STATE OF MICHIGAN

IN THE SUPREME COURT

CAROL BETH LITKOUHI,

Plaintiff - Appellant,

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT,

Defendant - Appellee.

MSC Case No: _____

Court of Appeals Case No. 364409

L/C Case No. 22-193088-CZ

Hon. Jacob James Cunningham

MACKINAC CENTER LEGAL FOUNDATION
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Attorneys for Plaintiff-Appellant
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

JACKSON LEWIS P.C.
Timothy J. Ryan (P40990)
Attorneys for Defendant-Appellee
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.301(A)(2) to grant leave to appeal from the Court of Appeals' opinion entered on February 22, 2024.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant Carol Beth Litkouhi seeks leave to appeal the Court of Appeals' February 22, 2024, opinion affirming the Oakland County Circuit Court's judgment in favor of Defendant. The opinion found that documents produced and held by teachers and other local government employees are not subject to disclosure under FOIA. Plaintiff respectfully requests this Court grant leave to appeal and reverse the lower courts.

STATEMENT OF QUESTIONS PRESENTED

1. Michigan requires that public records, with certain specific exemptions, be provided to members of the public under the Freedom of Information Act. Defendant-Appellee maintained, and the lower courts agreed, that a document or record produced and held by a teacher or other employee of a local government unit produced in the performance of their duty need not be disclosed under FOIA because that employee is not a "public body." Were the lower courts correct when they held that documents and records produced and held by local government employees were not subject to FOIA?

Court of Appeals says:	Yes
Plaintiff says:	No
Defendant says:	Yes
Trial court says:	Yes

2. Generally, a party cannot raise a new issue in an appellate court if that issue was not raised and preserved at the trial court. But is citing a different authority and making a modified argument in the Court of Appeals in support of the same issue raised in the trial court the same thing as raising an entirely new issue?

Court of Appeals says:	Yes
Plaintiff says:	No
Defendant says:	Yes

   Trial court did not address this issue.

3. This Court has dealt with, but not concretely answered, the question of whether local government employees are common-law agents of their government employer in a way that makes the documents they produce and hold become documents produced and held by their public employer. Should this court hear and decide the question of the application of common-law agency to local government employees in the FOIA context?

Court of Appeals says:	No
Plaintiff says:	Yes
Defendant says:	No

   Trial court did not address this issue.

INTRODUCTION AND REASONS FOR GRANTING LEAVE

This case originates from Plaintiff-Appellant, the parent of a student, using the Freedom of Information Act (FOIA) to request copies of classroom materials used to teach students about race and gender in a specific high school class.

The request was substantively denied by the defendant school district, which maintained that documents and records created and held by a public-school teacher are not subject to FOIA because a teacher is not a "public body" under its reading of FOIA's statutes. FOIA specifies that certain education-related documents and records are exempt from its requirements, but the Act and caselaw provide no blanket exemption for records produced and held by a teacher or other local government employee. The lower courts found that local government public employees are not "public bodies" within the meaning of FOIA.

The results of this holding could have great significance as they would hollow out both FOIA and the case law that has interpreted it. Never have our courts held that materials produced by someone who was unquestionably a public employee acting in the performance of an official duty are exempt from FOIA. If the Court of Appeals' opinion here stands, the courts will have to determine for every FOIA request made to local governments whether the documents sought were held by an employee or by an administrator, and in what location and capacity it was held. Decades of jurisprudence will have to be rewritten to account for this novel interpretation of FOIA.

After the trial court ruled as it did, Plaintiff-Appellant expanded her argument regarding the issue of whether such records were public records covered by FOIA. Plaintiff-Appellant showed that, in addition to creating FOIA, the state has established a comprehensive scheme governing public records and their retention. It has done so through statutes and rules promulgated by the Department of Technology Management and Budget (DTMB). Notably, Plaintiff-Appellant

did not assert that the DTMB statutes and rules provided her with another cause of action, nor even that these were dispositive. Rather, Plaintiff-Appellant used this authority to show that records such as she sought were considered public records, and that the two acts governing public records should be read together when questions of interpretation arise.

The Court of Appeals, however, said that consideration of the proffered DTMB statutes and rules were a new issue that Plaintiff-Appellant had not raised in the trial court, and therefore it could not be considered on appeal. Michigan generally precludes the raising of new issues on appeal that were not raised in the trial court. However, the new framing of arguments and the presentation of additional authority are not usually considered a new "issue." This is true in the federal courts and has generally been true here in Michigan. But there is some authority in our case law that new arguments are barred the same as new issues. This Court should take this opportunity to clarify this matter, and Plaintiff-Appellant requests that Michigan adopt a standard similar to the federal courts – hold that citing different or additional arguments and authorities in support of an existing issue are not the same as raising a new issue. This would be consistent with the notion that issues are refined and sharpened as they go through the appellate process.

Lastly, the issue of whether a local government employee is an agent for his public employer in the FOIA context was before this court recently in *Bisio v City of the Village of Clarkston*, 506 Mich 37 (2020). But the issue of agency was not concretely addressed, with the matter being resolved on other grounds. This case would be a good vehicle to revisit the matter of agency concepts as applied to FOIA. As such, Plaintiff-Appellant requests that the matter be resolved and that this Court hold that the common law of agency can be applied to public employees in the FOIA context.

All three of these questions involve questions of significant public interest and involve subdivisions of the state. FOIA is meant to provide the public complete and unfettered information about their public officials and their work. Additionally, defining what is an issue for the purposes of issue preclusion involves a legal principle of major importance to the state's jurisprudence.

