STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KATHERINE LINDSEY HENRY,
Defendant-Appellant.
_____/

Court of Appeals No. __-_____
Circuit Court No. 21-64004-AR
Lower Court No. 20-3569-SM

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_____/

KATHERINE L. HENRY (P71954)
Defendant In Pro Per-Appellant
[redacted], MI 49426
[redacted] (redacted per MCR 1.109)
[redacted]

DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL
DISTRICT COURT'S DENIAL OF DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT
(a.k.a. MOTION FOR SUMMARY DISPOSITION)

SUBSTANTIVE DUE PROCESS APPEAL
(PROCEDURAL DUE PROCESS APPEAL FILED SEPARATELY)

ORAL ARGUMENT REQUESTED

NOTICE PER MCR 7.205(F):

THIS EMERGENCY APPEAL REQUIRES APPELLATE RELIEF

PRIOR TO THE TRIAL DATE OF 4/28/21

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STATEMENT OF JURISDICTION

Defendant (Henry) appeals the district court's February 4th denial of her motion to dismiss because the court lacks subject matter jurisdiction. The "safeguards of liberty . . . should receive the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty." *Ex Parte Milligan*, 71 US 2, 124 (1866). So, "it is the *duty of courts* to see that the constitutional rights of the defendant in a criminal case shall not be violated."[1] Thus, the "court has the authority, and, in appropriate cases, *the duty*, to enter *permanent* injunctive relief against a constitutional violation."[2] The original duty belongs to the trial court, but when it denies a motion to dismiss, the accused may seek leave for an interlocutory appeal.[3] This court also has appellate jurisdiction in Const 1963, art VI, § 10 and MCL 600.308, as the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people."[4]

And since subject-matter jurisdiction involves a court's power to hear a case, "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court,"[5] thus establishing appellate jurisdiction. MCR 2.116 (J)(2)(a), MCR 7.203(B)(3), and MCL 600.8342 also bestow this court with appellate jurisdiction on interlocutory leaves to appeal.

STATEMENT OF QUESTIONS INVOLVED

1. **Did Henry have actual lawful authority to be at the town hall on election day?**

   District Court's Answer: **Unanswered**
   Prosecutor's Answer: **No**
   Henry's Answer: **Yes**

2. **Did the clerk have lawful authority to remove Henry from *public* property?**

   District Court's Answer: **No**
   Prosecutor's Answer: **Yes**

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[1] *People v Murray*, 89 Mich 276, 285 (1891) (emphasis added), citing *Hill v People,* 16 Mich 351, 357 (1868).
[2] *MI Coalition of State Empl Unions v Civil Serv Com'n*, 465 Mich 212, 219 (2001).
[3] *People v Wood*, ___ Mich ___ (2020) (Docket No. 159063).
[4] *Crawford v Washington,* 541 US 36, 67 (2004).
[5] *US v Cotton et al.,* 535 US 625, 630 (2002); *People v Richards*, 205 Mich App 438, 444 (1994), quoting *People v Smith*, 438 Mich 715, 724 (1991).

Henry's Answer: **No**

3. **Do misdemeanor accused have a right to seek legal, pretrial relief under a MCR 2.116 Motion to Dismiss; or under a MCR 2.504(B)(2) involuntary dismissal?**

   District Court's Answer: **No, No**
   Prosecutor's Answer: **No, Yes**
   Henry's Answer: **Yes, Yes**

4. **Does the district court have subject matter jurisdiction over this case (raised in substance, but not by name, in February 4, 2021 Motion Hearing)?**

   District Court's Answer: **Unanswered (but implied "Yes")**
   Prosecutor's Answer: **Yes**
   Henry's Answer: **No**

STATEMENT OF FACTS

Henry is a licensed attorney. Last May, she authored the Restore Freedom Initiative (RFI) constitutional amendment petition. Much of 2020, the state was locked down and larger events cancelled, severely limiting opportunities for collecting signatures. The team decided having their thousands of circulators at the polls was the best way to secure the signatures by the November 26th deadline. An election day summary (App 78, 89, 99) and training video were posted on the RFI website. Henry was devoted to answering questions from petition circulators on election day.

She was going to help another circulator[6] when circulator Doreen texted her from Leighton Township Hall. At 11am Doreen parked at the lot's far edge, pulling fully onto the grass (App 102), to not use any parking spaces or impede traffic. App 71. She set a small table (18" by 3'), four yard signs and small American flags at her tailgate. At 11:20am, the clerk said she couldn't be there due to an "ordinance."[7] Deputy Langlois came, threatening to arrest Doreen if she didn't leave because the clerk didn't want petitioners there. When co-circulator Rebecca asked where the property line was, so she could ask the neighbor to set up *there*, he said she couldn't (even with the property owner's permission) as people couldn't walk on the grass from the township lot to sign the petition. Langlois was talking to Doreen, as a voter came to sign. Rebecca told him about RFI. Interrupting,

[6] Putting election law highlights on RFI website, printing copies for circulators and police to discuss. App 78.
[7] App 107-109 *Public Access Resolution.* Although being called an *ordinance*, it is actually just a *resolution*.

Langlois, said she must stop talking about it *and* that the guy couldn't sign. Rebecca walked the guy to his car and gave him a paper with RFI info on it and told him to check out the website. App 69.

Doreen called Henry, who spoke with Langlois. He said they violated MCL 168.931(k), but when Henry read that law aloud, Langlois insisted she hadn't read it entirely. When she asked him to ensure he viewed the most current version, he became combative, saying he wasn't going to argue with her about the law and would just arrest Doreen if she didn't leave. Henry said he did not have the right to do that and she was on her way to discuss it in person. He said he would be waiting there for her, yet he was not there as she arrived. She parked next to the circulators, backing into the grass so her car was also entirely off the pavement. App 72. The 100' line was painted in the lot; Henry's car was beyond that, at 229' away. App 103-106. Not planning on staying long, she had her 6 year old daughter Emma stay in her carseat doing school work and eating snacks. With the car backed into the space, Emma saw everything Henry was doing, which was 10-15 feet away.

Langlois arrived, immediately combative, barking they had to leave or he would arrest them. Henry tried to talk about the law, but he said he didn't care what it said, it was not his job and she could bring it up when she had her day in court. App 68. He said they were violating an *ordinance*. App 107. Henry asked him to read *resolution's* ℙ 4, as it said they could be there if they were past 100'. Refusing, he said the owner wanted them to leave, so if they didn't, they are guilty of trespass. Henry asked who he thought the owner was; he said "the clerk." Henry told him *we the people* own the property. He asked her if she was the one who paid the bill to cut the grass. A voter nearby said *he* is an owner of the property, as he pays taxes to cut the grass. Langlois repeated it was *private* property, and the "ordinance" said they couldn't be there. App 76. He had deputies Anderson and Bussell come, and had the clerk come out. Doreen tried talking with her, but Langlois interrupted, saying *the clerk* needed to talk. The clerk said ℙ 3 prohibits being there unless for "township business," which *she* said was only *voting*. Henry pointed to ℙ 4 allowing petitions beyond 100'. The clerk said ℙ 4 had nothing to do with ℙ 3. As voters came to sign the petition, deputies told

them they were not allowed to and must leave. App 69, 109 at 25:05. When deputies asked Henry if she would leave, she asked for five minutes to talk with them about the law, but they refused.

One deputy violently grabbed her left arm, and the others assisted. App 73. They forcefully dragged her away, using excessive force, hurting her the entire time they had their hands on her, *id* ; but they ignored her cries of pain. None of them put a hand on her head so it wouldn't hit the door frame while literally being thrown into Langlois' SUV. She begged to *sit down* into the SUV instead of being *thrown* in so violently; they refused. Screaming in pain, she realized her arms had been injured, especially her left wrist. App 80, 96. She asked the deputies to call her husband to come get their daughter; they refused. App 80-81. She asked them to remove her handcuffs, as they were causing a lot of pain. Langlois flat out refused, telling the other deputies to do the same. He said she was arrested for trespassing and going to jail, CPS was taking Emma, and her car was being impounded. App 81. Henry realized how badly her wrists hurt, and Bussell said he would double lock the handcuffs this time, so they wouldn't continue to tighten. Langlois told Henry she could go to jail for trespassing, have CPS take Emma and have her car impounded, *or* leave, take Emma home, and accept trespass charges. She said she would go vote and care for Emma.

Langlois wanted to charge her with "election day" trespass, but was unable to find it. Henry said 168.744 was the other election day law, but with her past 100', he wouldn't want to use it. She said general trespass is in MCL Ch 750, and if he handed Henry her phone, she'd find the exact MCL. App 82. His SUV, parked diagonally, was blocking the lot's Northwest corner. Bussell told him he must move it as it was impeding voter traffic, App 91, so he moved it. He then said the Sheriff would speak with her. He started the call telling the Sheriff he tried to peacefully resolve the situation, but she "aggressively" live streamed it and told him he didn't have authority to arrest them. App 86, 93, 97. Sheriff said the clerk, controlling the property, had authority to have her arrested for trespassing. Her handcuffs were unlocked, and she was handed the ticket. App 83-84.

Henry's friends and husband had come; their cars impeded no traffic or pedestrians. In her

car, Emma was crying, having seen it all, App 69, 93, saying she was scared to see " police putting chains on mommy and dragging her away." Langlois threatened to arrest everyone, so they met at a park, where Henry realized everything hurt, her elbow bleeding, left wrist swollen, skin cut from handcuffs, upper right arm and right thigh badly bruised. App 91-92, 110-123. Later, at 5:45pm, Anderson went to Otsego town hall, greeted some circulators, asked about their petition and signed it. App 88, 124. He thanked them for doing it "right," saying he "fined" a circulator earlier since on top of the 100' rule, it is still trespassing if the township clerk just doesn't want you there and tells you to leave. App 88. Unknown to Anderson, this was the *same* petition - that Henry authored. Henry filed a motion to dismiss (with brief, affidavits, and exhibits) on January 13th; Prosecutor's six-page response had no brief, affidavits or exhibits; at the February 4th hearing, the motion was denied. Henry's appeal to circuit court was denied on April 5th. She now appeals.

ARGUMENT

Prosecutor argues this is a simple case of *Prohibited Parking*. Henry contends it's a *Constitutional Catastrophe*, as she is charged, following a violent arrest, with criminal trespass, for "violating" a *resolution* regulating township property parking on Election Day. To prove guilt of MCL 750.552 criminal trespass, Prosecutor must prove, beyond a reasonable doubt, that Henry

- ↳ Remained on the premises of another *intentionally* and *without lawful authority*
- ↳ After being notified to depart by the owner or *owner's agent*

Among the many other constitutional and legal problems, this charge ignores that Henry has a

- ↳ Right to collect voter signatures (required by state election law)
- ↳ For a Constitutional Amendment petition (allowed by the state constitution)
- ↳ On township property (open to the general public, and where voters would be)
- ↳ On Election Day (when voters would be there)

Thus, Henry has a constitutional right to ballot access, which boils this case down to:

- ➔ *Henry's authority* (as a member of the general public, and as an attorney in the official course of duties) *to remain* on government property open to the general public, *and*
- ➔ The township *clerk's lack of authority* to have Henry *forcibly removed* from that property while she was violating *no* state election *or* parking laws (or any other laws)

Let's be clear - this kind of thing doesn't happen. A rural town hall and public library is the

epitome of a public forum - a place *devoted* to assembly, debate, consultation, and free exchange of ideas. And there are no *public forum* criminal trespass cases in Michigan. There's cases of trespass on *limited-public* and *nonpublic* government property, as well as *private* property (public housing properties, college campuses, parking lots of private businesses), but *none* on *public* property. To understand why, we must remember Henry, like everyone, received her blessings of liberty[8] from God, *not* the government. *We the people* hold the sovereign power, having authority to access all *public* government property.[9] Government holds *public* properties in trust for use by the *public*,[10] not having its *own* source of rights, sovereignty, or property ownership. Government was created *by the people,*[11] acts *on behalf of the people*,"[12] and derives its authority *from the people*.[13]

