STATE OF MICHIGAN
IN THE SUPREME COURT

DETROIT FREE PRESS, INC., a Michigan corporation, and FEDERATED PUBLICATIONS, INC., a Delaware corporation,

Plaintiffs-Appellants,

v

THE REGENTS OF THE UNIVERSITY OF MICHIGAN, a Michigan constitutional corporation,

Defendant-Appellee.

Supreme Court No. 153852

Court of Appeals No. 328182

Court of Claims No. 14-176-MZ
Hon. Michael J. Talbot

MOTION OF MICHIGAN PRESS ASSOCIATION, NATIONAL PRESS CLUB, WILX-TV, WJRT-TV, STUDENT PRESS LAW CENTER, WNEM-TV, WOOD-TV, and WLNS-TV FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

Amici curiae Michigan Press Association, National Press Club, WILX-TV, WJRT-TV, Student Press Law Center, WNEM-TV, WOOD-TV, and WLNS-TV (collectively, "the News Media *amici*"), through counsel and pursuant to MCR 7.311, file this motion requesting leave to file the brief attached at **Tab 1** in support of the pending Application for Leave to Appeal in this matter. In support, the News Media *amici* state:

1. As the attached brief details at pp 1-2, the News Media *amici* are a variety of media outlets and state and national First Amendment organizations. They include print, broadcast, and digital media outlets; for-profit and student-run organizations; and trade associations. They share a common interest and goal in the proper interpretation

of Michigan's 1963 Constitution so as to provide for openness in government proceedings to the full extent envisioned by the ratifiers of that document.

2. The News Media *amici* have prepared the proposed brief attached at **Tab 1** to discuss and provide the Court with additional information regarding the fourth issue raised in the pending Application for Leave: whether *Federated Publications v Michigan St Univ Bd of Trustees*, 460 Mich 75; 594 NW2d 491 (1999) was erroneously decided, and should be overruled or limited to the presidential-search context.

3. The proposed *amici curiae* brief is not redundant of material provided in the parties' papers, and addresses various issues pertinent to analysis of Const 1963, art 8, §§ 4-6, as well as practical difficulties that *Federated Publications* has created for *amici* and the public in the 17 years since its issuance. The News Media *amici* believe the brief will assist this Court in ruling on the Application.

WHEREFORE, the News Media *amici* ask this Court to grant this motion and accept for filing the proposed *amici curiae* brief attached at **Tab 1.**

Respectfully submitted,

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Dated: August 31, 2016

Tab 1

STATE OF MICHIGAN
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BRIEF OF *AMICI CURIAE* MICHIGAN PRESS ASSOCIATION, NATIONAL PRESS CLUB, WILX-TV, WJRT-TV, STUDENT PRESS LAW CENTER, WNEM-TV, WOOD-TV, and WLNS-TV IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION ADDRESSED

This brief addresses the fourth issued raised in the Newspapers' Application for Leave:

4. If the Court of Appeals was correct in its holding, should the precedent it relied upon, *Federated Publications v Michigan St Univ Bd of Trustees*, 460 Mich 75 (1999), be expressly limited to the presidential search context, and its discussion of Const 1963, art 8, § 4's formal sessions provision be revisited and overturned by this Court because the decision is unworkable and badly reasoned?

The Court of Appeals answered:	**No**
Defendant-appellee answers:	**No**
Plaintiffs-appellants answer:	**Yes**
The News Media *amici curiae* answer:	**Yes**

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[1] All cases have been shepardized via Lexis and are valid in pertinent part as of August 31, 2016.

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Cases (cont'd)

Statute

Other Authorities

Other Authorities (cont'd)

INTRODUCTION AND STATEMENT OF INTEREST

Amici curiae (collectively, the News Media *amici*) are a variety of media outlets and state and national First Amendment organizations with a keen interest in seeing that the public's business is done in public:

Amicus **Michigan Press Association** is a statewide organization of more than 320 newspapers and digital-media organizations, whose collective readership extends to every corner of Michigan. Founded in 1868, the MPA's mission includes the defense of free speech, the promotion of open and responsive government, and the fostering of an informed citizenry. It has long been concerned with the openness of public-university board meetings, and its former President, Enoch "Ink" White, authored a key constitutional provision at issue in this case, the last sentence of Const 1963, art 8, § 4. 1 Official Record, Constitutional Convention 1961, pp 71, 1187. The MPA regularly files *amicus curiae* briefs with this Court on issues relating to its mission. *See*, *e.g.*, *State News v Mich St Univ*, 744 NW2d 130 (2008) (Order); *Federated Publications, Inc v City of Lansing*, 465 Mich 911, 638 NW2d 747 (2001) (Order); *Bitterman v Bolf*, 873 NW2d 102 (2016) (Order).

Amicus **National Press Club** is the world's leading professional organization for journalists, with more than 3,500 members, including journalists from every major news organization in the United States. Founded in Washington, D.C. in 1908, the National Press Club undertakes a wide variety of efforts to enhance the profession of journalism and bolster its members' skills, and is a steadfast supporter of openness in government.

Amici **WILX-TV**, the NBC affiliate in Lansing and **WJRT-TV**, the ABC affiliate in Flint-Bay City-Saginaw (both of which are owned and operated by Gray Television Group, Inc.); **WOOD-TV**, the NBC affiliate in Grand Rapids-Kalamazoo and **WLNS-TV**,

the CBS affiliate in Lansing (both owned and operated by Media General, Inc.); and **WNEM-TV**, the CBS affiliate in Flint-Bay City-Saginaw (owned and operated by Meredith Corporation) each are dedicated to informing their viewers about the workings of state and local government. That includes Michigan's constitutional universities, which not only educate the State's brightest and best students, but employ tens of thousands of its residents, and annually receive hundreds of millions of dollars from its taxpayers.