BACKGROUND

The parties

The Plaintiff-Appellant, Carol Beth Litkouhi, is a parent within the Defendant-Appellee Rochester Community School District (the "District") who, despite repeated attempts, has been stymied in her attempts to obtain records relating to the District's curriculum and classroom materials.

This case deals with a matter of significant public interest - namely, the ability of people to use FOIA to obtain records produced or used by local governments. More specifically, it is about the ability of parents and others to ensure schools are transparent about the lessons being taught to the children they serve. The need for transparency in this particular area is essential, as it affords parents the opportunity to understand what their children are learning, and to engage fully with local government officials about curricula, curriculum materials, and classroom instruction.

Plaintiff-Appellant's FOIA request

On December 14, 2021, Plaintiff-Appellant submitted a FOIA request to the District for the production of records relating to a "History of Ethnic and Gender Studies" course that had been taught by at least one of the District's member schools. The District responded to Plaintiff's request by partially granting it. Specifically, the District provided a unit plan for the semester. The remainder of her request for classroom materials and other records relating to the course was denied.

After receiving the District's response, Plaintiff-Appellant filed an administrative appeal on January 19, 2022, in an attempt to obtain a response containing the remaining materials she had requested. In this appeal, Plaintiff-Appellant specifically noted that, unless no teacher-prepared

materials had been distributed to students as part of the course, responsive records necessarily had to exist as the course had already been taught. Plaintiff-Appellant further explained that, despite numerous attempts to obtain the requested records through FOIA and alternate means, she had been repeatedly rebuffed.

The District responded to Plaintiff-Appellant's administrative appeal on February 8, 2022 by denying it. In its denial, the District emphasized that it had provided those responsive records the District knew of, and denied the remainder of Plaintiff-Appellant's appeal on the grounds that no responsive materials existed. The District failed to address any specific argument raised in Plaintiff-Appellant's administrative appeal, including the fact that the District's position would inherently mean that no classroom materials had been produced in a course that had been actively taught for over six months. The District seemed to indicate that it did not have any such documents in the possession of the District's administration.

The trial court resolution

In light of the District's partial denial of Plaintiff-Appellant's December 14, 2022 request, Plaintiff-Appellant brought this action against the District in the Oakland County Circuit Court.

After answering the complaint, the District sent a Request for Production of Documents to the Appellant-Plaintiff. Such a request is unusual, since a requestor's reasons for making a FOIA request are generally irrelevant to whether it must be filled. See, *Swickard v Wayne County Medical Examiner*, 184 Mich App 662, 666 (1990). The District also sought to depose the FOIA requestor. Plaintiff-Appellant moved to quash the noticed deposition. On that date of the hearing on the motion to quash, the parties engaged in a pre-motion discovery mediation. During mediation the parties recognized that this case presented two purely legal issues, which, depending on how

the court ruled on those issues, could resolve the case and render discovery unnecessary.[1] Following this mediation, oral argument was held on August 31, 2022. At the time the trial court heard the parties on the issues and the discovery disputes. This was the only oral argument or hearing at which the parties appeared before the trial court.

Following the August 31 hearing, the court entered a stipulated order under which the defendant District would file a motion for summary disposition on the question of whether it was "required to search for or produce records which may be in the possession of individual teachers." Stipulated Order of September 16, 2022, at Appendix page 3. Recognizing this determination would be dispositive, the parties agreed that "Discovery will be stayed pending the Court's ruling on the summary disposition motions." *Id*. The parties also waived the right to oral argument on the summary disposition motions to expedite the proceedings. *Id*. The parties submitted cross-motions for summary disposition and briefed the issue of a school district's duty to search for and provide records in the possession of an individual teacher. On December 15, 2022, the trial court issued its final order in this matter (Trial Court Order, Appendix at pages 4-10), which the Plaintiff-Appellant timely appealed.

The lower court dismissed the matter on Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) deciding that "Plaintiff['s] complaint fails to state a claim on which relief sought can be granted." Trial Court Opinion in the Appendix at page 9. The trial court found that school district employees are not subject to FOIA:

> MCL 15.232(h)(i) specifically provides employees of the executive branch state government are included in the definition of a "public body", but subsection (iii) specifically identifies "school district[s]" (notably not listing separately the district employees) as "public bodies." Because the Legislature specifically did not indicate individual employees of school districts are within the meaning of "public bodies,"

[1] One of those issues, relating to copyrighted materials, was resolved by the parties and dismissed by stipulation entered by the lower court on October 3, 2022. It is not at issue here.

> the Court is left with a conviction that the Legislature did not intend for a public school district's employees to be included in the definition of "public bodies" relative to FOIA. A review of the provided case law and [sic] does not lead the Court to a conclusion that public school teachers, and their individual work product, are discoverable "public records" of "public bodies" in accordance with FOIA.

Trial Court Opinion at Appendix page 8 (internal citation omitted).

The Court of Appeals affirms the trial court

Plaintiff appealed, and the Court of Appeals affirmed the lower court. "Public school teachers are not included in the definition of 'public body' and therefore records created and retained by individual teachers are not public records subject to disclosure for purposes of FOIA." COA Opinion February 22, 2024, slip copy at Appendix page 20. "In conclusion, public school teachers do not qualify as 'public bodies' for purposes of MCL 15.232(h)(i) or (iii) of FOIA. Their records are therefore not subject to disclosure under FOIA under those provisions. Any suggestion by Litkouhi that this Court should read public school teachers or public employees generally into the definition of public body in MCL 15.232(h) is improper; her efforts are more appropriately directed to the Legislature." *Id*., at 23.