In Prosecutor's motion response, curious word games about *parking* are played. For *Henry's authority* to be on the property, Prosecutor separates Henry's constitutionally protected *activity* from *parking* her car for the activity - claiming the charge has nothing to do with her *petitioning*, but that her *car* was not allowed there. Yet, for the *clerk's authority* to remove Henry, Prosecutor pairs the activity of *voting* with needing to *park* while voting - claiming that reserving parking for voters is an "important" governmental interest. App 161. Clearly, it cannot be both. And it cannot seriously be questioned that when a person has *authority* to engage in *protected* activity on *public* property, they also have authority to park their car in the parking lot of the *same* property. On this, we

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[8] "We the People" wanted to "secure the Blessings of Liberty." US Const, Preamble. "We, the people of the State of Michigan, [are] grateful to Almighty God for the blessings of freedom." Const 1963, Preamble. We are all "endowed by [our] Creator with certain unalienable Rights," like Liberty. Declaration of Independence.
[9] *Citizens Protecting Michigan's Constitution v Sec'y of State,* 503 Mich 42, n 90 (2018); US Const, art VI, Republican Form of Government; Const 1963, art I, § 1; US Const, Preamble "We the People" established the Constitution; Const 1963, Preamble "We, the people of" Michigan established our state constitution.
[10] *Shuttlesworth v City of Birmingham*, 394 US 147, 152 (1969) (citations omitted).
[11] To "secure the Blessings of Liberty" we established the Constitution. US Const, Preamble. "[G]rateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings undiminished to ourselves and our posterity," we the people established our state constitution. Const 1963, Preamble. We are all "endowed by [our] Creator with certain unalienable Rights" and "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Decl. of Independence.
[12] *Upper Peninsula Power Co v L'anse,* __ Mich App __ (2020) (Docket No. 349833), n 6 (emphasis added).
[13] "A constitution is made for the people and by the people," *Citizens* at 61, "deriving its force from the . . . people who ratified it," *Id*, containing "the principles on which [the government] shall act, and by which it shall be bound." *Id* at n 90. "Its most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties." *Id* at 81.

address the clerk's lack of authority to remove someone circulating a petition on public property on election day past the statutorily-required 100' mark. Whether "conduct falls within the statutory scope of a criminal law involves a question of law," thus properly within the scope of a motion to dismiss and subsequent appeal, which is reviewed de novo.[14] A ruling involving "the application of a constitutional standard to uncontested facts, [is also reviewed] de novo."[15] So, *only law, and no material facts, being disputed here*, Henry is entitled to dismissal without delay.[16]

I. No Subject Matter Jurisdiction, Thus Henry's Substantive Due Process Rights Violated

Due process provides "procedural safeguards to protect life, liberty, and property interests, [also protecting] substantive aspects of those interests against impermissible . . . restrictions."[17] Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is *narrowly tailored* to serve a *compelling state interest*,"[18] It also guarantees regulations will not deprive a person of life, liberty, or property for arbitrary reasons.[19] Henry had a right to be on *public* township property, thus, the arbitrary actions of the clerk and deputies violated her substantive due process protections, while the court and Prosecutor allowing this case to continue, in callous disregard for the lack of subject matter jurisdiction, creates additional due process violations. But when government officials violate the Constitution, the Constitution "does not permit judges to look the other way; [rather, they] must call foul when the constitutional lines are crossed."[20] This certainly applies to a court reviewing a lower court's ruling, where the "Court's fidelity to the Michigan Constitution"[21] is crucial.

A. Authority Inherent in the People, *Not* the Government

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[14] *People v Noble,* 238 Mich App 647, 658 (1999), citing *People v Hamlin*, 224 Mich App 87, 91 (1997).
[15] *People v Willing*, 704 NW2d 472, 479 (2005). See also, *People v Russell*, 471 Mich 182, 187 (2004); *People v Attebury*, 463 Mich 662, 668 (2001); *People v Daoud*, 462 Mich 621, 629-630 (2000); *People v Stevens*, 460 Mich 626, 631 (1999) (after remand); *Groncki v Detroit Edison Co*, 453 Mich 644, 649 (1996).
[16] *Ruggeri Electrical Contracting Co v Algonac*, 196 Mich App 12 (1992).
[17] *Electro-Tech, Inc v HF Campbell*, 433 Mich 57, n 9 (1989), citing *Hannah v Larche,* 363 US 420 (1960).
[18] *Reno v Flores,* 507 US 292, 302 (1993) (emphasis added); see also *Zinermon v Burch*, 494 US 113, 125 (1990), citing *Daniels v Williams,* 474 US 327, 331 (1986).
[19] *Electro-Tech* at n 9, citing *West Coast Hotel Co v Parrish,* 300 US 379 (1937).
[20] *In re Certified Questions,* __ Mich __, __ (2020) (Docket No. 161492), slip op at 41 (citations omitted).
[21] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 369 (2010).

Our Michigan Constitution declares "[a]ll political power is inherent in the people," Const. 1963, art 1, § 1, meaning Henry, as a member of the general public, has lawful authority to remain on public property *unless* it is specifically and lawfully taken away from her. Indeed, "Almighty God [gave us] blessings of freedom," Const 1963, Preamble, which include the right to be free from discrimination, bills of attainder and ex post facto laws, unreasonable searches and seizures, excessive bail and fines, cruel and unusual punishments, forced self incrimination, and deprivation of life, liberty or property without due process of law; rights to speedy and public jury trials, to be informed of the nature of the accusation, to appeal, etc. Const 1963, art I, §§ 2, 10, 11, 16, 17, 20. We may also exercise our unenumerated rights. Const 1963, art I, § 23 and US Const, Am IX.

Securing these rights so fundamental to a free society, we retained rights to free speech, bear arms, peaceably assemble, consult for common good, instruct representatives, petition for redress of grievances, recall officers, initiate legislation, and amend the state constitution. Const 1963, art I, §§ 5, 6, 3; art II, §§ 8, 9; art XII, § 2. We are to enjoy these rights undiminished, unrestrained, and unabridged. See, Const 1963, Preamble, and art I, § 5. Hence, Henry's rights to petition, assemble, and speak don't *automatically* end where a *township clerk says* others' right to vote begins. Our sovereign authority bestows, and the Due Process clause protects, the right to engage in a "full range of conduct which the individual is free to pursue." *Bolling v Sharpe*, 347 US 497, 499 (1954).

1. Right to be on Government Property Generally

Three things stick out: 1) Deputies threaten to arrest circulators, long before Henry arrived, because "the property owner didn't want them there" 2) Sheriff said the clerk has authority to have Henry arrested for trespassing by virtue of "having control over the property" 3) Resolution ℙ 3 prohibits property access for most of the public "without the express consent" of the clerk. Each demonstrates an appalling misconception of rights on the part of public officials in Allegan County.

Leighton Township Hall is a town hall and public library.[22] A town hall "houses the offices

[22] This property is *public,* "belonging to an entire community, state, or nation; [o]pen or available for all to use, share, or enjoy; . . . A place open or visible to the public." *Id* at 1264. And is a *public building*, "accessible to

of a town's government,"[23] where town meetings, or assemblies of "citizens for the purpose of discussing political, economic, or social issues," are held. *Id.* The "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[24] Ergo assembly and discussing public questions are traditional uses of "public places"[25] like libraries, parks, streets and facilities government bodies meet.[26] Thus, a "township, may not by its own ipse dixit destroy the 'public forum' status" of such property,[27] *nor* exclude people from such a public forum,[28] in which "all parties have a constitutional right of access." *Perry* at 55. The clerk, then, may *not* interfere with "free access to the streets, parks, or public places of the [township.]" *Hague* at 517.

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[29] Town hall being *public* property, the clerk does not have *exclusive* possession like a homeowner would.[30] And a township's "ownership of streets and park[ing lots] is [not] as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof." *Hague* at 514. However, the deputies' actions, Sheriff's statements, and resolution's wording implies the government has property rights akin to a private homeowner, and may exclude anyone at any time for any reason. Government, though, acts on behalf of the

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the public; esp., one owned by the government." *Id* at 1265. Black's also explains *publici juris* is "public right; of importance to or available to the public; a city holds title to its streets as property *publici juris*." *Id* at 1266.

[23] *Black's Law Dictionary* (8th ed) at 1529. Note, the "Court may refer to dictionaries to aid in discerning the plain meaning of" words in sorting out the legal issues before it. *People v Duncan*, 494 Mich 713, 723 (2013). See also, *People v Buie*, 485 Mich 1105 (2010); *People v Keller*, 479 Mich 467 (2007); *People v Higuera*, 244 Mich App 429 (2001), *People v Oros,* 502 Mich 229 (2018); *Krohn v HomeOwners*, 490 Mich 145 (2011).

[24] *Hague v Committee for Industrial Organization,* 307 US 496, 513 (1939), citing *US v Cruikshank,* 92 US 542, 552 (1876). See also, Const 1963, art 1, § 3.

[25] *Shuttlesworth* 394 US at 152, quoting *Hague* at 515; *Cornelius v NAACP Legal Defense & Educ Fund*, 473 US 788, 802 (1985); *Up & Out of Poverty v State,* 210 Mich App 162, 172 (1995), citing *Perry* at 45, citing *Grayned v City of Rockford,* 408 US 104, 117-118 (1972).

[26] *Shuttlesworth* 394 US at 172; *Cox v Louisiana*, 379 US 536 (1965); *Cox v Louisiana*, 379 US 559 (1965); *Edwards v South Carolina*, 372 US 229 (1963); *Cornelius* at 802-03, citing *Madison Sch Dist No 8 v Wisc Emp Rel Comm'n*, 429 US 167, 174, n 6 (1976). See also, *Up & Out* at 174; *Heffron v Int'l Society for Krishna Consciousness, Inc,* 452 US 640, 657 (1981).

[27] *US Postal Service v Council of Greenburgh Civic Ass'ns,* 453 US 114, 133 (1981).

[28] *Widmar v Vincent,* 454 US 263, 268 (1981), citing *Madison* at 175, n 8.

[29] *Anderson v Celebrezze*, 460 US 780, 801 (1983), quoting *Jenness v Fortson*, 403 US 431, 442 (1971).

[30] *Herro v Chippewa Cty Rd Comrs*, 368 Mich 263, 269 (1962); *Giddings v Rogalewski*, 192 Mich 319, 326 (1916).

people, its authority derived from the people, having no property rights distinct from the people.

It's long recognized "ownership [of public properties] is in the whole people of the state, and no individual has any property right in them." *People v Collison*, 85 Mich 105, 108 (1891). So, government owns property in trust for the public, *Hague* at 515, and must "preserve the property under its control *for the use* to which it is *lawfully dedicated*."[31] And while *the people* own all government property, the public's access may be limited, based on the "character of the property"[32] (public, limited public, or nonpublic). Thus, in criminal trespass cases, right of access hinges on the property's normal use.[33] It's trespassing to be right outside a prison, MCL 764.23a (1), or on specific state swampland, MCL 324.41512, being property held for legitimate nonpublic or limited public purposes (as with public hospitals, military bases, municipal airports and USPS mailboxes).

The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government," *Postal* at 129, but it *does* "protect[] a right of access to places traditionally open to the public."[34] Even with private property, "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it,"[35] and it may "be treated as though it were publicly held." *Logan* at 316. So for *all* property open to the public, "no meaningful claim to protection of a right of privacy can be" made, *id* at 324, and *all* "members of the public [have] an equal right of access." *Id* at 321. Thus, access may be denied to property *not* open to the public, but *not* to property "open to the public generally" *id* at 320, unless the excluded person is 1) obstructing normal operations or 2) interfering with others' rights of normal use of the property.[36] People so excluded can be charged

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[31] *People v Harrison*, 383 Mich 585, 592 (1970) (emphasis added); *Adderly v. Florida*, 385 US 39, 48 (1966).
[32] *Perry Ed. Assn. v Perry Local Ed. Assn.,* 460 US 37, 44 (1983).
[33] *Food Employees v Logan Valley Plaza,* 391 US 308, 321 (1968).
[34] *Midland Publishing Co v District Court Judge*, 420 Mich 148, 161 (1984).
[35] *Marsh v Alabama*, 326 US 501, 506 (1946).
[36] *Harrison* at 588-592, 596; *Perry, passim*; *Hague* at 514; *Healy v James,* 408 US 169 (1972); *Widmar*; *Edwards* at 231. Officials may not label town hall as "private property owned by township officials" who can tell people to leave if they simply don't want them there. Excluding people that way is part and parcel only with "rights traditionally associated with ownership of *private* property." *Logan* at 319.

with disturbing the peace, usually under MCL 750.167 or 750.170. But, regardless of ownership, members of the public **may *not*** be excluded from property open *to the public* "through the **use of [] trespass laws**."[37] Since Henry was *not* impeding normal town hall operations *or* the rights of others, she was not disturbing the peace; **being on property open to the general public, she was *not* trespassing, nor may her exclusion be pursued through trespass charges;** her mere presence then was "unquestionably lawful," leaving the *clerk no authority* to remove her. *Brown* at 136-44.