Amicus **STUDENT PRESS LAW CENTER** is a nonprofit, non-partisan legal assistance agency in Washington, D.C., devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment, and supporting the student news media in their quest to cover important issues free from censorship.

The News Media *amici* thus represent a broad array of news organizations – print, broadcast, and digital; for-profit and student-run; direct outlets and trade organizations. But they share a common interest and goal: proper interpretation of Michigan's Constitution, and correction of *Federated Publication*'s erroneous creation of an exception to the constitutional mandate of openness in university board meetings, that in practice over the past 17 years has come to swallow the rule.

DISCUSSION

I. The broad supervisory authority granted university governing boards under Const 1963, art 8, § 5 does not restrict the Legislature's power to statutorily require board meetings to be public.

Federated Publications v Michigan St Univ Bd of Trustees, 460 Mich 75; 594 NW2d 491 (1999), held that the Open Meetings Act (OMA) cannot be applied to a university's Presidential Search Committee – comprising half the MSU board's members,

along with an equal number of outsiders – because that would infringe on board autonomy under Const 1963, art 8, § 5. 460 Mich at 88-90 & n 12. The Court read art 8, § 4's mandate for public "formal sessions" of a university board to indicate that legislative regulation of "informal" sessions via the OMA was barred, because it would intrude on "basic day-to-day exercise of the boards' constitutional power" under § 5. 460 Mich at 90. But accepted principles of constitutional interpretation point to the opposite conclusion: While the People in art 8, §§ 5 and 6[2] gave university boards broad authority over "general supervision" of their institutions, they nowhere restricted the Legislature's power to require all meetings of a full university board to be public. To the contrary, the text, structure, and history of the Constitution show just the opposite. *Federated Publications* erred in blocking the Legislature from regulating sessions of full university boards via the OMA.

A. First principles

This Court's goal in construing the Michigan Constitution "is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004) (citation omitted). In doing so, it applies the rule of "common understanding," under which "the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that

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[2] For purposes of this dispute, art 8, § 6 sets forth powers for governing boards of public higher-education institutions other than the University of Michigan, Michigan State University, and Wayne State University that are identical to those that § 5 applies to those three institutions. The News Media *amici* in this brief will refer only to § 5, but those references should be understood as including § 6, as well.

was the sense designed to be conveyed.'" *Id*, *quoting* Cooley, *Constitutional Limitations* (6th ed), p 81. The Court's task is not to impose on the text the meaning its individual justices would prefer, "or even the meaning the people of Michigan today would prefer, but to search for contextual clues about what meaning the people who ratified the text *in 1963* gave to it." *Mich United Conservation Clubs v Secretary of State (Aft Rem)*, 464 Mich 359, 375; 630 NW2d 297 (2001) (Young, J, concurring) (emphasis in original).

Various tools assist the Court in that quest: 1) the Constitution's actual words, according to their plain meaning as might be revealed in contemporary dictionaries; 2) the Address to the People; 3) decisions of this Court construing analogous provision(s) in prior Constitutions; 4) where there is uncertainty about a term's plain meaning, contemporaneous commentaries about the provision or conditions that might have given rise to the need for it; and 5) where doubt remains, anything else that might provide historical context shedding light on whether a particular text has a meaning other than that which seems most apparent, including the Official Record of the Constitutional Conventions. Robert P. Young, Jr., *Perspective: A Judicial Traditionalist Confronts Unique Questions of State Constitutional Law Adjudication*, 76 ALBANY L REV 1947, 1949 (2012) (citations omitted) (listing tools "in descending order"). Here, each type of material supports the view that *Federated Publications* erred in its pronouncements regarding § 5 powers, and thus should be overruled or limited to presidential searches.

B. The Legislature has broad plenary authority to regulate university boards except where the Constitution expressly restricts it.

The People established a governmental system containing three, not four, branches. Const 1963, art 3, § 2; *Straus v Governor*, 459 Mich 526, 537; 592 NW2d 53 (1999) (per curiam). They placed the legislative power in the Senate and House of

Representatives. Const 1963, art 4, § 1. "Unlike the federal Constitution, our Constitution 'is not a grant of power to the Legislature, but a limitation upon its powers.'" *Michigan Coalition of State Employee Unions v State*, 498 Mich 312, 331; 870 NW2d 275 (2015), *citing Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004) and *In re Brewster St Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939); *see also Federated Publications*, 460 Mich at 83, *citing Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, 317-318; 254 NW2d 544 (1977). Thus, the Legislature "can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States." *Michigan Coalition of State Employee Unions*, 498 Mich at 331-332, *quoting Taxpayers of Mich Against Casinos*, 471 Mich at 327 and *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). "The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself." *Taxpayers of Mich Against Casinos*, 471 Mich at 327-328, *quoting Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934).

With regard to determining the scope of the authority a state Constitution grants the Legislature, it is a "fundamental rule" that

> [i]n creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, *subject only to such restrictions as they may have seen fit to impose*, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency, for the exercise of specifically defined legislative

> powers, *but is entrusted with the general authority to make laws at its discretion*. [Cooley, *Constitutional Limitations*, p 87 (emphasis added].[3]

Thus, the pertinent question is not how much material the Regents voluntarily post on their website or make available to the public, Answer, pp 4-8, commendable though those actions are. Nor is it relevant that they feel private meetings improve their operation of the university, or foster more robust and candid discussions and deliberations. *Id*, pp 9-12. Rather, the relevant question simply is whether the People – in art 8, §§ 4-6, or anywhere else in the Constitution – imposed any restriction on the Legislature's broad ability to require university boards to meet in public. In contrast to the presidential-search function – where such authority arguably may arise from the specific mention of that duty in art 8, § 5 – there is no such limitation source, express or implied, that would apply in the sphere of general university-board meetings.