When briefing the appeal, Plaintiff-Appellant made an additional argument to show that FOIA, along with another Act, provides a comprehensive legislative scheme for public documents. Plaintiff-Appellant showed that the Management and Budget Act, MCL 18.1284 *et seq*., provides rules and directives for document retention, and that documents of the kind sought by Plaintiff-Appellant were identified as such public records. Rules of statutory construction require that related statutes to be read together as closely as possible to provide meaning and context. The Court of Appeals refused to hear or consider this additional argument because it had not been made in the trial court and was therefore not preserved and waived. "Litkouhi did not raise her argument

related to the Management and Budget Act below, and the trial court did not address or decide it, so that aspect of her argument is unpreserved." COA Opinion at Appendix page 16, n 5.

Plaintiff-Appellant had preserved the issue of common-law agency relationships and requested that the court revisit the issue as initially ordered in *Bisio v City of the Village of Clarkston*, 506 Mich 37 (2020). The Court of Appeals did not address the matter of common-law agency, and instead resolved the case through statutory interpretation. The court stated: "Further, although 'school district' is included in MCL 15.232(h)(iii), and, public school teachers work at public schools which are part of school districts, this is akin to the agency-agent distinction the Supreme Court rejected in *Breighner*. See *Breighner*, 471 Mich at 231-233 (holding that 'agency' as used in Seciton [sic] 232(d)(iii), 'clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent.') (Emphasis in original)." COA Opinion in Appendix at page 21.

STANDARDS OF REVIEW

This Court reviews questions of statutory construction de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518 (1998).

The granting of summary disposition is likewise reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118 (1999).

ARGUMENT

I. The Court of Appeals was wrong to interpret FOIA as excluding from disclosure the records of public employees acting in their official capacity.

A. FOIA requires the disclosure of all public bodies' records, unless specifically exempt.

This Court reviews questions of statutory construction de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518 (1998). In doing so, the purpose is to discern and give effect to the Legislature's intent. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98 (1994). This inquiry begins by examining the plain language of the statute. Where that language is unambiguous, the Court presumes that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135 (1996). The Court must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may it look outside the statute to ascertain the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995).

Michigan's FOIA statute states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2).

The only exception to the release of "full and complete information" is when a statutory exemption "consistent with this act" applies. See, generally, MCL 15.243. "[T]he FOIA's exemptions must be narrowly construed and that the party seeking to invoke the exemption must

prove that nondisclosure is in accord with the intent of the Legislature." *City of Warren v City of Detroit*, 261 Mich App 165, 169-170 (2004).

The public body has the burden of proof in applying an exemption. "The court shall determine the matter de novo and the burden is on the public body to sustain its denial." MCL 15.240(4). "The public body has the burden to 'sustain its denial.'" *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).

"Public records" under FOIA are defined: "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i).

"Public bodies" are defined as:

> (h) "Public body" means any of the following:
> ***
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, *school district*, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

MCL 15.232(h) (emphasis added).

Schools are within the definition of what constitutes a public body, and schools are indisputably part of the "school districts." Public-school teacher positions are created by local authority and are "primarily funded by or through state or local authority," *id*.

B. School classroom documents are public records under complimentary statutes.[2]

[2] This is the new argument that Plaintiff-Appellant made in the Court of Appeals for demonstrating why Plaintiff-Appellant's interpretation of FOIA was superior, given *in pari materia* considerations. Plaintiff-Appellant will address in a subsequent section why it should be heard and is not a new "issue" which was waived because it was not raised in the trial court.

Michigan, in conjunction with FOIA, has a legal requirement that public bodies retain the records they use for a certain amount of time. This requirement can be found in the Management and Budget Act, Act 431 of 1984, MCL 18.1284 *et seq*.. This Act states:

> Sec. 287. (1) The department shall maintain a records management program to provide for the development, implementation, and coordination of standards, procedures, and techniques for forms management, and for the creation, retention, maintenance, preservation, and disposition of *the records of this state*. All records of this state are and shall remain the property of this state and shall be preserved, stored, transferred, destroyed, disposed of, and otherwise managed pursuant to this act and other applicable provisions of law.

MCL 18.1287(1) (emphasis added).

Pursuant to the Management and Budget Act, "The department shall issue directives that provide for all of the following: *** (e) The disposal of records pursuant to retention and disposal schedules, or the transfer of records to the custody of the department of history, arts, and libraries." MCL 18.1287(3)(e).

The Management and Budget Act also defines what public records are:

> (b) "Record" or "records" means a document, paper, letter, or writing, including documents, papers, books, letters, or writings prepared by handwriting, typewriting, printing, photostating, or photocopying; or a photograph, film, map, magnetic or paper tape, microform, magnetic or punch card, disc, drum, sound or video recording, electronic data processing material, or other recording medium, and includes individual letters, words, pictures, sounds, impulses, or symbols, or combination thereof, regardless of physical form or characteristics. Record may also include a record series, if applicable.

MCL 18.1284(b).