2. Henry's Free Speech & Assembly Further Protects Her Access to Town Hall

Prosecutor and the court surmised this case is merely "the trespass of a car" (Tr Mtn Hrg Feb 4, 2021, App 250), separate from Henry's protected petition circulating. But the *ipse dixit* "it is because I say it is, and no proof is needed" model doesn't work in the law, especially as Prosecutor "shall not prosecute any person . . . for conduct presumptively protected by the first amendment." MCL 750.543z. The "mere fact that speech is accompanied by conduct" like using a car to circulate petitions, "does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Logan* at 323. The "question [here] is solely one of right of access for the purpose of expression of views. [Petition circulating] involves conduct other than speech, namely, the physical presence" of the circulator, who may also park their car, on township property. *Id* at 315-16. But the clerk may *not* exclude Henry for the "nonspeech aspects" of her activity (parking her car there) *unless she shows* such parking significantly interfered with public use of the property. *Id* at 323.

But *criminal trespass by parking* is simply absurd. *Criminal* trespass occurs when a person remains on property *intentionally* and *without authority*. If this case is based on the *car* remaining

[37] *Logan* at 319. And, there being *no* trespassing of government property *open to the general public*, the only regulations upheld are those preventing direct interference with the public's use of the property, like banning picketing done in a manner to "unreasonably interfere with free ingress or egress" or to intentionally interfere with "the administration of justice," etc. *Id* at 320. MCL 750.552 was *not* written to apply to property open to the general public anyway. Just like in *Brown*, the "sole statutory provision invoked by the State contains not a word about . . . punish[ing] the bare refusal to obey an unexplained command to withdraw from a public street, . . . or public building." *Brown v Louisiana,* 383 US 131, 141(1966). Rather, here, like in *Brown*, the "statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest [at] a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution." *Id* at 142, citing *Wright* at 292.

on the property, it would only be trespass if the *car* remained intentionally and without authority. Clearly, an inanimate object does not form intent. The court and Prosecutor also conflate *criminal* trespass and *civil* trespass. *Civil* trespass is an intrusion upon an owner's exclusive occupation and enjoyment of his premises. Thus, *civil* trespass may entail the unwanted depositing of debris, water or cars onto another's property. *Herro* at 269. But "*[c]riminal* statutes must be strictly construed, with each word interpreted according to its ordinary usage and common meaning," (*Noble* at 659, citation omitted) and MCL 750.552 states "a *person* shall not . . . remain" on another's land. So, *criminal* trespass has *nothing* to do with her *car,* but rather her *person.* Finding no "infringement of her person," see n 38, then, was an inaccurately hasty dismissal of Henry's First Amendment claims.

Again, the court and Prosecutor claim the First Amendment doesn't apply since, according to them, the charge has nothing to do with the *activity* Henry was doing. To prove criminal trespass, though, Prosecutor has to prove the clerk had authority to force Henry to leave public property. Prosecutor claims the clerk had this authority *because of the resolution*. They claim the resolution prohibited her car from being parked on township property *because of the activity* she was doing (petitioning, and not voting). So Henry *was* undoubtedly forced to leave the property *because of the activity* she was doing. And with the government seeking to punish Henry for her constitutionally protected ballot access activity, First Amendment protections certainly apply.

Unlike the trial court's method of just taking the prosecutor's word for it,[38] jurisprudence requires the court to embark upon a three-step process for analyzing free speech claims, like those raised by Henry. This well-established US Supreme Court test requires the court to 1) determine whether the conduct is protected, 2) identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic, and 3) determine whether the exclusion from that forum satisfies the requisite standard. *Cornelius* at 797.

[38] "[D]efendant claims that this charge is an infringement of her person" but "this is not an action that pertains to the activity that defendant was engaged in or from our reading of the prosecutor's response, this is an action based on the trespass of a car . . . in a township lot on an election day." App 250.

Criminal trespass dealing with *Henry's* actions, and not those of her *car*, we now see if her conduct is protected. We have a First Amendment right to free speech, peaceable assembly and petition government,[39] and "our constitutional command of free speech and assembly is basic and fundamental, and encompasses peaceful social protest, so important to [freedom]." *Cox* at 574 (1965). So, speech like Henry's here must receive "the *broadest protection* in order to ensure the unfettered interchange of ideas for" effecting change, and "be uninhibited, robust, and wide open."[40]

Prosecutor argued Henry's *mere presence* at the lot's far edge interfered with voters' rights, making them her "unwilling audience." App 161. There's *no* evidence supporting this libel. Neither deputies nor the clerk allege Henry was forcing speech onto others, see App 109, nor do the ticket or police reports. Rather, App 102 shows Henry at the lot's far end and voters have to walk *past* their cars to sign her petition or talk to her. But the argument isn't even logical, implying every time we exercise free speech where others are present, we are necessarily intruding upon them. Speech is futile if we may not speak to an audience. This is why speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[41]

Yes, it's trespassing to occupy booth space assigned to others, where constitutional rights are *exercised to directly interfere* with others' rights,[42] for example. But we "start from the premise that peaceful [petitioning] in a location open generally to the public"[43] is protected because "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Id* at 315. Rather, "the right to use a public

[39] Also, Const 1963, art I, § 5 protects free speech, while art I, § 3 protects peaceable assembly, consulting for common good, instructing representatives, and petitioning the government for redress of grievances.
[40] *Eyde Construction v Charter Twp of Meridian*, 119 Mich App 792, 794-95 (1982) (emphasis added). See also, *Roth v US,* 354 US 476, 484 (1957); *Anderson* at 794.
[41] *Edwards* at 237-238; *Terminiello v Chicago,* 337 US 1, 5 (1949).
[42] *Harrison* at 604 (T.M. Kavanagh, J., concurring), 597 (Adams, J., concurring).
[43] *Logan* at 313, citing *Thornhill v. Alabama*, 310 US 88 (1940); *AFL v Swing*, 312 US 321 (1941); *Bakery Drivers Local 802 v Wohl*, 315 US 769 (1942); *Teamsters Local 795 v Newell*, 356 US 341 (1958).

place for expressive activity may be restricted only for weighty reasons," that must be reasonable. *Grayned* at 115-16. The "nature of a place, the pattern of its normal activities, dictate" if the restrictions are reasonable, *Widmar* at n 19 (cleaned up), citing *Grayned* at 104, where the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* at 116. With parallel issues, *Edwards* sums it up well:

> it is clear . . . that in arresting [Henry, officials] infringed [her] constitutionally protected rights of free speech, free assembly, and freedom to petition. . . . The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. [Henry and others] felt aggrieved by [government overreach, so they] peaceably assembled at [a town hall] and there peaceably expressed their grievances to the citizens. *Edwards* at 235.

For an even clearer example of how authority to control property does *not* equal authority to shut down free speech, we turn to *Marsh v Alabama*, as described by *Logan* at 317:

Marsh v Alabama	This case
"Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her."	Henry was told it is unlawful to park there when not voting "without the express consent of the clerk," but the clerk wanted Henry to leave.
"When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights," she was ordered to leave.	Henry told the clerk and deputies the resolution cannot supersede constitutionally protected rights, but the deputies ordered her to leave.
She refused to leave, so she was arrested for criminal trespass.	She "refused" to leave, so she was arrested for criminal trespass.

Marsh's conviction was reversed, the Court ruling *even private* owners can't exclude members of the general public under a criminal trespass statute when the property is open to the general public.

a) Additional Protections for Ballot Access Bolster Henry's Authority

Last year saw much debate on public issues, with much discord over government's role in various aspects of our lives. Responding to government overreach, Henry drafted the RFI Petition, needing 425,059 signatures in a rather short time period (180 days) to secure a place on the ballot. A grassroots effort, when most of our state was shut down, RFI knew they needed circulators at every polling place possible on election day. As such, the "First Amendment protects [Henry's]

right not only to advocate [her] cause, but also to select what [she believes] to be the most effective means for so doing." *Meyer v Grant*, 486 US 414, 424 (1988) (citations omitted). Thus, to the extent the resolution prohibits her from petitioning in the parking lot, displaying signs on her car, having fliers and other supplies in the tailgate of her small SUV, the resolution "impedes the sponsor's opportunity to disseminate . . . views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached" and "necessarily reduces the quantity of expression." *Id* at 419.

This is crucial as "there is no more constitutionally significant event than when the wielders of '[a]ll political power' [in] Const 1963, art I, § 1, choose to exercise their extraordinary authority to directly approve . . . an amendment thereto," as found in art XII, § 2. *Citizens* at 59, n 18. Indeed, soliciting signatures for a petition and associating to achieve ballot access receive strong constitutional protection,[44] and any restriction thereto burdens these fundamental rights directly. *Socialist* at 588; *Meyer* at n 5. So, when the actions of local officials, as in this case, burden Henry's signature-gathering efforts, by violently arresting and forcefully removing her, "voters are less interested in the campaign" and will be less likely to sign the petition. *Anderson* at 792.

B. Clerk Lacked Lawful Authority to Force Henry to Leave *Public* Property

Clarifying Henry was 1) engaging in constitutionally-protected activity 2) at a public forum, we must now 3) determine whether the clerk excluding Henry from the public forum satisfies the requisite standard. Since "a principal purpose of traditional public fora is the free exchange of ideas, [a person] can be excluded from a public forum *only* when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[45] Remember, the clerk has no inherent source of authority, rights, or property ownership because government acts *on behalf of* the people with its authority *derived from* the people. Thus, the clerk

[44] *Meyer* at n 5; see also, *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 504 (2004); *Socialist Workers Party v Sec'y of State*, 412 Mich 571,588 (1982). See also *Martin v Sec'y of State,* 280 Mich App 417, 434 (2008), (O'CONNELL, dissenting) (ratified in *Martin v Sec'y of State,* 482 Mich 956 (2008). Likewise, we find protection in Const 1963, art I, § 5 free speech.

[45] *Cornelius* at 800 (emphasis added); See also, *Reno* at 302; *Meyer* at 420; *Socialist* at 589-594.

has no authority to restrict Henry's use of the *public* property *unless* a constitutionally enacted statute or *ordinance* specifically provided that authority.[46] Therefore, lacking a narrowly tailored means of achieving a compelling interest leaves the clerk *without* authority to remove Henry.

1. Clerk Lacked Compelling Interest to Exclude Henry From Public Forum

To exclude Henry, the clerk must have a *compelling* interest, so what is it? The resolution names *convenient access*, stressing (but not defining) *township business*, which Prosecutor claims is *only voting*. App 161-62. The resolution fails to *even mention* "poll," "vote," "voting," etc., and the rule of lenity requires ambiguities be interpreted in Henry's favor.[47] Considering our *we the people* system of government, especially at the local level, *township business* is not merely election day voting. Voting is not even listed in the Bill of Rights, while free speech, assembly and petitioning are. So, ensuring access only for voting is not compelling.

Moreover, *access* means "ability to enter, approach, pass to and from," with *no* reference to parking. Black's Law Dictionary (8th ed) at 14. *Access to public buildings* is only recognized as "ingress and egress to or from"[48] the buildings, not *parking* at such buildings. Attorney General Opinion, No. 6488 clarified officials may *only* impose reasonable restrictions to "permit orderly ingress and egress to the polling place." And given Prosecutor argues "[p]arking is not a First Amendment right,"[49] it follows that reserving *all* parking for voters is *not* a compelling interest. Thus, the interest is compelling only to the extent it is limited to ingress and egress for town hall.

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[46] Prosecutor claims the resolution is viewpoint neutral. App 160. But it's only in *limited public* or *nonpublic* fora that limitations on speech and conduct are required only to be reasonable and viewpoint neutral. But the town hall is a *traditional public forum*. Also, to make sure that regulations are content neutral, the regulations must "contain adequate standards to guide the official's decision and render it subject to effective judicial review," *Thomas v Chicago Park Dist,* 534 US 316, 323 (2002), which this does not have.