Federated Publications gave a nod to the notion of broad legislative power, observing that, "absent a constitutional limitation, the Legislature has the power to legislate within a particular field." 460 Mich at 83-84 (citing cases). But its analysis then misread the Constitution as the People ratified it. That document – which, after all authorizes the Legislature to regulate meetings of even the Executive branch and its subordinate boards and commissions, OAG, 1977-78, No. 5183, pp 1-2 (March 8, 1977) – does not treat universities any differently, despite their unique constitutional status. An

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[3] Justice Cooley's other "fundamental rule," that the Legislature may not exercise executive or judicial functions except "where they are incidental, necessary, or proper to the exercise of legislative authority, or where the constitution itself, in specific cases, may expressly permit it," *Id*, is not implicated here. This case does not raise the question of whether the OMA interferes with a coequal branch of government, but rather whether it impermissibly interferes with the universities' unique authority under art 8, § 5.

express constitutional requirement that board members meet in public for "formal sessions" in no way exempts any other types of sessions from the Legislature's reach, so as to give boards *carte blanche* to redefine their meetings and evade § 4's stricture. Moreover, applying § 4 to require that all board meetings be public does not come remotely close to the legislative intermeddling that led to creation of the universities' unique constitutional status in the first place.[4] *Federated Publications* should be revisited.

C. Notwithstanding university boards' broad supervisory authority, the Constitution's text places no limit on the Legislature's power to mandate that they meet publicly.

As noted, a primary means of determining the ratifiers' common understanding of the Constitution is to look to that document's actual words, as illuminated by contemporary dictionaries. Young, 76 ALBANY L REV at 1949. Those sources support the Newspapers' view that the constitutional grant of authority to university boards in art 8, § 5 does not restrict, and is not infringed by, the Legislature's exercise of its proper authority to mandate that all board meetings be open to the public.

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[4] A contemporary source described the managerial practices of the legislatively dominated university boards prior to their elimination in the 1850 Constitution:

> At first they dig up the seed a few times, to see that it is going to come up; and, after it appears above the surface, they must pull it up, to see that the roots are sound; and they pull it up again, to see if there is sufficient root to support so vigorous branches; then lop off the branches, for fear they will exhaust the root; and then pull it up again, to see why it looks so sickly and pining, and finally to see if they can discover what made it die. And, as these several operations are performed by successive hands, no one can be charged with the guilt of destroying the valuable tree. [2 House Documents 1840, p 470, *quoted in Sterling v Regents*, 110 Mich 369, 376; 68 NW 253 (1896)].

1. The Constitution contains no express restriction on legislative power.

As the Regents correctly point out, constitutional provisions are to be construed with reference to one another, not in isolation, and harmonized to give effect to the whole. Answer, p 15 (citation omitted). With regard to the Legislature's authority to tell public bodies across the State, including university boards, when they must meet openly, the Constitution nowhere contains any express limitation. Indeed, except for provisions governing how the Legislature is to function internally[5], only rarely does the 1963 Constitution impose any affirmative restriction on legislative authority at all – and in those few cases, it does so directly and with specificity. *See*, Const 1963, art 4, § 6 (power of legislative apportionment placed with non-legislative commission)[6]; § 12 (authority to set salaries of legislators and certain other executive and judicial officials placed in part with State Officers Compensation Commission, subject to legislative amendment and approval); § 29 (Legislature shall pass no local or special act in any case where a general act can be made applicable); § 36 (no general revision of the law shall be made); § 41 (no law authorizing certain forms of gambling may take effect without statewide vote); § 46 (no law providing for death penalty shall be enacted). Here, nothing in the wording of Const 1963, art 8, § 5's grant of general supervisory authority to university governing boards, or any other constitutional provision, expressly limits the Legislature's ability to require such boards to meet in public.

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[5] *See, e.g.*, Const 1963, art 4, § 24 (no law shall embrace more than one object, which shall be expressed in its title); § 25 (no law shall be revised by reference it its title only).

[6] Invalidated by *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982).

The significance of that lack of an express bar on the Legislature's power is underscored by two provisions the People included elsewhere in the Constitution, expressly safeguarding university-board autonomy against even potential threats. In directing the Legislature via art 4, § 53 to appoint an Auditor General to audit all financial transactions and accounts "of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law," the People also spelled out that "[n]othing in this section shall be construed in any way to infringe the responsibility and constitutional authority of the governing boards of the institutions of higher education to be solely responsible for the control and direction of all expenditures from the institutions' funds." Const 1963, art 4, § 53. Likewise, in establishing the State Board of Education and giving it responsibility for "[l]eadership and general supervision over all public education," the People not only included an express exception for "institutions of higher education granting baccalaureate degrees," but also included a second proviso making clear that "[t]he powers of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section." Const 1963, art 8, § 3.

In sharp contrast, nothing in art 8, § 4 even hints at any limitation on the exercise of the legislative power, nor stakes out as sacrosanct university authority over opening (or closing) to the public their governing boards' sessions. This not only suggests that "formal sessions" includes all meetings of a university board, but indicates that – contrary to *Federated Publications* – nothing in § 4's last sentence comes close to impinging on university boards' authority under § 5. Because where Constitutional provisions threaten

to allow legislative power even *potentially* to infringe upon that autonomy, the People took pains to expressly delineate a boundary protecting the latter from the former.