Pursuant to this Act, the Department of Management and Budget produces guides stating which records are public records and how long different documents must be retained. One of these guides is the "General Retention Schedule #2 Michigan Public Schools." A copy of this Schedule

has been included in the Appendix at pages 24-72.[3] The Schedule clearly states that it applies to records created and used by the public bodies: "This General Retention and Disposal Schedule covers records commonly maintained by public and charter schools, school districts, and intermediate school districts." *Id*. at 24. Further, it directs that schools are to retain, as public documents, documents that include "Daily Lesson Plans and Objective Files: These records document class assignments related to each curriculum objective that are planned by teachers." These are to be retained for one year and then destroyed. *Id*. at 58. These are the exact sort of records that Plaintiff-Appellant requested from the District.

The Department of Technology, Management, and Budget has created retention schedules applying not only to teachers and schools, but also to other local governments and their subdivisions.[4] These include, among other entities, local health departments (GS7), local law enforcement (GS11), public libraries (GS17), fire and ambulance departments (GS18), and many others. (See DTMB General Schedule for Local Government in Appendix at pages 71-76.) It cannot be doubted that many if not most of the records are produced by employees, and many are held in their possession rather than in the possession of their governing legislative authority.

It might be objected that the public-record retention laws are not the same as FOIA, and that a public record under the Management and Budget Act is not the same as one under FOIA. And while it is true that not every public record under the Management and Budget Act must be

[3] The Guide for public schools can also be accessed here: https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/RMS_GS2.pdf?rev=3432edf66ff446d1aa878aee44217dfa&hash=45F6B987223F9A7193FB1E2F45AC99D5 (accessed April 2, 2024).

[4] A list of these schedules for local governments has been provided in the Appendix at pages 73 to 77. The list itself and a link to each separate schedule can be found here: https://www.michigan.gov/dtmb/services/recordsmanagement/schedules/gslocal (accessed April 2, 2024).

disclosed under FOIA, that is not because they are not public records, but rather because FOIA provides exemptions for public records that are not required to be disclosed under FOIA. See MCL 15.243.[5] But when interpreting two statutes or acts on the same subject, the courts are required to read the two statutes *in pari materia*: "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662 (1953), cited in *Robinson v Lansing*, 486 Mich 1, 8 (2010). When read together, it is clear that the classroom records sought by Plaintiff-Appellant are the sort of public records contemplated by FOIA for production, regardless of whether FOIA specifically names teachers or other district employees.

C. FOIA provides an exemption for certain school materials, but not for what was requested here.

1. Michigan's FOIA law and school records.

The FOIA statutes exempt certain school-related records from disclosure, but not the records sought here. Therefore, this information should be disclosed. That certain school-related records should be non-disclosable makes sense. In the school setting, for example, the public shouldn't be able to obtain, through FOIA, the completed homework or grades of a particular student. And for this reason, the statutes are specific on what can and cannot be exempt. MCL 15.245(1)(q), for instance, exempts: "(q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution."

[5] This is developed and will become more apparent in the next section.

The most extensive part of the statute regarding education-related exemptions is found in MCL 15.243(2) which incorporates the federal "Family Education and Privacy Act," 20 USC 1232g ("FERPA"):[6]

> (2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection is not used, rented, or sold for the purpose of surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection will not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

MCL 15.243(2).

Notably, MCL 15,243(2) does not mean that academic records are not public records. Rather, it provides an exemption for specific types of academic records. Rules promulgated under Michigan's Management and Budget Act make clear that academic-performance records are public records: "These records document the grades that students received from their teachers throughout the school year, and which are often entered into the student information system. These may include, but may not be limited to, student names, grades, and attendance." General Schedule, item #1400A-B, Appendix, at page 58. Again, although these are public records, they are exempt from FOIA disclosure by statute. The records Plaintiff-Appellant seeks, however, are outside the scope of the FERPA exemption.

[6] 20 USC 1232g, referred to in MCL 15.243(2), is provided here in the attached Appendix at pages 78 to 86.

2. The interplay of federal student privacy laws and our state's FOIA.

Neither MCL 15.243(2) nor FERPA exempts information of the kind sought here. FERPA conditions the receipt of federal funds on compliance with that act. The FERPA's purpose and intent is to provide confidentiality of individual students' records, but also to ensure that the school cannot keep information concealed from the student's parents. Nothing in FERPA allows the District to exempt the information Plaintiff-Appellant has requested.[7] The primary purpose of the federal law is summed up in the federal statute here:

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following-.

20 USC § 1232g(b)(1), Appendix at page 78.

Under the canon of *expressio unius est exclusion alterius*, the express mention of one thing implies the exclusion of similar things. *Detroit v Redford Twp*, 253 Mich 453, 456 (1931). This canon "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of all that shares in the grant or prohibition involved."

---

[7] Another related federal statute *requires* that such information be provided to parents upon request. 20 USC 1232h(c)(1)(C) requires: "a local educational agency that receives funds under any applicable program shall develop and adopt policies, in consultation with parents, regarding the following: … (C)(i) The right of a parent of a student to inspect, upon the request of the parent, any instructional material used as part of the educational curriculum for the student; and (ii) any applicable procedures for granting a request by a parent for reasonable access to instructional material within a reasonable period of time after the request is received." See the Appendix at page 90.

However, this federal statute is not dispositive and does not provide an avenue of relief for Plaintiff-Appellant as it does not provide a private cause of action and must be enforced by the Secretary of Education. See *CN v Ridgewood Bd of Educ*, 146 F.Supp.2d 528 (DNJ 2001), affirmed in part, reversed in part 281 F.3d 219, on remand 319 F.Supp.2d 483. But it does highlight that the lower courts here have said that the District does not need to provide materials under FOIA which it is required to provide to parents under federal law.