[47] *US v Bass,* 404 US 336 (1971); *McBoyle v US,* 283 US 25 (1931); *US v Gradwell,* 243 US 476 (1917). *Rewis v US,* 401 US 808, 812 (1971). See also *Ladner v US,* 358 US 169, 177 (1958); *Bell v US,* 349 US 81 (1955); *US v Cardiff,* 344 US 174 (1952); *People v Turmon*, 417 Mich 638, 655-656 (1983); *People v Woods*, 241 Mich App 545, 557 (2000); *People v Rogers*, 249 Mich App 77, 105 (2001).

[48] *Up & Out* at 174, citing *Cameron v Johnson,* 390 US 611 (1968), *Heffron* at 657; *Edwards* at 231-232.

[49] App 160. Besides, claiming "parking is a First Amendment right," or "the constitution *guarantees* me a parking space" is different from the clerk being allowed to forcefully remove people for parking there. Further, on election day when more people go to town hall, it makes sense to limit parking to people there to vote or observe the voting process, use the library, assemble, petition government, or other *town hall* purposes, rather than those using town hall parking simply as a place to store their car while they went somewhere else. While such parking distinctions *make sense*, they are not *compelling*.

2. Removing Henry From Public Property *Not* Narrowly Tailored to Interest

Reserved parking is not a compelling interest, so Henry was impermissibly excluded, but we analyze *arguendo* if the resolution is necessary and narrowly tailored. *Township business* logically includes constitutionally protected activities like petitioning, but even *if* township business excludes constitutionally protected activities *besides* voting, ℙ 4 specifically exempts politicking past 100' from actions considered unlawful. As such, the clerk had *no* authority to remove Henry. *If* township business *is* only voting, then excluding Henry is not narrowly tailored, given her car, parked at the lot's far edge, impeded *no* ingress or egress, App 102, nor has such ever been alleged.

With only 3310 voters voting that day in the township (many voting by absentee), it is well positioned to handle increased election day parking needs with 84 marked parking spaces and about 3.5 acres of flat, open land. The lot was never full that day, and there were only two cars parked on the grass, leaving remaining acreage open for parking. Neither the clerk, deputies, nor Prosecutor alleged parking was a problem that day (thus, exclusion is *not* necessary), or that Henry's car was impeding pedestrian or vehicular traffic. Indeed, voter ingress and egress was only blocked when Langlois parked diagonally across the lot, *blocking traffic from using that entire portion of the lot*. A voter even asked Langlois to move his SUV, as he needed to pick up his daughter from school, but Langlois left it there until Bussell told him he *must* move the SUV since several cars were having trouble accessing the precinct. So, Prosecutor's argument suggests *Langlois* should be the one facing trespass charges. Prosecutor *cannot* prove denying Henry the right to petition or having her forcibly removed did *anything* to allow better access to polls, let alone that it was necessary in allowing such access. Further, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression;" rather, the forbidden conduct (here, Henry's parking) must be shown to be a material disruption to the general public's use of the town hall. *Grayned* at 117-18. The interest is *not* effectively served by the resolution, let alone in a narrowly tailored manner, leaving the resolution unable to provide authority for the clerk to remove Henry.

3. Unconstitutionally Vague and Overbroad Resolution Gives Clerk NO Authority

Like *Rapp*, the resolution may "be enforced against *anyone*" in *any* constitutionally protected activity with their car *anywhere* on township property.[50] So, "criminaliz[ing] a substantial amount of constitutionally protected speech," *id* at 77, and being "susceptible of regular application to protected expression," it is overbroad, and facially invalid. *Houston v Hill*, 482 US 451, 467 (1987).

Also, *parking regulation* or not, "where officials have unbridled discretion over a forum's use," it creates censorship, violating the First Amendment.[51] "It is offensive . . . to the very notion of a free society - that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors."[52] So where, like resolution ℙ 3, a person may be present "only at the whim" of a clerk, it is a "constitutional vice of so broad a provision [it] needs no demonstration."[53] A "municipality may not empower its [] officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions."[54] That's why there must be "appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct." *Cox* at 576 (1965). As such, regulations cannot confer on an official the right to exclude others from using *public* property, without *specific standards*, as in determining if someone is there for *township business* or to provide an exception, if not.[55] Regulations are also unconstitutionally vague when used to punish conduct that cannot be constitutionally punished, and cannot justify excluding Henry from a place she has a constitutional right to be present."[56] Being vague and overbroad, the resolution bestows no authority.

4. *Election* Law Preempts *Election Day* Resolution, Eliminating Clerk's Authority

Prosecutor claims Michigan Election Law (MEL) does not apply here,[57] arguing this case

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[50] *People v Rapp*, 492 Mich 67, 76 (2012).
[51] *Southeastern Promotions, Ltd. v Conrad,* 420 US 546, 553 (1975).
[52] *Watchtower Bible & Tract Soc'y of New York, Inc v Village of Stratton,* 536 US 150, 165-166 (2002).
[53] *Shuttlesworth v City of Birmingham,* 382 US 87, 88-91 (1965).
[54] *Shuttlesworth* 394 US at 153 (emphasis added); See also, *Rogers* at 96.
[55] *Cox v New Hampshire,* 312 US 569 (1941); *City of Owosso v Pouillon,* 254 Mich App 210, 215 (2002).
[56] *Wright v Georgia,* 373 US 284, 293 (1963), citing *Taylor v Louisiana,* 370 US 154 (1962); *Garner v Louisiana,* 368 US 157, 174 (1961); *Buchanan v Warley,* 245 US 60, 80-81 (1917).
[57] See, e.g., App 159, 250.

has *nothing* to do with Henry's petitioning election activities. Yet, Prosecutor claims the clerk had authority to remove Henry because of the township's *Election Day* resolution. As townships cannot legitimately enact regulations repugnant to the constitution[58] *or* in conflict with law,[59] this *election day* resolution must be viewed in light of MEL and Const 1963 *election* provisions.

Only a *valid* regulation gives a clerk authority, so a regulation express, conflict, or field preempted by state law is not a valid regulation, and bestows *no* authority. *Michigan Gun* at 701-02. To the extent the resolution restricts election day affairs, Const 1963 expressly preempts it. Article II, § 4 states "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections," giving the *legislature*, not a township, authority to regulate elections, and *all that entails*, *Socialist* at 598, invalidating this resolution regulating *election day* activities.

A township may not enact a regulation "in direct conflict with the state statutory scheme."[60] MEL (Act 116 of 1954) sets powers of local election officials (clerks) in exacting detail, which does *not* include authority to remove people, absent direct voter interference, from polling place property on election day. Direct conflict also exists when the resolution prohibits what the law permits, *Ter Beek* at 20. Michigan Attorney General clarified MEL "*expressly recognized* that persons other than election officials *may be present*," and that "*others may be present in the voting place* was also recognized by the Michigan Supreme Court."[61] Further, "the rights of the public to be present [even] during the actual casting of a ballot" *inside* the polling room, let alone *outside*, is undeniable. *Id.* So, by prohibiting nonvoting people access to town hall facilities (including parking), this *resolution* directly conflicts with election law, making it *conflict* preempted.

There's more *conflict preemption*. One way the legislature used MEL to balance election integrity with protected signature gathering[62] was to prohibit politicking within 100' from a precinct

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[58] *Michigan Alliance for Retired Americans v Sec'y of State*, unpublished opinion of the Court of Appeals, issued October 16, 2020 (Docket No. 354993), at 4.
[59] *Michigan Gun Owners v Ann Arbor Public Schools*, 502 Mich 695, 701-702 (2018).
[60] *John Ter Beek v Wyoming*, 495 Mich 1, 19 (2014) (citations omitted).
[61] Attorney General Opinion, No. 6488 (January 15, 1988) (emphasis added).
[62] The first being required by Const 1963, art II, § 4, the other being protected speech, *Meyer* at n 5.

door. Being *outside the 100'*, MCL 168.931(k) and .744 *allow* campaigning, soliciting donations, or *obtaining petition signatures* at the polls. While resolution ℙ 4 makes it clear *it also allows* these activities past 100', to the extent it's interpreted it to prohibit collecting signatures past 100', a conflict exists because the *resolution prohibits what the statute permits*. *Ter Beek* at 20. Similarly, MCL 168.931-.947 detail all offenses and penalties for election day violations. So, by enforcing this *election day* resolution (by charging trespassing), local officials turned election day violations from 90 day, $500 misdemeanors into 30 day, $250 misdemeanors. MCL 168.934; 168.744(2), (4); 750.552(3). Heavily *conflict-preempted*, the resolution gives the clerk *no* authority to remove Henry.

Next, *field preemption* applies if the state statutory scheme occupies the field of regulation, to the exclusion of the resolution, even if there's no direct conflict. *Michigan Gun* at 703. The state undeniably occupies the field of election regulation. Also, *comprehensiveness* of a statutory scheme shows state law preemption. *People v Llewellyn*, 401 Mich 314, 326 (1977). In MCL 168.21, the secretary of state, as chief election officer, has "supervisory control over local election officials." MEL's stated purpose also clearly identifies its comprehensiveness. Inasmuch, it is an act to:

> reorganize, consolidate, and add to the election laws . . . to prescribe the powers [of] . . . local officials and employees; to provide for the nomination and election . . . for public office; to provide for [removal] of certain public officers; to provide for the filling of vacancies in public office; to provide for and regulate primaries and elections; to provide for the purity of elections; to guard against the abuse of the elective franchise; to define violations . . . [and] prescribe penalties and provide remedies; and to repeal certain acts and all other acts inconsistent with this act.[63]

Clearly, then, the "breadth and detail of this statutory scheme provides an indication that the Legislature has preempted" election regulations "to the exclusion of a supplementary" resolution like this. *Llewellyn* at 327. Further, if the "subject matter demands uniform, statewide treatment," *id*

[63]Also, in MCL 168.31 the secretary of state will create rules for election conduct, "direct local election officials as to the proper methods of conducting elections," publish "procedures on prohibiting campaigning in the polling places," "require reports from the local election officials the secretary of state considers necessary," "investigate . . . administration of election laws," establish curriculum for comprehensive training of all township officials responsible for conducting elections, establish a local clerks continuing election education program, train all new local election officials within 6 months, "create an election day dispute resolution team that has regional representatives . . . which shall appear on site, if necessary," and create "rules establishing uniform standards for state and local . . . ballot question petition signatures."

at 326, local regulation is preempted. Since "improper *implementation* of election laws affects the process by which citizens normally exercise their collective voice,"[64] this "is clearly an area of the law which demands uniform, statewide treatment." *Llewellyn* at 327. Indeed, there are significant similarities with this case and the *Socialist Workers* case, at 598, which did *not* involve

> unfair treatment on the ballot . . . but rather unfair treatment which has prevented access to the ballot. [In Const 1963, art. 2, § 4, the legislature received] . . . constitutional authority to enact laws governing the entire election process. Just as clearly, the election process includes access or failure to gain access to the ballot.

The improper implementation of MEL here worked to prevent ballot access for Henry's petition.

Further, it is "clear that if each locality in the state of Michigan were allowed to establish its own [rules on certain topics], a great deal of uncertainty and confusion would be created." *Llewellyn* at 327. Given Henry was collecting 425,059 signatures from *all over the state*, the Court's analysis, although not specific to elections, is most appropriate. The Court continued:

> To allow each of the multitude of Michigan localities to establish its own [election restrictions] would be to invite the cultivation of a legal thicket which would make both the scope of the individual right to free expression and the permissible prohibition of [election activity] well-nigh impossible to determine. . . [T]he resultant confusion and provocation of endless appeals, both threaten important individual rights and undermine efficiency in the control of [election integrity]. On the one hand, the uncertainty created by local [election day regulations] would effectively chill the right to free expression, and raise serious due process problems in that . . . there [is] little opportunity to discover the nature of the prohibited conduct. *Id* at 328.

So, this local resolution prohibiting protected election activity by forbidding parking for such activity at the isolated, rural town hall on election day is not only *expressly preempted*, but also *conflict* and *field preempted*, leaving it *unable to provide the clerk authority* to remove Henry.