Had the People thought that the mandate of public "formal sessions" of university boards infringed on boards' § 5 supervisory powers over their institutions, they would have added protective language in § 4 similar to that included in art 4, § 53 and art 8, § 3. They did not, and the omission is one of significance. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, (St Paul: Thomson/West, 2012), pp 94-95 (under the "omitted-case canon" of *casus omissus pro omisso*, "[t]o supply omissions transcends the judicial function") (*citing Iselin v United States*, 270 US 245, 251 (1926) (per Brandeis, J)). Or as this Court has stated, "[i]t is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction." *Speed v Common Council of Detroit*, 98 Mich 360, 370; 57 NW 406 (1894) (citation omitted). As Justice Scalia noted with regard to such judicial gap-filling,

> What has been omitted in the *gap* invariably turns out to be what the judge believes desirable – so gap-filling ultimately comes down to the assertion of an inherent judicial power to write the law. Our rejection of such a power does not rest on a belief that "when a legislature undertakes to prescribe at all for a problem it prescribes in full." That is a false statement of the issue. The issue is whether, *when* a legislature prescribes in a fashion that courts regard as providing only "in part" and not "in full," what remains is to be governed by preexisting law, unamended, or rather by a new law, enacted by the courts. Judicial amendment flatly contradicts democratic self-governance. Scalia & Garner, *Reading Law*, pp 95-96 (emphasis in original, footnotes omitted)].

That reasoning applies with even greater force to a Constitution. *Federated Publications* essentially read into art 8, § 4 a provision safeguarding university autonomy from legislative encroachment, similar to the ones set forth in art 4, § 53 and art 8, § 3 –

ignoring that the People declined to include one. Even worse, it did so impliedly, finding the limitation arising from the term "formal sessions" – reasoning that that language "signifies that the governing boards retain their power to decide whether to hold 'informal' sessions in public," and thus elevates § 5 into a restriction on legislative "intru[sion] in this basic day-to-day exercise of the boards' governing power." 460 Mich at 90. That simply is not what the ratifiers of the 1963 Constitution adopted. By turning that document into something other than what the People ratified, *Federated Publications* "flatly contradicts democratic self-governance." Scalia & Garner, *Reading Law*, p 96.

2. No constitutional restriction on the Legislature may reasonably be implied.

Nor does such a restriction on legislative power arise implicitly elsewhere in the Constitution. In divining one through a combination of art 8, § 4's wording regarding "formal sessions," and amorphous, unarticulated notions of broad university-board powers emanating from art 8, § 5, *Federated Publications* erred.

Contrary to *Federated Publication*'s artificial dichotomy between "formal" and "informal" university-board sessions, common usage at the time of ratification would have viewed the phrase "formal sessions" as including *all* structured meetings of board members, other than chance or social gatherings – that is, any time governing-board members sat down to consider university-related matters. Contemporary lay dictionaries defined "session" as "**1 :** an actual or constructive sitting of a body (as a court, council or legislature)…." *Webster's Third International New Dictionary Unabridged* (1961); "the actual sitting or assembling of a court, council, or legislative body…," *Webster's New School & Office Dictionary* (1962); and "**1.** the sitting together or meeting of a group assembly, as of a court, legislature, council etc." *Webster's New Twentieth Century*

Dictionary of the English Language Unabridged (2d ed 1963). They primarily defined "formal" in the sense of having a form or structure, i.e. "**1 a :** belonging to or being the essential constitution of a thing as distinguished from the matter composing it <the ~ nature of a square is a relation of lines and angles rather than a matter of space or solidity; *often* **:** having power to make a thing what it is **:** CONSTITUTIVE, ESSENTIAL….", *Webster's Third International New Dictionary Unabridged*; "according to form or established rules; precise; ceremonious; conventional; essential…." *Webster's New School & Office Dictionary*; and "**1.** of external form or structure, rather than nature or content; apparent." *Webster's New Twentieth Century Dictionary of the English Language Unabridged*.

Thus, the People who ratified the Constitution understood its reference to "formal sessions" as meaning *any* time university Trustees, Regents, or Governors came together as a board, other than chance meetings (which were not "formal" in the sense of "forming" a body) or social gatherings (which were not "sessions"). They would not have considered a holiday party, political fundraiser, or alumni/donor dinner at which some or all board members were present to be a "formal session," because such a gathering did not have a "form" – the board had not been deliberately constituted. But a gathering of Regents "for the purpose of hearing presentations and engaging in dialogues with University administrators and staff," or to receive "background briefings and updates by the University Administration on general topics such as 'finances' and 'strategic plans,'" Answer, pp 9-10, *citing* Deitch Dep and Interrogatory Responses, would certainly fall within the ambit of a "formal session" as the People understood that term.

Reading "formal sessions" as giving rise to an implicit bar against regulating "non-formal" sessions also confuses the sweeping nature of a Constitution with the more limited scope of mere legislation. As Justice Cooley noted,

> It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. [*Constitutional Limitations*, pp 78-79].

It truly "lower[s] the proper dignity of" the 1963 Constitution to read § 4's affirmative directive of open board sessions as giving rise to an implicit ban on legislative authority to regulate "informal sessions," based on boards' § 5 authority over day-to-day university operations. Unlike some State Constitutions that address the most parochial of concerns in detailed fashion, *see* Maryland Const 1867, art XI-C, § 1-a (barring gas stations on land acquired for off-street parking in Baltimore City on streets 25 or more feet wide), nothing in Michigan's Constitution reflects such micromanaging by the People. And since they felt strongly enough to include in the Constitution a mandate that university-board meetings be open, a proper reading of that document applies it to *all* such meetings, without creating a loophole giving board members the unlimited, unilateral ability to evade it by merely relabeling their sessions. Justice Cooley again:

> If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. [*Id*, p 79 (footnote omitted)].