Bronner v Detroit, 507 Mich 158, 173 (2021), quoting Scalia & Garner, *Reading Law* (St. Paul: Thomson/West, 2012), p. 107.

Here, FOIA explicitly excludes certain education records. Expressly exempting certain education-related records implies that other education records, such as those sought here, are not exempt.

3. The courts have previously interpreted FOIA as allowing the disclosure of records produced by public employees in the performance of their public functions.

From these very specific exemptions we can discern that the Legislature intended to make other, non-performance-related, classroom information disclosable under FOIA. The fact that they explicitly excluded specific school-related records, but not all such records, shows that the Legislature intended for all other District-related matters to be disclosed barring another exemption. Plaintiff-Appellant is seeking course materials which are public records, and for which there is no exemption.

This conclusion is buttressed by *Howell Education Ass'n, MEA/NEA v Howell Board of Ed*, 287 Mich App 228 (2010). *Howell* concluded that teachers' *private* emails stored on the school server were not subject to disclosure under FOIA. The Court did not reach this conclusion based on teachers not being public bodies, but rather due to the fact that these records were not public records for the purposes of FOIA:

> In the present case, defendants can function without the personal e-mail. There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution. Thus, we decline to conclude that they are equivalent to the student information in [*Kestenbaum v Michigan State Univ*, 414 Mich 510 (1982)]. Furthermore, 'unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee.' *Id.* We believe the same is true for all public bodies.

Id. at 236.

By implication then, teachers' work-related emails were subject to FOIA. "Although the question is not before us, we note that an e-mail transmitted in performance of an official function would appear to be a public record under FOIA." *Id*. at 247, n 10. This conclusion would have been both inappropriate and unnecessary if teachers were not encompassed in the definition of public body found in MCL 15.232.

4. Previous opinions of this Court and the Court of Appeals have muddied the waters regarding local government employees and FOIA.

The lower courts here cited *Blackwell v City of Livonia*, 339 Mich App 495 (2021), leave to appeal denied, 509 Mich 977 (2022) for the holding that: "[I]t would defy logic (as well as the plain language of § 232[d][iii] to conclude that the Legislature intended that any person or entity qualifying as an 'agent' of one of the enumerated bodies would be considered a 'public body' for the purposes of the FOIA." Trial Court Opinion, Appendix at page 9, quoting from *Blackwell*. From this the lower courts concluded that public school teachers are not public bodies, and therefore "their papers and work product are not 'public records' under FOIA." *Id.*

Yet as we have already seen, teachers' work products are considered public records by the state, according to the Department of Technology, Management and Budget. And any determination in this regard based on the analysis *Blackwell* should be dicta. *Blackwell* did not deal with the work product of public employees – instead, it dealt with a mayor's use of social media for his personal use. As that was the question before it, any holding about public employees' work product would be dicta (while also being inconsistent with *Howell*).

In *Blackwell*, a plaintiff used FOIA to try to obtain "production of inbox communications sent to a private social media account." *Blackwell* at 497. The *Blackwell* court determined that those documents were not "prepared, owned, used, in the possession of, or retained by" the city. *Id*. *Blackwell* had no trouble determining that the mayor's office was a public body, with the only

question being whether the mayor's messages from a private account were public records under FOIA. "That the office of the mayor is a public body, however, is not the end of the analysis. The question presented in this case is whether the inbox messages sent to [the mayor's] Facebook profile, which is not maintained or used by the office of the mayor, are also public records under FOIA. We hold that they are not." *Id*. 505. This is the limit of the application of *Blackwell*, which did not address the issue of records created and used by a public employee in the performance of their public functions.

The portion of *Blackwell* relevant to this matter is mere dicta. *Blackwell* cited another opinion of this Court on this matter, *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217 (2004), but the discussion was not necessary to determining *Blackwell*.

Blackwell also misstated *Breighner*. *Blackwell* cited *Breighner* for the proposition that "The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of 'public body.'" *Blackwell* at 505. But this is not the holding of *Breighner*, which dealt with the question of whether *non-governmental* entities became the agents of a public body when these entities worked together. *Breighner* was silent as to whether employees of a public body could be construed as common-law agents for purposes of FOIA.

In *Breighner*, a FOIA plaintiff sought to obtain documents from the Michigan High School Athletic Association (MHSAA). MHSAA was a private nonprofit organization that "organizes and supervises interscholastic athletic events for its voluntary members." *Breighner* at 219. Although MHSAA had close ties to state and local governments, it was held to not be a public body for the purposes of FOIA. This Court devoted its primary analysis to the source of MHSAA's funding and whether such funding would qualify as a public body under MCL 15.232. Finding

that MHSAA was funded by tickets to high school postseason championship tournaments, this Court concluded that it was "therefore not 'funded' by nor through a governmental authority." *Id*. at 226. As such, MHSAA was not a public body subject to FOIA.

Breighner has no application to either the lower courts' decisions here or to *Blackwell*. Here, it is undisputed that the records sought were created by public-school teachers who are employed by the school district. Further, those records were created in the performance of their official duties. Unlike *Blackwell*, no private accounts or records were involved. Unlike *Breighner*, the question was not one of a private entity's source of funding or the legislative source of its creation. Instead, the instant matter involves public employees, being paid from public funds, and access to the records they created in their official capacities.