5. Resolution Actually *Protects* Henry's Activities & *Prohibits* Clerk's Interference

Although argued that the resolution prohibited Henry from being there, its wording actually *protects* Henry's petitioning, and *prohibits* the clerk's interference with such activities. Prosecutor claims resolution ℙ 3 gives the clerk authority to remove Henry from the property, but it says:

> On election day, when more members of the public require access to Township property, it shall be unlawful to . . . park or leave any motor vehicle on Township

[64] *Martin,* at 432 (O'CONNELL, dissenting) (ratified in *Martin v Sec'y of State,* 482 Mich 956 (2008)).

> property beyond the time necessary to transact Township business without the express consent of the Township Clerk or other Township official.

As discussed, *township business* surely includes constitutionally protected activities traditionally enjoyed at town halls and other public fora, like circulating petitions, which is why ℙ 4 says:

> Nothing in this resolution shall be construed to interfere with MCL 168.931(k) which allows a person to disseminate campaign literature on election day when a person is beyond 100 ft. from an entrance to a building in which a polling place is located.

Of course MCL 168.931(k) does not reference *campaign literature* (168.744 actually does). Having the same main idea of allowing politicking only past 100', though, we see 931(k)'s vote soliciting, and .744's donation soliciting, *petition signature gathering*, and campaign literature distribution, all of which appear to be covered in ℙ 4. Thus, the resolution is worded to respect *our First Amendment rights*, so long as we abide by election law in exercising those rights. We must also notice what is *not* in the resolution. Like the *Brown* case, Henry, as a member of the public, is charged criminally for merely refusing to leave *public* property. Yet, the resolution text gives no authority to punish "violations," and fails to notify the public "violations" yield *any* consequences, let alone criminal sanctions or jail time. Beside the obvious due process issue with that, as with *Brown*, the resolution's wording reveals *nothing* Henry has done elevates to a crime against the State. *Brown* at 141. So, the resolution allows politicking *past 100'*, thus, *prohibiting* the clerk's interference with the same, and since it allows *no* sanctions for "violations," the clerk has *no* authority to remove or punish therefore.

6. Only Ordinances, *Not Resolutions*, Can Legally Regulate the People

Townships create local laws through *ordinances*, and the clerk and deputy repeatedly said an *ordinance* said Henry and the circulators "couldn't be there." As the *undisputed* facts show:

> [Doreen and Rebecca] set up to start circulating the [RFI] Constitutional Amendment petitions at 11:00 am on election day . . . At around 11:20 am MaryLou, Leighton Township Clerk, came out and told us we couldn't petition there because the township has an ordinance against it and asked us to leave. Doreen showed MaryLou the 2nd page of the pdf sheet she downloaded from the [RFI] site regarding the constitutional rights we have to be there. MaryLou showed no interest in hearing anything Doreen was saying but kept interrupting her to tell us she didn't care what that said since she had an ordinance. . . .Langlois showed up shortly after and he told us to leave. We tried to explain the same thing to him as we tried with MaryLou and

> he didn't show any interest in why we were there either. He said it didn't matter why we were there, the township has an ordinance that said we can't be there. App 68.

However, this document is a *resolution*, not an *ordinance,* App 107-08, with phrases "it hereby resolved," "in this resolution," and "foregoing resolution." It is entitled "resolution #2016-10-01, Township Property Public Access *Resolution*." Prosecutor even confirmed it's a *resolution* (versus *ordinance*) 11 times, *People's Response passim*, but never addressed the proviso for localities to regulate by *ordinances* only. One "may form a *resolution* [or] frame an ambition . . . but these are private prescriptions, *not laws*." Black's Law Dictionary (8th ed) at 900. Indeed, *municipal laws* are "*ordinances* and other laws applicable within" a township, *id* at 1043, while *resolutions* regulate *internal* affairs or express *opinions* of a governing body.[65] This distinction matters, considering the "responsibility on the part of all citizens to obey all *valid laws and regulations*." *Cox* at 574 (1965).

Ergo, per MCL 42.20 "resolution[s] shall be limited to matters required or permitted to be done by resolution . . . and to matters pertaining to the internal affairs or concerns of the township government. Any other act of the township board, and any act *imposing a sanction for the violation* of the act*, shall be by ordinance* (emphasis added)." Further, MCL 41.183 allows a "township board [to] provide in a township *ordinance* a sanction for violation of the *ordinance*." Criminal Procedure allows complaints for violations of felonies, misdemeanors or *ordinance* violations, *not* resolutions. MCL 761.1(c). Violations of local regulations are only punishable for township *ordinances* or charters, *not* resolutions. MCL 761.1(o)(i). MCL 600.8311 gives district courts jurisdiction over *ordinance* and charter violations, misdemeanors, and some felony hearings, which the "expressio unius est exclusio alterius doctrine," where "the expression of one thing suggests the exclusion of all others,"[66] affirms district court has *no* jurisdiction over *resolutions*.

Indeed, our courts only interpret *ordinances* and only "presume[] that *ordinances* are

[65] See https://www.legislature.mi.gov/(S(hc4aawckdk10g3wwh2vdijng))/mileg.aspx?page=Resolutions for current proposed state resolutions, which *all* govern the *internal* actions of the legislative body *or* express the *opinion* of the legislative body, where *none regulate* the conduct of the *general public.*

[66] *Michigan Gun* at 707, quoting *People v. Wilson*, 500 Mich. 521, 526 (2017).

constitutional."[67] The US Supreme Court hasn't recognized resolutions as valid regulations; rather, it's stated it is "properly drawn statutes and *ordinances* [that are] designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions." *Cox* at 574 (1965). Only a "local *ordinance*" is defined as a "type of law enacted by a local unit of government."[68] In other words, no courts treat resolutions the same as ordinances,[69] as citizens can't be charged for violating *resolutions*. So, the clerk's basis for authority is void.

7. Vehicle/*Parking* Laws Preempt *Parking* Resolution, Eliminating Clerk's Authority

This case undoubtedly involves Henry's rights to free speech, peaceable assembly, and petitioning. Yet, without considering *any* of Henry's underlying legal arguments or sworn affidavits, the court stated "this is not an action that pertains to the activity that defendant was engaged in or from our reading of the prosecutor's response, this is an action based on the *trespass of a car* over stay in a township lot on an election day." App 250. *If* this case is about the trespassing of a car (*parking* of Henry's *vehicle*), we must consider our state *vehicle* and *parking* laws, and possible *express*, *conflict* or *field* preemption. *Michigan Gun* at 701-02. Field preemption applies if the statutory scheme preempts the resolution by occupying the field of regulation, to the exclusion of the resolution. *Id* at 703. The Uniform *Traffic* Code (UTC), Control of Traffic in *Parking* Areas act (CTPA), and Michigan *Vehicle* Code (MVC) work together to *comprehensively regulate* the movement and *parking of vehicles*.[70] Moreover, the expansive sections of the MVC alone include

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[67] *Rapp* at 72 (emphasis added); *People v Maggit*, 319 Mich App 675, 683 (2017).
[68] Michigan Judicial Institute (MJI), *District Court Magistrate Manual - Revised Edition* (2021) at 1-21.
[69] A substantive due process challenge can be either "as applied" or "facial." A facial challenge claims any application of the regulation is unconstitutional. An "as applied" challenge attacks only the decision that applied to them. See, *Richardson v Township of Brady,* 218 F3d 508, 513 (6th Cir 2000). To the extent the resolution was interpreted to exclude Henry's constitutionally protected petitioning activities from township property on election day, this substantive due process claim challenges the resolution as applied. However, to the extent it's a *resolution* and not an *ordinance* being enforced, that it is unconstitutionally vague and overbroad, and that it is preempted by state law, Henry raises a facial challenge.
[70] The UTC was made "to authorize the director of the department of state police to promulgate a uniform traffic code; to authorize a city, township, or village to adopt the uniform traffic code by reference without publication in full; and to prescribe criminal penalties and civil sanctions for violation of the code." The CTPA is to "authoriz[e] local units of government to regulate and control traffic in parking areas; and to provide a penalty for a violation of this act." Further, the MVC is "to provide for the regulation and use of streets and

regulation of cars in work and school zones, moving violations causing injury or death, use of cell phones, traffic control devices and posting signs giving notice of local traffic regulations, traffic signals and markings, accidents, driving while intoxicated and reckless driving, speeding, passing, turning and starting, right-of-ways, equipment, inspection of vehicles,[71] **stopping and parking**, MCL 257.672-.675d. The statutory scheme's comprehensiveness, then, shows a preemptive intent, *Llewellyn* at 327, to regulate *vehicles* and *parking*, but for a few areas in which localities may pass additional regulations. Further, MCL 257.605 says the MVC applies "uniformly throughout this state and in all political subdivisions and municipalities." Thus, the resolution's attempts to make it illegal to "park or leave any motor vehicle on Township property beyond the time necessary to transact Township business" are *field preempted* by state laws regulating the *parking of vehicles*.

With *conflict* preemption, a township "is precluded from enacting an ordinance . . . if [it] is in direct conflict with the state statutory scheme." *Ter Beek* at 19. MJI explains "[l]ocal ordinances addressing traffic laws must be consistent" with the MVC and those that "conflict with the MVC are void to the extent of the conflict."[72] The UTC states, in enforcing parking lot regulations (MCL 257.951(2)), any municipal traffic codes adopted must model the uniform traffic code created by the state police, and be adopted by an *ordinance* (MCL 257.951(1)), which "shall clearly identify the code adopted by reference" and state the complete code is available for public inspection at the clerk's office. MCL 257.952. So, while under the UTC a local parking lot regulation must 1) model the uniform traffic code, 2) be adopted by *ordinance*, and 3) clearly state the entire parking lot code is available for public inspection, the regulation here does *not* 1) model the uniform traffic code, 2) adopt the regulation through *ordinance* (doing it only by *resolution*), or 3) reference the complete code being available for inspection. Therefore, this resolution is *conflict* preempted by the UTC.

Also, MCL 257.942 allows a township *ordinance* to "prohibit, regulate, restrict, or limit the

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highways; . . . to provide penalties and sanctions for a violation of this act; to provide for the enforcement of this act; . . . to repeal all other acts or parts of acts inconsistent with this act or contrary to this act."

[71] MCL 257.601b through MCL 257.655 and MCL 257.683 through MCL 257.715a.

[72] *Dist Court Mag Manual - Rev Ed* (2021), 1-21, citing *Builders Ass'n v Detroit*, 295 Mich 272, 277 (1940).

stopping, standing, or parking of vehicles in specified areas of the parking area," so this parking *resolution* conflicts with the CTPA. Conflict also exists when the resolution prohibits what a statute permits. *Ter Beek* at 20. So, by prohibiting parking in the *entire* parking lot while CTPA only allows for prohibiting parking in *some* of the lot, the resolution is *conflict preempted* by the CPTA, too.

Further, localities may regulate "standing or parking of vehicles," but the regulation is "not enforceable until *signs giving notice* of the local traffic regulations are posted."[73] As the resolution is *not* posted and the only "notice" came from the clerk verbally, it's certainly *express preempted* by the MVC. This *express* preemption is affirmed in 257.605 stating a "local authority shall not adopt, enact, or enforce a local law that . . . is otherwise in conflict with this chapter," such as MCL 257.606.

Amidst *express* preemption, 257.605 raises the crucial *punishment* issue. In prohibiting that which "block[s], obstructs, impedes, or otherwise interferes with" access to town hall, the resolution syncs with the MVC saying one may not "block, obstruct, impede, or otherwise interfere with the normal flow of vehicular or pedestrian traffic" - but MCL 257.676b makes this a *civil infraction*. Indeed, ***all*** MVC *Stopping, Standing and Parking* violations are classified as *civil infractions*. MCL 257.672 - 257.675d. Also, MCL 257.943 states violations of local regulations made per the Control of Traffic in *Parking* Areas act are *civil infractions*. Therefore, this township resolution, as paired with the trespass statute, "imposes a *criminal* penalty for an act . . . that is a *civil infraction*" under the MVC, making it conflict with the MVC and, thus, "void." MCL 257.605; 257.951(3).