It is simply not reasonable to read § 4's mandate of open "formal sessions" as implicitly giving rise to an unrestricted right to relabel a board meeting as something else, and hold it in private.

D. Other sources of authority also support the Newspapers' view.

1. Address to the People

While the Address to the People made clear to voters that neither the relocated Auditor General nor the newly created State Board of Education would encroach on university autonomy, it gave no indication the Legislature would be barred from exercising routine regulatory powers as to whether those boards meet in public. This, too, is significant.

Describing art 8, § 4, the Address stated that its final sentence, a new provision, "insures that formal sessions of the governing boards of [universities] will be open to the public." 2 Official Record, Constitutional Convention 1961, p 3396. But it made no mention of that authority colliding with, or being subordinate to, university boards' supervisory powers under art 8, § 5. *Id.* As to those § 5 powers, the Address noted simply that they would put university boards "on an equal basis in the supervision of their respective institutions and the control and direction of all expenditures from the institutions' funds." *Id*, pp 3396-97. It made no mention of that supervisory authority stripping the Legislature of the ability to declare that university boards must meet in public. *Id*.

Notably, the Address to the People specifically discussed both of the express safeguards protecting the boards' supervisory authority against the power of newly created or reassigned constitutional actors. Discussing art 4, § 53's transformation of the

Auditor General from a statewide elected office to a legislatively appointed post, the Address noted that "[n]othing in this section is to be construed in any way to infringe upon the responsibility and constitutional authority of the governing boards of the state's institutions of higher education." 2 Official Record, Constitutional Convention 1961, p 3378. University boards "are to be solely responsible for the control and direction of all expenditures from the institutions' funds." *Id*. Similarly, in discussing the new State Board of Education, the Address noted that while that body would give "advice" to university boards "as to the total needs of education" in the State, the final paragraph of art 8, § 3 "preserves for boards of institutions of higher education the power to supervise their respective institutions and control and direct the expenditure of their funds as at present." *Id*, p 3396. And all of this occurred against the Address's overarching comment that a "major convention consideration" was "[s]trengthening of the legislative branch as a counterpart to a strengthened executive branch…." *Id*, p 3359.

Having read the Address to the People, a voter headed to the polls in 1962 would have been surprised indeed to find that the proposed "strengthened" Legislature nonetheless would be powerless to declare that university-board meetings must be public – and that its attempt to do so would be "intruding in [the] basic day-today exercise of the boards' constitutional power." *Federated Publications*, 460 Mich at 90. That revelation would have been especially puzzling given the new provision at the end of art 8, § 4 "insur[ing] that formal sessions of the governing boards of [universities] will be open to the public." 2 Official Record, Constitutional Convention 1961, p 3396.

2. Contemporaneous commentaries, including the Official Record of the Constitutional Convention, affirm that application of the OMA does not infringe on university autonomy.

Sections 4, 5, and 6 of article 8, dealing with public universities and colleges and their boards, were taken up at the Constitutional Convention as Committee Proposal 98. 1 Official Record, Constitutional Convention 1961, p 1135. Though proponents hoped Proposal 98 could be disposed of in an afternoon, *Id*, p 1137 (statement of Committee Chairman Bentley), delegates spent *five and a half days* debating and revising its provisions, *Id*, p 1188 (Statement of Chairman Powell). Notably, however, the final sentence of § 4, added via amendment near the end of debate, was the subject of only a few minutes' discussion, with no dissent, and had such broad support it passed by a voice vote. *Id*, p 1187. As was pointed out by the provision's author, Republican delegate and former MPA President Ink White, the need for it arose at all because

> [m]eetings of governing boards of the 3 major universities have been open to the public and news media for the past ½ dozen years and that has been accomplished only after a long period of negotiations. As it stands, the public and news media are present only as a matter of sufferance. [1 Official Record, Constitutional Convention 1961, p 1187 (statement of Delegate White)].

Significantly, Delegate White used the terms "meetings" and "formal meetings" interchangeably in discussing the proposal, *Id*. This further supports the view that contemporary usage viewed "meetings" and "formal meetings," "sessions" and "formal sessions," as fungible. The contrary *post hoc* judicial declarations on which the Regents rely exemplify the exact sort of unrigorous constitutional analysis this Court in recent years has rightly abandoned. *See*, Answer, pp 18-19, *citing Federated Publications*, 460 Mich at 94 (Cavanagh, J, concurring in part and dissenting in part) (review of Official Record shows that the "obvious logic" of including the last sentence of § 4 was that

framers determined that formal university board meetings could only be declared open constitutionally, in which case legislative enactment such as the OMA would be insufficient); *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993) (Riley, J, dissenting) ("that the convention considered a constitutional amendment necessary to ensure that the recent practice of open formal meetings continued strongly suggests that the framers understood that the regents possessed plenary power with regard to the issue").

In addition to Delegate White's comments, a Convention officer spoke "very strongly" in favor of the proposal, noting that "the [university] boards should be open to the public as a matter of constitutional right." 1 Official Record, Constitutional Convention 1961, p 1187 (Statement of Vice President Downs). Though Vice President Downs raised the possibility of a limitation "where public security demands otherwise," *Id*, no such amendment was offered. The only other comment came from a delegate who thanked Delegate White. *Id* (Statement of Delegate Madar). Thus, the brief Convention discussion of that noncontroversial measure fully supports the view that it was meant to make all university board meetings public – as does the Regents' ensuing silence in the three decades post-1963, when they did not contend otherwise.