The *Breighner* court was explicit that "Our holding today is limited to the specific question whether the mhsaa is a 'public body' within the meaning of foia." *Id*. at 228, n 3 (lower case spelling in the original). Therefore, it is an error for the *Blackwell* court to say that *Breighner* held that it was "the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of 'public body.'" *Blackwell*, supra. *Breighner* had nothing to do with public employees, the records at issue were produced by an outside private agency. Additionally, for this proposition, *Blackwell* further cited footnote 6 of *Breighner* in support of its conclusion that the Legislature intended to exclude local employees from the scope of FOIA. But that footnote has no application to public employees. Instead, that footnote focused on FOIA as applied to outside entities that arguably acted as agents of a public body:

> The Department of Labor and Economic Growth, for example, is a governmental "agency," but a real estate office hired to sell governmental property is not a governmental "agency." Indeed, it would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the foia.

Breighner at 233 n 6 (lowercase spelling in the original).

The lower courts were incorrect to cite *Blackwell* (citing *Breighner*) for the proposition that the work product of employees of school districts or other local government entities is not a public record subject to FOIA. This Court should correct and clarify the law in this matter.

5. Excluding local government employees' work product from FOIA would produce an absurd result.

The lower courts' interpretation of FOIA has produced an absurd result, and such results are to be avoided if possible. Avoiding absurd results is another canon or doctrine of statutory interpretation, the "absurdity doctrine." Although the appropriate application of the absurdity doctrine is not always clear,[8] even staunch textualists such as the late Justice Antonin Scalia have found that "Some absurd outcomes can be avoided without doing real violence to the text. . . . As Blackstone explained: '[W]here words bear . . . a very absurd significance, if literally understood, we must deviate from the received sense of them.'" Scalia and Garner, supra at 234.

Here, if it were true that local government employees' work product is exempt from FOIA, FOIA's scope would be narrowed dramatically. Local governments work almost entirely through their employees. If the 'public body' interpretation of *Blackwell* and *Bisio* applied to employees of local governments, then decades of opinions would have been overruled. Further, such an interpretation runs contrary to the State's existing recordkeeping practices. See Department of Technology Management and Budget's public records schedules. (Appendix pages 71 to 77.) Under the lower courts' interpretations, both the judiciary and executive branches would have been consistently incorrect in the application of FOIA for decades. Subverting longstanding precedent and practice is inappropriate, particularly based on a questionable interpretation of law only

[8] See *Johnson v Recca*, 492 Mich 169, 192 (2012).

recently discovered. This runs contrary to the explicit intent of FOIA that the public are entitled to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." MCL 15.231(2), supra.

If accepted, such an interpretation also creates significant legal uncertainty about the application of FOIA going forward. This new approach would require a case-by-case determination of whether a particular individual, employee, or entity would be fairly considered a public body. Take, for instance, a typical city. Is the mayor sufficiently within the public body definition to have his or her official records subject to FOIA or is only the city council a public body. If a record is produced by a city employee, is it exempt from disclosure unless it comes into the possession of the city council? If the city council wishes to avoid disclosure under FOIA, can it simply designate a low-level employee to be the final repository of any public record? The lower courts' interpretation would give rise to each of these questions by re-writing the statute. Instead of "'[p]ublic record' mean[ing] a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created," the lower courts' interpretation here would redefine public record as meaning 'a document prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created, *but only if it is held by or kept in the possession of an elected member of a public body*.' This is clearly an incorrect interpretation of FOIA.

The lower courts' interpretation would be absurd and could undermine FOIA. Court challenges to FOIA denials would become an evidentiary exercise in tracking the possession of the records. In each case, courts would be forced to examine who represents the public body? Was the record produced by an employee or by an administrator? If produced by the employee, did that employee still have possession? Was the record in the personal possession of an

administrator? Was it held by the administrator at the time of the request? Was it in the administrator's office? How far does the administrator's possession extend? What if it were held in a different building? Stored off-site? In individual schools? And even if those questions are answered consistently, the lower courts' interpretation of FOIA would allow a public body to evade FOIA by storing records somewhere other than in an administrator's direct possession, such as in the possession of employees.[9] This interpretation would rewrite decades of FOIA law.

This is clearly not the intended application of FOIA, given its stated purpose: "It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and ***public employees***, consistent with this act." MCL 15.231(2) (emphasis added). To read the Act together as a coherent whole, and in conjunction with our other public-records laws, it cannot be read to say that employees' work product is something that the school district does not need to obtain from the teacher or produce in response to a FOIA request.

II. Parties should be allowed to sharpen and clarify their arguments by citing additional cases and making different arguments in the appellate courts.

A. Michigan follows a "raise or waive" rule regarding the preservation of issues.

Michigan law holds that a party may not raise new issues on appeal which were not preserved in the lower court. For that reason, the Court of Appeals here refused to consider

[9] In interpreting a similar act, this Court has already rejected the interpretation that a single person acting on behalf of a public body insulates that body from the Open Meetings Act (OMA). "[D]elegating the task of choosing a public university president to a one-man committee, such as Regent Brown, would warrant the finding that this one-man task force was in fact a public body. As the *Goode* Court observed, "[w]e do not find the question of whether a multi-member panel or a single person presides to be dispositive. Such a distinction carries with it the potential for undermining the Open Meetings Act. …" [*Goode v Department of Social Services*, 143 Mich App 756, 759 (1985)]… *Accordingly, this individual or these entities must be deemed 'public bodies' within the scope of OMA*." *Booth Newspapers, Inc v University Board of Regents*, 444 Mich 211, 226 (1993) (emphasis added).