Thus, the argument this is simply *prohibited parking* fails because the *parking* resolution is *field*, *conflict* and *expressly* preempted, unable to give the clerk authority to act. And with the UTC, CTPA, and MVC limiting parking violations to *civil infractions*, the disproportionate punishment sought for this "parking violation" is highly alarming. The *only* legal punishments for *single* parking

[73] MCL 257.606. Also, a locality may provide "*by ordinance* for the impounding of any motor vehicle parked contrary to a local *ordinance*," where the vehicle's "owner has failed to answer 6 or more parking violation notices or citations regarding illegal parking." MCL 257.606. The deputy repeatedly said he was impounding Henry's car (which can be heard in the video) for "violating the ordinance," but it is a *resolution* ***not*** *ordinance*, the township *has no* ***ordinance*** allowing the impounding of a car, *and* Henry had not "failed to answer 6 or more parking violations or citations regarding illegal parking."

violations are fines, with 6 or more unanswered parking violations allowing vehicle impoundment or immobilization. See, e.g., MCL 257.606. Similarly, the common sense approach tells us that in an alleged *prohibited parking* situation, *if* the clerk had any authority, it would be over Henry's car, not her body. So, stretching *criminal* trespass, with up to a $250 fine and *jail time,* to prosecute her for an alleged *parking* violation, Prosecutor is pursuing the infliction of cruel and unusual punishment. Thus, beyond the lack of subject matter jurisdiction, US Const, Am. VIII and Const 1963, art I, § 16 prohibitions against cruel and unusual punishments stand as due process bars to this prosecution.

8. Henry May Not Be Charged with Misdemeanor While Serving as Attorney

While actively serving as an attorney, one can't be arrested or imprisoned for a misdemeanor offense. Henry is a licensed attorney.[74] In April 2020, as an attorney with a "duty to protect and inform the public,"[75] she began explaining the EOs, state law, and US and Michigan Constitutions to Michiganders, and has been asked for dozens of radio and TV appearances to do just that. She continues to do videos and events explaining the Constitution to thousands of people regularly.[76] In May 2020, she authored the Restore Freedom Initiative (RFI) Petition. On election day, Henry, as founder and lead attorney of RFI, was in charge of answering legal questions for petition circulators at the polls. One such circulator was Doreen in Leighton Township. Henry attempted to resolve the situation with the deputy on the phone, but when they seemed at a communication impasse, she said she would come talk to him in person and bring the laws with her. He said he would be waiting for her, but upon arriving, he refused to discuss the law *at all*, instead arresting her for a misdemeanor.

However, all officers "in the actual service of the state . . . are privileged from arrest and imprisonment during the time of their actual service except for treason, felony, or breach of the peace." MCL 600.1825(3). A public officer is "a person who holds public office in this state," either elected or appointed, M Crim JI 22.19, and the "state bar of Michigan is a public body," whose members are licensed to practice law. MCL 600.901. State bar members are also "officers

[74] First admitted in MN, then MI, East. Dist. MI, West. Dist. MI, Saginaw Chippewa Tribal Ct, US Sup. Ct.
[75] MCL 600.901 Compilers Note, citing *Falk v State Bar,* 418 Mich 270 (1983).
[76] Attorney Katherine Henry's Video Views, App 289-90.

of the courts of this state." *Id*. Thus, by serving as an attorney (a court officer and member of a public body), Henry was in actual service as a public official. Her communication with the clerk and deputies was all in her capacity as lead attorney for RFI; as such, there was no authority to arrest her for this misdemeanor, and by removing the authority of the court to sentence Henry to jail time for this misdemeanor, the legislature also divested the court of subject matter jurisdiction.

Why is this important? A "lawyer is a part of a judicial system charged with upholding the law," having a "duty, when necessary, to challenge the rectitude of official action [and] uphold legal process." MRPC 1.6, official comment.; MRPC 1.0, Preamble. Indeed, a "lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists." MRPC 8.4, official comment. So, attorneys are public officials with a duty to defend legal process and the law, and to protect and inform the public, and need not obey questionable legal obligations. This is exactly what transpired here. Henry informed the circulators of petitioning laws. With a deputy threatening to arrest them due to a grossly inaccurate reading of the law, Henry had a duty to challenge the deputy's action, and seek to uphold legal process. If deputies are allowed to violently arrest an attorney, the court and prosecutor free to continue prosecution, for such events - especially for an alleged "parking trespass" - no attorney will ever get involved to protect the public.

C. Court Erred in Denying Henry's Motion to Dismiss on Procedural Grounds

The court denied Henry's MCR 2.116 motion, *not* on its merits, but on "procedural defects." The court ruled Henry only had a right to a jury trial (for a finding of guilt or innocence as a matter of fact), and no right to challenge the charges as a matter of law. Prosecutor argued Henry's only option to bring a motion is to wait and move for directed verdict. The court ruled the accused have no option to file a motion to dismiss, specifically ruling 2.116 does not apply in criminal cases as doing so would "usurp due process and jury trial rights." The court also held there is no judicial oversight of prosecutorial actions, even for violations of law or court rule. None of this is true.

1. Henry has Legal Remedies, Not Merely a Jury Trial Right

At the motion hearing, the court ruled there's *n*o procedure for the accused in misdemeanors to raise issues of law, where the charges or procedures conflict with state law or the Constitution.[77] The court held motions to dismiss are available *only* in civil cases, and Henry is merely "entitled to her full rights to a jury trial," adding she has due process protection where the prosecutor (and only the prosecutor) has "a higher duty to review the law and to adjust or possibly dismiss a charge according to the *facts* of the case." *Id* at 23. The court held "allowing" such motions would open a "flood gate of civil procedure motions in every single criminal matter." *Id.* Even for "aggressive use of force or an abuse of process by the . . . prosecutor [and] law enforcement officers" involved, the court held, the accused has *no* legal remedies, but may merely ask *that same prosecutor* to file charges, and if that doesn't work, then the accused's only choice is to file a civil case against them. *Id.* Let's think on that for a minute . . . the judge won't let a silly little illegal or unconstitutional act of a deputy or prosecutor get in the way of having a perfectly fine jury trial. If that notion was actually true, it would literally wipe out every due process protection we now know.

A court ruling the accused have *no* potentially dispositive *legal* remedies available must remember it "is a bedrock legal principle that it is, emphatically, the province and *duty* of the judicial department, to say what the law is" because the law "shall not depend on each jury that tries a cause." *Krohn* at 172 (citations omitted). So, "courts decide questions of law,"[78] and juries "decide questions of fact." [79] Further, the *court* must "adjudicate upon and protect the rights and interests of individual citizens, and to that end [must] construe and apply the laws."[80] Determining if "conduct falls within the statutory scope of a criminal law involves a question of law," *Noble* at 658, citing *Hamlin* at 91, thus is properly within the scope of a motion to dismiss to be decided by the judge.

Courts have historically decided criminal cases on issues of law, when it so requires.

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[77] App 248. Yet MCL 600.8317 allows district courts to provide for pleadings and *motions* and do all other things necessary to hear and determine matters within the jurisdiction of the courts.
[78] *Id*; See also, *Phoenix Ins v John Allen,* 11 Mich 501, 511-12 (1863); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592 (1994), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803); *Groncki* at 649; M Crim JI 3.1; Black's at 857; MCL 418.131; MCL 691.1402a; MCL 600.2114a; MCL 500.3135(2)(a).
[79] Black's at 873; *Charles* at 582; MCL 768.8; MCL 500.3135(2)(a)(ii); M Crim JI 3.1.
[80] *Charles* at 591, citing *Johnson v Kramer Bros Freight Lines,* 357 Mich 254, 258 (1959).

Kolaski, for example, held where the complaint is so defective that it does not charge an offense, there can be no legal determination of guilt - even by guilty plea. *Kolaski v US*, 362 F2d 847 (1966). *Here*, the court said determining Henry's guilt is the "sole province of the jury," App 251, but in many instances, an accused is innocent as a matter of *law*, regardless of the *facts*. That is why "even if the point is the subject of uncertainty, it should, if a pure question of *law*, be resolved by the *court*, not by the finder of fact." *Charles* at n 44 (citations omitted).

2. Motions for Summary Disposition in Criminal Cases

For decades, our courts have recognized *before* trial, the accused may file "a written motion for dismissal of the charges,"[81] it being reiterated in 2020 that *before* trial, the accused may move to dismiss the charges. *Wood* at __. In MCL 767.4, the Code of Criminal Procedure recognizes "proceedings before trial" include a "motion to dismiss," and MCR 6.004(A) and 6.110(H) specifically contemplate *pretrial* motions to dismiss. MCL 600.2315(6) specifically disallows relief *after* a verdict has been rendered when a pretrial "motion to dismiss could have been maintained."[82]

MJI explains a "trial court ***must*** dismiss an action when there is a lack of subject matter jurisdiction, and a *party cannot be estopped* from raising the issue."[83] The State Bar of Michigan Criminal Law Section also understands how integrated summary judgment motions are in criminal cases. Retired Circuit Court Judge Dennis Kolenda authored the 2015 Criminal Law Section's book *Potentially Dispositive Pre-Trial Motions,* App 279-84, with an entire part called "Motions to Quash/Dismiss," and preface stating "the universe of pre-trial motions which can end a prosecution is almost limitless. In any given case, a particular . . . point of law may be so significant that its

[81] *People v McCartney*, 72 Mich App 580, 584 (1976); See *People v Hartwick,* 498 Mich 192, 227 (2015); *People v Kenan*, 144 Mich App 201, 203-04 (1985) (the motions must be written, notice given to prosecutor).
[82] Prosecutor also argues a defendant's Motion to Dismiss may only be filed "at the conclusion of the People's proofs," citing *People v Moore,* 51 Mich App 48 (1974). But *Moore* did *not* say a Motion to Dismiss *has* to be done after the People's proofs. Rather, Moore *chose* not to file for *before* trial - but instead *after* trial, at 52-53. The *Moore* quote Prosecutor cites is from prior cases. In *People v Compton,* 23 Mich App 42, 44 (1970) and *People v Compian*, 38 Mich App 289, 293 (1972), defendants *chose* to file for Directed Verdict. The other cases cited in *Moore* here are *People v Crown,* 33 Mich App 266 (1971) and *People v Brown*, 42 Mich App 608 (1972), where defendants filed no Motion to Dismiss at all, simply raising issues on post-trial appeal.
[83] MJI, *Crim Proc Benchbook*, Vol 1, §2.2; quoting *In re Contempt of Dorsey,* 306 Mich App 571, 581 (2014).

pre-trial resolution means an end to that case." One such point of law is where the "[a]ctivity proven by the prosecution is not a crime." *Id.* Likewise, the ICLE Criminal Law Formbank has numerous samples of *pretrial* Motion to Dismiss and Motion to Quash. App 285-88.

Black's Law Dictionary, exceptionally respected (see n 23), explains a motion to dismiss is a "request that the court dismiss the case because of" a procedural defect like lack of subject matter jurisdiction or "failure to state a claim on which relief can be granted," at 1039. Black's also states a judgment of dismissal is a "final determination of a case (*against* the plaintiff in a civil action or *the government in a criminal action*) without a trial on its merits."[84] Surely, if summary dismissals aren't routine in criminal cases, we wouldn't see it clarified this way. Whether a motion to dismiss looks like a double jeopardy claim, challenge to subject matter jurisdiction, or entrapment defense, the result is the same - the court *must* ensure the rights of the accused are not violated. *Murray* at 285. Inasmuch, the court has the authority, and here, the duty, to enter *permanent* injunctive relief against a constitutional violation, *MI Coalition* at 219, necessitating a dismissal *with* prejudice.

a) All Authority Supports the Claim that MCR 2.116 Applies in Criminal Cases

Prosecutor claims the accused cannot file MCR 2.116 motions as "it is a rule that clearly applies to civil actions only," yet offers *no* authority to support the claim. But we interpret court rules the same as statutes,[85] and so, begin with the rule's plain language. If it's unambiguous, we simply follow its plain meaning. *Duncan* at 723. MCR 6.001(D)'s plain wording clearly applies 2.116, and all other civil rules, to misdemeanors, barring only specific exceptions. Further, the prosecution "may not by its own ipse dixit destroy," *Postal* at 133, the long-held principle that due process requires a way for the accused to challenge unconstitutional or illegal government action occuring at *any* stage in the case. Also, if it so clearly applies only in civil cases, where is a single case holding 2.116 motions to dismiss are inapplicable in criminal cases? Not even one has been mentioned, while the many cases, statutes, court rules and other resources cited here clearly

[84] *Id* at 860 (emphasis added). Court may use dictionaries to discern a rule's plain meaning. *Duncan* 723.
[85] *People v Buie*, 491 Mich 294, 304 (2012), citing *Ligons v Crittenton Hosp.,* 490 Mich 61, 70 (2011).

demonstrate how essential MCR 2.116 motions are *especially* in criminal cases.