Likewise, the widely distributed League of Women Voters' voter guide, "It's Your Choice," told voters considering whether to adopt the Constitution that university governing boards "will be responsible for the direct supervision, control, and financial management of their universities," and that "*[b]oard meetings* will be open to the public." Pls' 5/17/15 MSD Ex A, p 2 (emphasis added). Not "some board meetings" or "only those board meetings members choose to hold publicly," but "board meetings."

This, too, supports the notion that the People voted both to give university boards broad day-to-day authority, and to require all their meetings to be public.

Convention discussion regarding the express safeguards for university autonomy that actually *were* put into the Constitution – in art 8, § 3 and art 4, § 53 – also supports the Newspapers' position. The former provision, establishing the State Board of Education, was considered by the Convention as Committee Proposal 47, to replace Const 1908, art 11, §§ 2 & 6. 1 Official Record, Constitutional Convention 1961, p 1206. As proposed, it consisted of two sections, "a" and "b," with the former setting forth the new Board's role, and closing with a final sentence stating that it was not to impinge on university autonomy:

> Sec. a. There shall be established a state board of education which shall provide leadership and supervision over public education including adult education and instructional programs in state institutions other than colleges and universities. In addition, it shall serve as the general planning and coordinating body for all public education in the state and shall provide advice to the Legislature and to the People as to the amount of state support required. *The power of the boards or institutions of higher education otherwise provided herein to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section*. [1 Official Record, Constitutional Convention 1961, p 1188 (emphasis added)].

As originally conceived, the State Board of Education was to be "the unifying and coordinating force for education within the state," to "receive information from all of the various levels of public education – elementary, secondary, higher and other public institutions providing instructional programs" that would be used "in order that the state board of education may adequately consider and advise local school boards, governing boards of colleges and universities, the legislature and the people as to the total needs of education in this state and make recommendations concerning their solution." *Id*, p 1189

(statement of Committee Chairman Bentley). The extensive debate over Proposal 47 focused on the issues of whether the Governor should have a seat on the Board, whether the superintendent of public instruction should be elected or appointed by the Board or the Governor, and whether the Board should provide "advice" to the Legislature alone, or also to the People. *Id*, pp 1188-99; 1206-32. Delegates recognized Proposal 47 as containing an "enlargement and expansion of the authority and powers" of the state Board of Education. 2 Official Record, Constitutional Convention 1961, p 3148 (statement of Committee Chairman Bentley). Although the clause protecting universities' autonomy was new, having not been present in either §§ 2 or 6 of Const 1908, art 11, it was the subject of no debate. Indeed, it was the Committee on Style and Drafting that moved the language from the original paragraph (a) to its own paragraph at the end of art 8, § 3, and augmented the first paragraph with an additional explicit protection for universities from State Board of Education encroachment. *Compare* 1 Official Record, Constitutional Convention 1961, p 1232 *and* 2 Official Record, p 2573.

So too with the Auditor General provision, art 4, § 53. Introduced by the Committee on Legislative Powers as Proposal 78, it originally provided for the Legislature to appoint an Auditor General to conduct "comprehensive fiscal postaudits of all transactions and accounts kept by or for all departments, offices and agencies of the state government," with no exception for universities. 1 Official Record, Constitutional Convention 1961, p 1672. The Auditor General's jurisdiction was intended to extend to "everything" in state government, every kind of state authority and institution. *Id*, p 1681 (Statement of Committee Chairman Martin). From the outset, however, opponents voiced concerns that it could allow an overzealous auditor "to interfere with the academic

operations of constitutionally established universities beyond mere dollar auditing….[and] could include a review of the entire academic operation of what, to date, has been Michigan's constitutionally independent system of higher education." *Id*, p 1673 (Minority Report B).

Eventually, a group of four prominent delegates with university backgrounds – former Michigan Regent and Wayne State Governor Bonisteel, former CMU President Anspach, sitting Michigan Regent Goebel, and longtime MSU President John Hannah – offered an amendment that would become art 4, § 53's penultimate paragraph, preserving university boards' sole responsibility "for the control and direction of all expenditures from the institutions' funds." 1 Official Record, Constitutional Convention 1961, p 1708. Opponents argued that the amendment was "legally unnecessary," since the auditor's duties were strictly proscribed and would not extend to interfering with the boards' sole responsibility for control and direction of all expenditures from their funds. *Id* (statement of Delegate Wanger). But President Hannah recounted the failed experiment with legislative operation of the University of Michigan in statehood's early days, the resulting establishment of university autonomy over day-to-day functions, and the importance of safeguarding that *with regard to course content and other core academic concerns*:

> Now, I would only answer Mr. Wanger by referring him to some of the incidents that were reported in the press just a few months ago when individual members of our legislature became very much concerned and interested in the content being taught in certain courses and departments and programs on our own campus. The constitutional status of our institution made it possible for the institution's board of trustees and president to say that *the board and president are perfectly willing to be subject to scrutiny, to answer questions, to appear before such inquiries as you may want to conduct,* but when you move in the direction of actually examining course content or demanding of individual instructors explanations of what they teach and why they teach, this is improper. [*Id*, p 1709 (Statement of Delegate Hannah) (emphasis added)].

Thus, the leading university officials who served as Convention delegates did not view decisions to close board meetings as being within the "day-to-day exercise of the boards' constitutional power," *Federated Publications*, 460 Mich at 90. After all, in proposing a measure to safeguard university autonomy, they noted they were "perfectly willing to be subject to scrutiny, to answer questions, to appear before such inquiries as you may want to conduct…." 1 Official Record, Constitutional Convention 1961, p 1709 (Statement of Delegate Hannah). The autonomy interest to be protected, rather, was university control over "course content," and instructors not having to give compelled "explanations of what they teach and why they teach." *Id*.