Plaintiff-Appellant's argument that FOIA should be read in conjunction with the Management and Budget Act because that argument was not raised in the trial court. COA Opinion slip copy, n 5, Appendix at pages 16-17. Plaintiff-Appellant maintains that this additional argument is not a new issue. Instead, the issue remains the same: Whether documents prepared and retained by local government public employees are subject to FOIA.

New arguments and additional authority should be considered as part of the appellate process that refines and sharpens the issues. This is the law in federal courts and other state courts. But it is not clear that this is the law in Michigan, and at least one decision of this Court seems to indicate the contrary - that new arguments are treated the same as new issues or claims.

The "raise or waive" rule of appellate law has been a part of Michigan's jurisprudence since at least *Kinney v Folkerts*, 84 Mich 616 (1891). An early opinion, *Spencer v Black*, 232 Mich 675 (1925) states that the preclusion is meant to apply to unraised "questions." " 'The sole question of law involved here is whether or not a married woman can be bound, by an oral promise, for materials furnished and services performed on property held by entireties.' The record does not show that this question was brought to the attention of the trial court. It cannot be raised here." *Id*., at 676.

"To preserve an issue, the party asserting error must demonstrate that the issue was raised in the trial court." See *Glasker-Davis v Auvenshire*, 333 Mich App 222, 227 (2020). But this does not answer the question of what an "issue" is and whether any deviation from what was argued in the lower court is a new issue. The terms "issue," "claims," and "arguments" seem to have been used interchangeably.

Generally, Michigan's courts have followed the idea that unpreserved issues are waived.[10] But this Court has observed that "this Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented.[11]" *McNeil v Charlevoix County*, 484 Mich 69, 81, n 8 (2009). However, new arguments have also been referred to as new issues or claims. See, *Booth Newspapers, Inc v University of Michigan Board of Regents*, 444 Mich 211 (1993) where the question of whether the Open Meetings Act (OMA) violated the constitutional autonomy of the state's universities was raised for the first time on appeal. At the trial court, the plaintiff newspaper had accused the defendant university of not complying with FOIA and OMA when it had selected a new president. Defendant had not raised the constitution-based challenge as an affirmative defense, and the matter had been tried on the basis of whether the university complied with FOIA and OMA – not whether the acts applied to universities. For that reason, this Court held "On the basis of the arguments articulated above, we refuse to consider the board's constitutional *argument*." *Id*., at 234 (emphasis added).

While this Court in *Booth Newspapers* called this separate issue an "argument," Plaintiff-Appellant would argue that the matter there was a completely different claim or issue rather than a reframing of an existing argument. This constitutional matter was an affirmative defense that

[10] The allowance of issues that were not raised at the trial court has always been more permissive for criminal matters, as an appellate review might be the only remedy for the accused's freedom: "If a criminal defendant were to allege a plain error at trial concerning insufficiency of the evidence, appellate review might well be the only remedy. A malpractice claim based upon ineffective assistance of counsel, for example, could hardly compensate a wrongfully convicted person for undeserved imprisonment in a state prison." *Napier v Jacobs*, 429 Mich 222, 247 (1987), footnote 2. But as this is a civil matter, Plaintiff-Appellant will confine the discussion to civil issues and claims.

[11] The issue here, too, of evaluating the FOIA statutes using a related public document act would appear to be one of law.

should have been raised in the lower court and thoroughly argued there. This was not an additional argument which refined the issues, nor was it additional authority.

B. Federal law generally precludes unpreserved claims but makes a distinction between claims and arguments.

The U.S. Supreme Court has recognized distinctions between claims and arguments. In *Yee v Escondido*, 503 US 519; 112 SCt 1522 (1992). In this case, mobile home park owners brought an action alleging that rent control was a taking. In the lower courts, the petitioners had argued that it was a physical taking. But at the Supreme Court, the argument was made that it was a regulatory taking. The Supreme Court held that the two different arguments were not separate claims, and so petitioner was not precluded from raising the regulatory taking claim:

> Petitioners unquestionably raised a taking claim in the state courts. The question whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is thus properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-5 (emphasis in original, internal citations omitted).

A similar situation arose in *Lebron v National Railroad Passenger Corp*, 513 US 374; 115 SCt 961 (1995), where Amtrak denied petitioner a lease to place his art. The question was whether this was appropriate under the First Amendment. In the lower courts, petitioner had argued that Amtrak was not part of the government. At the U.S. Supreme Court, however, he changed his

argument and claimed that Amtrak was a part of the government. The U.S. Supreme Court cited *Yee* and cases going back to 1899[12] for the proposition that:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Id., at 965.

C. Other states differentiate between claims, issues, and arguments.

Other states have considered and made the distinction between allowing new arguments and raising new issues or claims. Maryland courts, for instance, have held: "This Court, in several cases, has distinguished between the raising of a new *issue*, which *ordinarily* is not allowed, and the raising of an additional *argument*, even by the Court, in support or opposition to an issue that *was* raised, which is allowed."[13] Similarly, Texas has held: "We do not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the Court."[14] Utah has adopted a similar approach: "[T]he argument advanced … misapprehends the preservation rule. *Issues* must be preserved, not arguments for or against a particular ruling on an issue raised below."[15]

D. Michigan should join the federal courts and other states and distinguish between issues, claims, and arguments.

---

[12] *Dewey v Des Moines*, 173 US 193, 198; 19 SCt 379, 380 (1899).

[13] *Kopp v Schrader*, 459 Md 495, 525; 187 A3d 88, 99 n 12 (Md 2018) (emphasis in original).

