing suit, that goal is inapplicable to attorneys proceeding *pro se*. Finally, the concern of abusive fee-generating practices identified in the context of attorneys proceeding *pro se* is absent in cases where the plaintiffs are represented by counsel (whether paid or pro bono) and the fees go to the plaintiff's counsel or to reimburse the plaintiff. *See Kirk v Arnold*, 157 NE3d 1111, 1118-1121 (Ill App 2020).

Likewise, it makes no difference whether the plaintiffs personally incur the fees at issue. Thus, in *Swickard v Wayne Medical Examiner*, 196 Mich App 98 (1992), the defendant argued that the plaintiff was not entitled to FOIA fees because he did not personally incur the cost of fees, because his employer, the Detroit Free Press, financed and paid for the litigation. The court rejected that argument and upheld the lower court's decision awarding fees. *Id*. at 101.

In sum, the award of attorney fees to pro bono counsel directly furthers the intent of the FOIA statute. Moreover, the possibility of fee shifting is a critical part of pro bono programs, both

from the referring agency side and from the firm side. Because fee shifting encourages pro bono work, it increases access to the legal system for low income persons and public interest organizations. This Court should make clear that the pro bono nature of an attorney's representation is never a legitimate justification to reduce fees, and that, if anything, such circumstances may only be considered a reason to enhance fees under the *Smith-Pirgu* factors (because the receipt of any fee is uncertain at the time the case is filed (Factor 8)).

CONCLUSION

In sum, Amici make two requests to this Court: (1) rather than focus on a fact-specific "prevailed completely" analysis, or on a formulaic "fraction of the requests obtained" standard, the Court should provide much-needed guidance to the lower courts on FOIA fee issues by adopting the "fairly allocable" standard advanced forty years ago in *Kestenbaum* and *Dawkins*. This is the only standard consistent both with the language and purpose of the FOIA's attorney fees provision and with other fee-shifting laws. (2) The Court should further hold that the pro bono nature of a plaintiff's representation is never a basis to reduce an attorney fees award.

Respectfully submitted,

Dated: August 1, 2022

/s/ Nicholas A. Gable (P79069)
Robert F. Gillett (P29119)*
Paul D. Reingold (P27594)*
Counsel for Amici
DISABILITY RIGHTS MICHIGAN
4095 Legacy Pkwy
Lansing, MI 48911
(517) 487-1755

*Affiliate counsel