And the power against which universities' unique constitutional status would protect was not public scrutiny, but legislative micromanagement and partisan political intermeddling:

> Now, why we want this language written in here – and I've made it clear in the comments I made a couple of days ago that there's no feeling on the part of most of us in education that education should be a sacred cow; that *we are perfectly willing that these institutions and boards and operations shall be subject to the same scrutiny with reference to the procedures they use in the expenditure of their money, that they be made to be accountable*, and make certain that they do follow prudent and defensible procedures – is that there is always the fear that this thing you call the legislative auditor, or auditor general, may become the tool of a group or even an individual or a committee of members of the legislature and be used for the purpose, not intended, of inquiring into what is taught and why it is taught. [The amendment] takes nothing away from [Proposal 78]. It doesn't make it impossible or undesirable or in any way impede attaining the objectives that the committee had in mind when they wrote the provision. It does give the colleges and the universities the protection that they should have if they are to serve you and the people of this state now and in the future as they should.
>
> ….I think we should do everything that needs to be done to be certain that we maintain this great strength that we have had in Michigan that has been widely copied more recently by other states in keeping our educational institutions *completely free from partisan political influences*

> just as nearly as that can be done. [*Id* (statement of Delegate Hannah) (emphasis added)].

Given that, it is simply incorrect to conclude that a university board's decision whether to hold open or closed meetings somehow constitutes the "basic day-to-day-exercise of the boards' constitutional power," *Federated Publications*, 460 Mich at 90, or that the Legislature in mandating openness via the OMA "dictates the manner in which the university operates on a day-to-day basis." *Id* at 88. If the decision whether to open or close board meetings truly involved the "the manner in which the university operates on a day-to-day basis," art 8, § 4 would have contained a provision similar to art 8, § 3 and art 4, § 53 clarifying that, except as to "formal sessions," nothing in it was meant to interfere with university board authority. That it did not, speaks volumes.

Nor should that be surprising. In 1962, unlike today, our public-university boards and presidents were "perfectly willing to be subject to scrutiny, to answer questions, to appear before such inquiries as you may want to conduct…." 1 Official Record, Constitutional Convention 1961, p 1709 (statement of Delegate Hannah). The titans who in the mid-20th Century built Michigan's constitutional public universities into the world-class institutions they are today, would doubtless be astonished and dismayed to find their successors retreating behind closed doors to discuss things as innocuous as bicentennial celebrations.

The Regents' argument breaks down when they assert that art 8, § 4 "unambiguously permits [them] to hold 'informal' sessions not in public," Answer, p 3. Even crediting their view that § 4 by its plain terms requires only their "formal" sessions to be public, the fact that the Constitution does not affirmatively *require* other meetings to be public says absolutely nothing about whether it *permits the Legislature* to order that

statutorily, via the OMA. "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley, *Constitutional Limitations*, p 129. Here, when the Constitution is correctly construed, and its provisions analyzed as a whole, it is plain that it does not deprive the Legislature of the authority to require all meetings of university governing boards to be public.

The Regents' argument that *Federated Publications* extends beyond presidential searches, and allows them unilaterally to label meetings "non-formal" and thus secret, effectively writes the last sentence of art 8, § 4 out of the Constitution. Just as agencies and commissions, though constitutionally created, are not empowered to decide whether their actions conform to the Constitution, *Reed v Civil Svc Comm*, 301 Mich 137, 151; 3 NW2d 41 (1942), neither can university governing boards. This Court should grant the Application, and either overrule *Federated Publications* or limit its holding to the presidential-search context from which it arose.

II. The News Media *amici* have a strong interest in restoring openness to university governance.

All Michiganders have an interest in oversight of their public universities and the governing boards that run them. That was true in 1963 and is even more so today, as the Regents themselves make clear. Answer, pp 1-2 (U of M system includes three campuses, 27 different colleges, 61,000 students, 60,000 employees, and a $3-billion health system). That interest is especially strong for current and prospective students, alumni, university employees, nearby residents, and other direct stakeholders. But people

are busy, and/or they live far from Ann Arbor, East Lansing, Detroit, or other centers of learning, so they rely on the News Media *amici* and their constituent members to keep them informed about these critical institutions. Manifestly, that task is made more difficult when university-board members wield unilateral authority to decide what they will discuss in public, and what they will talk about only behind closed doors. Because *Federated Publications* erroneously imbued board members with the belief that they have such authority, it should be overruled, or at a minimum, appropriately cabined.

"*Stare decisis* is a 'principle of policy' rather than 'an inexorable command,' and…the Court is not constrained to follow precedent when governing decisions are unworkable or badly reasoned." *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014), *citing Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) (citations omitted). Two relevant considerations are "whether the decision at issue defies 'practical workability' and whether reliance interests would work an undue hardship." *Tyra v Organ Procurement Agcy of Mich*, 498 Mich 68, 106; 869 NW2d 213 (2015) (Viviano, J, concurring in part and dissenting in part), *citing Robinson*, 462 Mich at 464 (internal brackets omitted). *Federated Publications* as applied to university board meetings certainly defies practical workability, since it allows board members unilaterally to decide what to discuss publicly, and what to talk about in secret. And the reliance interests in it are nil – overruling the case or limiting it to the presidential-search context simply would require board members going forward to hold their sessions publicly, except for matters falling within one of the OMA's exemptions.