[14] *Greene v Farmers Insurance Exchange*, 57 Tex Sup Ct J 1406; 446 SW3d 761, 764 n 4 (2014) (emphasis in original).

[15] *Gressman v State of Utah*, 745 Utah Adv Rep 24; 323 P3d 998, 1010 (2013) (emphasis in original).

As one law review author has put it, "Michigan follows the general rule that failure to timely raise an issue 'waives' review of that issue on appeal, with the appellate courts reserving the right to consider issues not litigated at the trial level under certain circumstances. But Michigan appellate courts, and their judges and justices, have been inconsistent, at best, and idiosyncratic, at worst, with regard to consideration of issues not litigated below…"[16]

One of the most commonly-used guides to Michigan appellate law indicates that Michigan already follows the federal rule. But the Court of Appeals in this case and in the caselaw cited above show that this is not correct – or at least that the courts have not been consistent:

> The rules [of issue preservation] require an issue to have been raised below in most cases, but this does not mean that the issue must be stated exactly as it was stated in the court of appeals or in the application for leave to appeal to the supreme court. As long as you do not raise an entirely new issue or seek different relief, you may frame your issue and arguments in the manner you choose. Scholars and courts acknowledge that issues are limited, sharpened, and clarified as the case moves from trial court to the appellate court and again as it moves to merits review in a court of last resort. Take advantage of this process to refine the issues you present to the court at the merits stage.[17]

A former Justice of this Court had recently urged a reconsideration of the preservation requirement:

> [E]ven if the precise issue had been unpreserved (and once again it was only the precise argument that was purportedly unpreserved), "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when ' "necessary to a proper determination of a case...." ' "
> ***
> The decision of an individual litigant not to pursue an available line of argument, or even to relinquish an available issue, cannot impose on this Court an obligation to operate upon erroneous premises or to fail to take into account relevant statutes.

[16] Baughman, *Appellate Decision Making in Michigan: Preservation, party presentation, and the duty to "say what the law is,"* 97 U Det Mercy L Rev 223, 225 (2020).

[17] Shannon & Gerville-Reache, eds., *Michigan Appellate Handbook* (ICLE, 2021), p 446.

Michigan Gun Owners Inc v Ann Arbor Public Schools, 502 Mich 695, 737-8 (2018) (Markman, C.J., dissenting) (internal citations omitted).

Plaintiff-Appellant argues that this court should clarify the issue and declare Michigan to join the federal courts and other states mentioned above in distinguishing between issues and arguments. Making new arguments is not the same as raising new issues or claims.

E. This Court should reconsider the application of common law agency to FOIA.

The question of the scope of common-law agents of the public body and their relation to FOIA was raised in this Court in *Bisio*, supra, but not decided. In its Order granting leave to appeal, the Court stated:

> The parties shall address: (1) whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.231 et seq.; and (2) whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA…

Bisio v Clarkston, 504 Mich 966 (2019) (emphasis added).

Despite this Court calling for the parties to address the agency question, the Court did not decide it. A concurrence by Chief Justice McCormack (and a dissent by Justice Viviano) noted that the Court did not address the question that it had ordered the parties to brief. Chief Justice McCormack addressed the question at length in her concurrence and noted that the common law of agency still applies unless abrogated by statute. In doing so, she noted the absurdity of interpreting FOIA to exclude documents produced or held by employees:

> Moreover, applying common-law agency principles is the only way that the FOIA works. The plaintiff submitted her FOIA request to the City, an artificial entity that can only act through others. That corporations act through agents is well settled. If agency principles did not apply, how could citizens obtain public records from a municipal corporation? The FOIA's definition of a "public body" for local governmental units does not include employees. See MCL 15.232(h)(iii). Yet a city can only act through its agents and employees. Thus, if agency principles did not

> apply to the FOIA, no records from a municipal corporation would be subject to disclosure; it can't prepare, use, or retain records on its own.

Bisio, 506 Mich, at 57-59 (McCormack, CJ, concurring). (Footnotes and internal citation omitted.)

Defendant-Appellee is indisputably a public body. It is an artificial entity that can only act through its employees or agents. So, according to the lower courts' logic, most public records can no longer be obtained from any public body. The only exceptions are when requests are made to executive branch employees or the local legislative bodies. This is yet another absurd result and should be revisited if this Court agrees with the lower courts that the subject employees' work product is not covered by the statutory language of FOIA.

CONCLUSION AND RELIEF REQUESTED

The lower courts' interpretation of FOIA is inconsistent with decades of precedent and produces absurd results. Local governments can only act through employees or agents. A ruling which holds that FOIA requestors cannot obtain records produced and held by local-government employees in the performance of their official duties would render the provisions of FOIA related to local government meaningless.

Therefore, Plaintiff-Appellant requests that the Court grant leave and reverse the Court of Appeals.

Respectfully submitted,

Dated: April 3, 2024

MACKINAC CENTER LEGAL FOUNDATION

By: /s/ Derk A. Wilcox
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
MACKINAC CENTER LEGAL FOUNDATION

140 West Main Street
Midland, MI 48640
(989) 631-0900

CERTIFICATE OF WORD COUNT

Pursuant to MCR 7.212(B) and 7.305(A), the undersigned hereby certifies that the word count for this application conforms to the rules. MS Word counts 10,609 words, which is less than the allowed 16,000 words.

Dated: April 3, 2024 /s/ Derk A. Wilcox