Also, since subject matter jurisdiction and other constitutional elements are necessary for the case to proceed, which court rule allows for those *requirements* to be ensured in misdemeanor cases if not MCR 2.116? The phrase "motion to dismiss" only appears once in the criminal rules (6.110(H)), and *nowhere* in the criminal rules does it mention "motion for summary disposition." The word "dismiss" by itself is only mentioned 9 times in the criminal rules, but MCR 6.001(B) makes the dismissals regarding probable cause issues (6.110(H)), procedural defects with the charging document (6.112(G)), and post judgment relief (6.504(B)) expressly inapplicable in *misdemeanors*, leaving only dismissals for speedy trial violations (6.004). Thus, 6.001(B) expressly excludes those necessary remedies to misdemeanor defendants. But note, our court "rules do not provide for motion practice in criminal proceedings; [so,] the rules for civil motion practice apply. See MCR 6.001(D)." *Criminal Proceedings Benchbook,* Vol 1, Rev Ed., §9.2. This then makes MCR 2.116 the avenue for these remedies in misdemeanors *unless* one of a few exceptions exist.

The court then said the "very first line of MCR 2.116 indicates that this is a rule, a court rule that applies to civil matters and discusses stipulating to civil facts." App 249. But stipulating to facts occurs in criminal cases, too. See M Crim JI 4.7; *People v Crawford*, 458 Mich 376, 389 (1998). The court makes another point here, though - if any *subpart* of a rule does not apply to criminal cases, then *none* of it applies to criminal cases (saying 2.116(A) only applies to civil actions, so *none* of 2.116 applies in criminal cases). Yet, the court then implied, App 250, Henry must abide by 2.119(A) (which is true) even though 2.119(G) covers motion fees *not applicable in criminal cases*. It's not sound to hold 2.119 *in its entirety* does not apply since most of subpart (G) does not apply; so, too, 2.116(A) does *not* void using the rest of 2.116 in misdemeanors.

Indeed, the rules and cases emphasize 2.116 *does* apply in criminal cases.[86] The 2.116 2007 Staff Comment states "[d]efects in subject-matter jurisdiction cannot be waived and may be raised

[86] E.g., *Higuera* at 447, n 15 contemplates procedures of MCR 2.116(I)(5) and 2.118; *People v Moreno*, 491 Mich 38 (2012) contemplates 2.116(C)(10) (quashing charges because the officers' conduct was unlawful).

at any time. *People v Erwin,* 212 Mich App 55, 64 (1995); *People v Richards*, [at] 444." It then goes over time frames for (C)(8) - (10) motions, citing *People v Grove*, 455 Mich 439 (1997). If 2.116 did not apply in criminal cases, the official comments for the rule would not use criminal cases to explain it. Also, Chief Justice Bridget McCormack co-authored the original *Defender Motion Book* published by the Michigan State Appellate Defender Office, including a sample *Motion to Dismiss on Procedural Grounds (failure to state claim).* App 274-78. It utilizes 2.116 in a criminal case by moving under (C)(8) when "the complaint fails to sufficiently state a violation," and under (C)(10) when the facts "viewed in a light most favorable to the prosecution, cannot support a violation." App 171-72. The book, addressing pretrial practice and commonly-filed motions,[87] states:

12-1 Insufficiency of the Charging Instrument

If the prosecution has failed to meet its minimal burden at the charging stage, you should move to dismiss the specific charge or charges on which the proof is deficient.

Misdemeanors: Although Mich. Ct. R. 6.110(H) does not apply to misdemeanors, motions to dismiss may still be brought pursuant to M.C.L. 764.9d and Mich. Ct. R. 2.116(C)(8), (10).

b) Unethical to Argue the Accused May Only Motion for Directed Verdict

Prosecutor then argues if the accused is entitled to legal remedies, the only option is to move for directed verdict. Prosecutor's logic is nonsensical and based on *no* cases, statutes, court rules, etc. The accused is not precluded from filing one kind of motion by the virtue of being able to file another kind of motion. And while the accused may file directed verdict motions after the People's proofs, their ability to file those exists entirely distinct from their ability to file 2.116 motions.[88]

Further, arguing to extend MCR 6.419 motions to misdemeanors but *not* 2.116 motions blows past illogical and on toward unethical. MCR 1.109(E)(5) states Prosecutor's signature on the response "constitutes a certification [that] after reasonable inquiry, the document is . . . warranted *by existing law or a good-faith argument for*" its reversal. It's one thing to argue 2.116 doesn't apply in criminal cases, having zero authority to back up that claim. But it's quite another to, at the same

[87]SADO Defender Books, www.sado.org/Page/54/Services-SADO-Defender-Books, accessed Feb 11, 2021.
[88] MCR 6.419 motions are granted where evidence at trial is insufficient to sustain a conviction, while 2.116 requires dismissal for a legal or procedural deficiency, regardless of sufficiency of the evidence presented.

time, claim 6.419 provides a *more appropriate* remedy for misdemeanor defendants than 2.116.

Let's again look at the plain language of the rules. MCR 6.001(D) states 2.116 applies to misdemeanors *unless* a rule or statute says it does not (this is not the case), a rule or statute provides another procedure (this is not the case), or when it clearly appears it applies to civil actions only (also not the case). But Prosecutor's ipse dixit - "2.116 doesn't apply to misdemeanors because Prosecutor says so" has no logic behind it. But if you apply those same parts of 6.001(D) to whether 6.419 applies to misdemeanors, you'll find there *is* a rule, 6.001(B), that makes only *certain* rules in Chapter 6 applicable in misdemeanors, and 6.419 is *not* one of them. "A reasonable application of the expressio unius est exclusio alterius doctrine gets to the . . . answer: the expression of one thing suggests the exclusion of all others." *Michigan Gun* at 707; *Wilson* at 526. In other words, Prosecutor argued how "obvious" it was the *civil* summary disposition rule doesn't apply to misdemeanors but the *criminal* directed verdict rule does; however, by the very wording of 6.001(D) - *all* civil rules apply to misdemeanors *unless* one of the limited exceptions exists, while in 6.001(B) - *no* criminal rules apply to misdemeanors *unless* specifically listed.

c) MCR 2.116 Does Not Usurp Due Process or Jury Trial Rights in Criminal Cases

The court said it couldn't dismiss the charge because it would violate Henry's due process and right to a jury trial. "Yet, at no time has the right to a jury trial in any fashion been understood to displace the authority and duty of the judiciary to determine legal issues. For as long as the right to a jury has been recognized, the exclusive province of the court to rule on matters of law has been acknowledged." *Charles* at 607. The irony here is that M Crim JI 2.4, Function of Court and Jury explains it's the judge's job to "make sure that the trial is run fairly and efficiently," which includes making sure no accused has to endure a trial if the court lacks subject matter jurisdiction. Indeed, "the role of the court in our constitutional system is to declare what the law is and to determine the rights of the parties conformably thereto." *Charles* at n 23. "Moreover, the formal and procedural standards provided by the rule of law address two problems inherent in the administration of justice:

the problems of enforcement error and enforcement abuse." *Id* at n 36. Trial judges ignoring the law, and constitutional protections for the accused, allows such errors and abuses to go unchecked.

> The court also held pretrial motions to dismiss for constitutional or legal defects would
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> be the transgression of our fundamental rights to be processed in a jury trial if the prosecutors were to engage in similar motion practice to seek conviction when they deemed that there was no issue of material fact. So, the idea that this particular rule could be utilized in a criminal matter would, if we flipped it around the other way, would be of really truly basic and horrendous usurping of fundamental rights of due process and the right to a jury trial. App 249-50.

In so holding, the court forgets 2.116(C)(10)'s main premise, where dismissal only occurs if the moving party is entitled to judgment as a matter of law. And where the nonmoving party must, by affidavits, "set forth specific facts showing that there is a genuine issue for trial," 2.116(G)(4) still only allows "judgement, *if appropriate*, [to] be entered." Appropriateness certainly accounts for the accused's legal and constitutional protections. The Fifth Amendment (and Const 1963, art. 1, §17) allows the accused to remain silent if she chooses, and the prosecutor still bears the sole burden of proof, beyond a reasonable doubt to establish each element of the offense.[89] So, looking at the entire legal picture, 2.116 does *not* require a nonmoving accused to assert *any* facts (even to rebut a Prosecutor's motion) and a Prosecutor would *never* be entitled to judgment as a matter of law.

The court's claim applying 2.116 to criminal cases destroys due process also overlooks that (C)(1) - (8) *only* work in dismissing a *claim,* not a defense - so they can *not* be used against the accused. (C)(9) stating the "opposing party has failed to state a valid defense to the claim asserted," is one of the MCR 6.001(D) exceptions to applying the civil rules in criminal cases, as "it clearly appears that they apply to civil actions only," since the due process protections in criminal cases described above require Prosecutor to maintain the burden of proof even if the accused stays silent from arrest through verdict. Here, "the rule's plain language," affirms that use of 2.116 in criminal cases does *not* usurp the accused's rights, and such unambiguous language controls. *Duncan* at 723.

[89] *Hartwick* at 216, citing *Crawford* at 389 (1998); *Oros* at 251, citing *Jackson v Virginia,* 443 US 307 (1979); M Crim JI 3.2; M Crim JI 1.9.

3. MCR 2.116(I)(1) Provides Dismissal as Appropriate Remedy

Henry filed 2.116 motions by (C)(2), (3), (8) and (10), but only laws raised under (C)(8) and (10) are addressed here. Summary disposition may be properly granted under multiple subrules,[90] or a different subrule than the one pleaded,[91] and is proper even if based on grounds not asserted in the motion, such as (C)(4) grounds here now. *Ruggeri.* After all, if pleadings show a party is entitled to judgment by law, MCR 2.116(I)(1) requires the court to "render judgment without delay." *Id.*

On appeal, the court reviews the "denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law [and, thus,] reviews the entire record to determine whether defendant was entitled to summary disposition."[92] When the court "review[s] a question de novo, [they] review the legal issue independently without deference to the lower court."[93] So, when there is no question of fact, the lower courts err by denying summary disposition, *Grange* at 515, and the reviewing court must "remand to the [trial] court for entry of summary disposition in favor" of the party entitled to judgment as a matter of law.[94] Let's put this in context to see how the foregoing law creates grounds under (C)(8), (C)(10), but also (C)(4).

As to (C)(10), dismissal must be granted if there's no issue of material fact and Henry is entitled to judgment as a matter of law. Here, the court said the "defense alleges that the plaintiff has not responded to her supported MCR 2.116(C)(10) motion with affidavits but this court does not find that the support provided by the defendant in this matter warranted any such response." App 250. This ruling ignores a (C)(10) motion made and supported by a brief, affidavits, etc. (which Henry did) means the "'adverse party may not rest upon the mere allegations or denials of his or her

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[90] See, e.g.,*Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57 (1993) ("summary disposition was appropriate under either subrule C(7) or C(10)").
[91] *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309 (2005); *Ruggeri*; *Ellsworth* at 57; *Blair v Checker Cab Co,* 219 Mich App 667 (1996).
[92] *Maiden v Rozwood,* 461 Mich 109, 118 (1999), citing *Groncki*; *Hoffner v Lanctoe*, 492 Mich 450, 459 (2012); *Grange Ins v Lawrence*, 494 Mich 475, 489 (2013); *Snead v John Carlo,* 294 Mich App 343, 353-354 (2001), citing *Loweke v Ann Arbor Ceiling,* 489 Mich 157, 162 (2011), *In re Egbert R. Smith Trust*, 480 Mich 19, 23 (2008); *PF v JF*, __ Mich App __, __ (2021) (Docket No. 351461), slip op at 4; *Morden v Grand Traverse Cty*, 275 Mich App 325, 331 (2007). See also *Cooper by Cooper v Wade,* 218 Mich App 649 (1996).
[93] *People v Jemison,* __ Mich __, __ (2020) (Docket No. 157812), citing Const 1963, art I, § 20.
[94] *Grange* at 481; *Paul v Wayne Cty Dep't of Pub Serv*, 271 Mich App 617 (2006); *Groncki* at 649 (Brickley, CJ)

pleadings, but must, by affidavits or [other admissible evidence], set forth specific facts [at the *time of the motion*,] showing that there is a genuine issue for trial. If the adverse party does not *so* respond, judgment, if appropriate, *shall* be entered against him or her.'"[95] Prosecutor set forth *zero* facts showing an issue for trial, let alone ones sufficiently supported by affidavits or evidence. Prosecutor never even argued (at oral argument or in pleadings) that there *is* an issue of material fact, only arguing the motion should be denied because it is "improper procedure."