The Application bears this out. As the Newspapers note, the Regents routinely retreat behind closed doors to consider innocuous issues (such as "bicentennial

planning") that seem to have no reasonable need for private discussion. Application, pp 10, 11, 27, 28, 37. Worse, they use generic descriptions to mask private discussion of tremendous public import. Thus, the agenda for the Regents' July 2014 "informal" session included an item entitled "Admissions update." Application, p 11, *citing* Deitch Depo Tr Ex 5. Only weeks earlier, the U.S. Supreme Court had issued its landmark decision in *Schuette v Coalition to Defend Affirmative Action*, __ US __; 134 S Ct 1623; 188 L Ed 2d 613 (2014), in which it held that Const 1963, art 1, § 26 did not violate the Equal Protection Clause. The People via initiative (Proposal 2) had added that provision by a 58-42 percent margin, in direct response to *Grutter v Bollinger*, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003), which had approved the University law school's consideration of race as part of its "holistic" admissions process. And shortly after the emphatic adoption of Proposal 2, at the very outset of the *Schuette* litigation, the Regents were upbraided by the Sixth U.S. Circuit Court of Appeals for colluding with the very plaintiffs who were suing them, by stipulating (along with the Governor and the Attorney General) to an injunction delaying the measure from taking effect. *Coalition to Defend Affirmative Action v Granholm*, 473 F3d 237, 252 (CA 6, 2002) (Sutton, J) ("…this is an unusual way to use the federal courts").

Thus, what the Regents' July 2014 agenda labeled simply "Admissions update," doubtless involved a discussion of developments in one of the Nation's most hotly debated issues of the previous decade – the use of race in college admissions – and the U.S. Supreme Court's recent ruling upholding the People's emphatic order to the Regents to stop it. Ironically, then, having been at the epicenter of this controversial issue, which

over 11 years triggered three landmark U.S. Supreme Court rulings,[7] a Constitutional amendment via initiative, and a strong rebuke from the Sixth Circuit, the Regents in July 2014 met secretly to hear an "Admissions Update" that was of eminent interest to the public – while leaving the public and the news media locked out in the hallway.[8]

Further, *Federated Publications* is being interpreted by the Court of Appeals in a way that extends its reach limitlessly. Thus, in *Oakland Sail v Oakland Univ Bd of Trustees*, unpublished per curiam opinion of the Court of Appeals, issued Aug. 30, 2005 (Docket No. 252391), Answer to Application, Ex 11, the Court of Appeals held that the Oakland University board's meeting with university lobbyists was beyond the OMA's reach. "Critical to the Court's decision in *Federated Publications* is that the presidential selection committee was exercising authority granted exclusively to the board of trustees by the constitution." *Oakland Sail*, Ex 11 to Answer, p 2. But given the broad authority granted public universities under art 8, § 5, that logic exempts from public scrutiny board discussions of nearly *everything*. Extensive renovations to the President's residence,

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[7] *Schuette*, *Grutter*, and *Gratz v Bollinger*, 539 US 244; 123 S Ct 2411; 156 L Ed 2d 257 (2003) (Regents' use of racial preferences in undergraduate admissions violated the Equal Protection clause).

[8] There was no policy reason favoring private discussion of the July 2014 "Admissions update," even if the update was being given by legal counsel. The "pending or threatened litigation" exemption of OMA § 8(e) permits closed-session consultation, but only regarding "trial or settlement strategy in connection with specific pending litigation," and only if an open meeting would have a "detrimental financial effect on the litigation or settlement position of the public body." MCL 15.268(e). *Schuette* overruled the *en banc* Sixth Circuit ruling finding Proposal 2 unconstitutional, and reinstated art 1, § 26 as the law of the land in Michigan. Any discussion from legal counsel and/or the Administration as to how University admissions would be handled going forward was outside the narrow scope of the § 8(e) exemption. Moreover, it was of keen interest to residents statewide, and they and the news media such as *amici* should have been allowed to hear it.

elimination of an undergrad program or college, a tuition hike, and even payment of the monthly bills, each constitute the exercise of authority "granted exclusively to the board of trustees by the constitution." But under *Federated Publications* as the Court of Appeals is applying it, all debate over such things may take place in back rooms or private clubs, away from the eyes of the People and the news media.

That is precisely what is happening. *See* Hayhoe & Ballentine, *Behind Closed Doors*, The State News (Dec. 7, 2011), <http://statenews.com/article/2011/12/behind_closed_doors> (accessed Aug. 30, 2016) (MSU Board routinely meets in closed-door "work sessions" and discusses items such as budget, tuition, and the Master Plan); *see also* Jesse, *Oakland University Officials Spent $155K on Florida Trip*, Detroit Free Press (June 4, 2016), <http://www.freep.com/story/news/local/michigan/2016/05/29/oakland-u-officials-spent-150k-florida-trip/84976608/> (accessed Aug. 30, 2016) (describing Oakland board's private meeting in Florida, and related expenditures for 43-person entourage, shortly after 8.4-percent tuition hike). Indeed, in the Regents' view, under § 5 and *Federated Publications*, they have no obligation to disclose even "the date, content, attendees or other details" of any such meetings – or even the fact that they met. Answer, Ex 6, Supplemental Interrogatory Answers, pp 2-3. It is inconceivable that the Framers of the 1963 Constitution, while mandating that "[f]ormal sessions of governing boards…shall be open to the public," at the same time also authorized keeping themselves in the dark via such practices.

CONCLUSION/RELIEF REQUESTED

Thirty-six years after the People adopted art 8, § 4 and mandated that "formal sessions of [university governing boards] shall be open to the public," this Court opined

that such boards nonetheless possess the "power to decide whether to hold 'informal' sessions in public." *Federated Publications*, 460 Mich at 90. That conclusion was erroneous, and this Court should grant the Application and overrule or limit *Federated Publications*.

Respectfully submitted,

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