The ticket (complaint) also fails to allege any necessary facts. Our criminal laws and rules require the complaint to be as *complete as possible*, specifically stating the *substance of the accusation,*[96] including *all the facts and circumstances constituting the statutory offense.*[97] Yet, the ticket merely states "MCL 750.552 Trespass," and "asked to leave many times," (App 125-26) having *no descriptive words* for the alleged illegal conduct, and thus containing *no well-pleaded* allegations. As to the facts stated by Henry in her combined motions to dismiss, Prosecutor's "denials" do *not* "state the substance of the matters on which the pleader will rely to support the denial." MCR 2.111(D). Prosecutor simply states "Deny," creating baseless denials of several truly uncontroverted facts. For example, Prosecutor's unsupported "denial" of Henry's ℙ 4 denies the ticket filed in court was different than the *copy* served on Henry, yet at the hearing, Prosecutor admitted the ticket "was altered" and "it was clear error." App 242. Also, in 2.111(E), allegations "are admitted if not denied in the responsive pleading" and "Pleading no contest has the effect of an admission," yet Prosecutor responded to some of Henry's allegations by simply stating "Neither admit nor deny." So, even if "Neither admit nor deny" were permissible responses from Prosecutor under 2.111(C) they are still treated as admissions for the purposes of this case.

Also, Henry served on Prosecutor a Request for Discovery on February 15th, pursuant to MCR 6.201, MCR 6.610(E), MCL 763.8(3) and (5), and other authority, providing notice pursuant

[95] *Maiden* at 120-21, citing MCR 2.116(G)(4) (emphasis added).
[96] Code of Criminal Procedure, MCL 764.1d; MCR 6.101 ("The complaint must include the substance of the accusation against the accused ***and*** the name ***and*** statutory citation of the offense.); MCL 257.728(1).
[97] *People v Husted*, 52 Mich 624 (1884).

to MCR 6.201(F) and (J) that if the prosecution fails to comply with the requests made within 21 days, Henry will request the Court to order the testimony or evidence excluded. The 21 days were up on March 8th, yet Prosecutor has failed to respond to the request to-date. This, with the aforementioned willful defiance of MCL 764.1d, MCR 6.101, MCL 257.728(1), MCR 2.111(C)(D) and (E), MCR 2.116(C)(8), MCR 2.116(G)(4), MCR 6.201, MCR 6.610(E), MCL 763.8(3) and (5), make clear the dispute here is one of law, not one of fact, thus within the *sole* province of the court.

All in all, Prosecutor pleaded grossly inadequate facts to support criminal trespass - because the undisputed facts simply don't constitute a crime. Further, Prosecutor fails to follow basic procedural requirements, relevant state laws and court rules, and Henry's constitutional guarantees. Given this, the prosecution should "lose its right to raise factual issues . . . when it has failed to raise such . . . in a timely fashion during the litigation,"[98] which, if there ever were time for this rule to apply, it would be now. If for nothing else, than to simply promote the interests of justice.

Therefore, Prosecutor, with the hefty burden of proof beyond a reasonable doubt as to *each* element of the offense, has only ever *alleged* that 1) Henry and her car were on the grass of *public* property on election day and 2) the clerk told her to leave. This fails to *even allege* if/how the clerk had lawful authority to tell members of the public to leave the *public* parking lot, whether Henry had lawful authority to be on the property, or whether Henry *intended to remain unlawfully* on the property after being told to leave, meaning the charging document and subsequent filings are insufficient on their face. And if mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action in a civil case,[99] certainly it is not enough in a criminal case, where the liberty interests of the accused are implicated by bond conditions, etc., long before a trial is ever held.[100] Thus, with no issue of material fact, dismissal was warranted under (C)(10).

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[98] *People v Trapp,* __ Mich App __, __ (2020) (Docket No. 345239), slip op at 2, n 1, quoting *Steagald v US*, 451 US 204, 209 (1981).

[99] *Eason v Coggins Mem'l Christian Methodist Episcopal Church*, 210 Mich App 261 (1955).

[100] Henry is appealing the denial of her motion to dismiss on the grounds that although the dismissal should have been granted under (C)(8) and (C)(10), the same laws show grounds under (C)(4). However, it is still important to note "the correct legal standard," on a (C)(10) appeal requires "considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All *well pleaded* factual allegations are accepted as true and construed in the light most favorable to the nonmovant [and dismissal will be granted] where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'"[101] As described, the ticket and six-page response are factually deficient, having no *well-pleaded* allegations or *any* substantiated factual claims. And although the deputy marked on the ticket Henry was "in violation of State Law," he charged her with criminal trespass on *public* property while acting as an attorney for circulators of a constitutional amendment petition on election day - an act constitutionally protected and done compliant with state law. Therefore, since Henry's pleadings sufficiently demonstrated how the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, (C)(8) created an appropriate basis for dismissal.

However, let's not forget about MCR 2.116(C)(4). All laws that established grounds for (C)(8) and (10) also establish grounds for (C)(4). This *Election Day* resolution is also preempted by Michigan *Election* Law, and purporting to regulate *parking* it is preempted by the MVC, CTPA and UTC. It's illegal to enforce mere *resolutions*, to prosecute Henry for conduct presumptively protected by the first amendment, or to arrest Henry while serving as an attorney (a public officer). So, the court has no subject matter jurisdiction over such actions. Moreover, the court has no subject matter jurisdiction over a trespass charge on property open to the public, because there is no such crime. In the alleged *parking* violations, the court has no subject matter jurisdiction over Henry's person, but only her car; and since there is no criminal trespass by parking, the court lacks subject matter jurisdiction over the charge. So, for many reasons, "the charge is brought under an inapplicable statute," and the court lacks subject matter jurisdiction.[102] Finally, "[d]efects in

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standard citing the mere possibility that the claim might be supported by evidence produced at trial." *Maiden* at 121. Prosecutor set forth *zero* specific facts showing a genuine issue for trial, and offered *no* evidence in opposition to Henry's motion; Prosecutor's "proffered evidence fails to establish a genuine issue regarding any material fact, [and Henry as] the moving party is entitled to judgment as a matter of law." *Id* at 120.

[101] *Maiden* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158 (1992)

[102] *People v Beckner*, 92 Mich App 166, 169 (1979), citing *People v Johnson*, 396 Mich 424, 439-444 (1976), *Blackledge v Perry,* 417 US 21 (1974), *People v Parney*, 74 Mich App 173 (1977).

subject-matter jurisdiction cannot be waived and may be raised at any time," *Erwin* at 64; *Richards* at 444, and "the court is [even] required to recognize that it lacks subject matter jurisdiction, 'regardless of whether the parties raised the issue."[103] So, the court must order dismissal under 2.116 even though subrule (C)(4) was not specifically pleaded below. *Erwin* at 64; *Richards* at 444.

Although MCR 2.116(I) contemplates Prosecutor filing an amended complaint, not only did Prosecutor make no MCR 2.118 motion to do so, but it would be futile, as anticipated in MCR 2.116(I)(5).[104] Therefore, under MCR 2.116(I)(1), since the pleadings show Henry is entitled to judgment as a matter of law, the court "shall render judgment without delay." *Ruggeri.*

4. Regardless of MCR 2.116, Court Has Duty to Address Jurisdictional & Legal Issues

Even *if* this court should hold MCR 2.116 does not apply in misdemeanors, the court still has the *duty* to act here, just as the lower court had, to ensure Henry's rights are not further violated. *Murray* at 285, citing Hill at 357. The "province of the court in our constitutional system is to determine the law, regardless of its procedural posture in any given case." *Charles* at 593. It is also the court's duty "to enforce the law which the people have made,"[105] including Michigan *Election* Law, and vehicle and *parking* laws, but *not* a *resolution* that can't be used to regulate the people.

MCL 15.151 requires *all* government officials, including township clerks and sheriff's deputies, to take an oath to uphold the constitution. And "a reasonably competent public official should know the law governing his conduct."[106] However, the deputy and clerk used a local *resolution* to stretch a state criminal statute to thwart Henry's political expression, disregarding all constitutional and statutory safeguards against this very kind of government action. Also, the resolution does not provide a narrowly tailored way to achieve a compelling interest. It's also unconstitutionally vague and overbroad. Henry was *not* impeding normal town hall operations nor the rights of others. Thus, in holding streets and parking lots "in trust for public use, the absolute

[103] MJI, *Criminal Proceedings Benchbook*, Vol 1, Rev Ed, § 2.2; quoting *People v Clement,* 254 Mich App 387, 394 (2002); *Johnson* at 442; *Erwin* at 64.
[104] *MacDonald v PKT, Inc,* 464 Mich 322 (2001); *Yudashkin v Linzmeyer*, 247 Mich App 642 (2001).
[105] *People v Harding*, 53 Mich 481, 485 (1884).
[106] *Spurlock v Satterfield,* 167 F3d 995, 1006 (1999), citing *Harlow v Fitzgerald,* 457 US 800, 818-819 (1982).

denial of their use" to Henry was not "valid exercise of the police power." *Hague* at 514. Also, the prosecutor ignored significant substantive impediments negating the authority to bring these charges in the first place. Likewise, Prosecutor ignored MRPC 3.8 that *requires* refraining from prosecuting a charge known not to be supported by probable cause. How can a court "retain public confidence in the judicial system"[107] if it does not hold the prosecutor to these simple, yet essential standards?

The trial court ruled there's *no* judicial oversight of prosecutorial actions, effectively ruling prosecutors are not subject to court rules and have no consequences for violations. But that ignores that "is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[108] Specifically, here, the prosecution has been willfully defiant of MCL 764.1d, MCR 6.101, MCL 257.728(1), MCR 2.111(C)(D) and (E), MCR 2.116(C)(8), MCR 2.116(G)(4), MCR 6.201, MCR 6.610(E), and MCL 763.8(3) and (5).[109] Prosecutor's signature on the response to Henry's motion certified the response was not brought for reasons of delay or any other improper purpose, so when a response is signed in violation of the court rules, the court is *obligated* to impose sanctions. See, e.g., MCR 1.109. At the very least, the court was required to deny Prosecutor the opportunity to present arguments of fact[110] or of law[111] at the motion hearing. While it's true Prosecutor operates as a distinct branch of government, Prosecutor's charging discretion "is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta v California*, 422 US 806, n

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[107] *Grove* at 457, overruled on other grounds by *Franklin* (Mich 2012).
[108] *Mapp v Ohio*, 367 US 643, 647 (1961), quoting *Boyd v US*, 116 US 616, 630 (1886).
[109] In addition to the many factual deficiencies, Prosecutor's response to Henry's motion to dismiss was also willfully disobedient to the requirements of raising legal arguments. MCR 2.116(G)(1)(a)(ii) requires the "response to the motion (*including brief and any affidavits*) [to] be filed and served;" timely to allow for Henry's Reply Brief which must rebut the arguments in Prosecutor's "*response brief*." MCR 2.116(G)(1)(a)(iii). Indeed, a "response to a motion that presents an issue of law *must be accompanied by a brief* citing the authority on which it is based." (MCR 2.119(A)(2); MJI, *Criminal Proceedings Benchbook*, Vol 1, Rev Ed., §9.2.) And in MCR 2.116(C)(10), the nonmovant's *brief* must set forth specific facts demonstrating a genuine issue for trial. *Barnard Mfg Co v Gates Performance Eng'g, Inc,* 285 Mich App 362 (2009). However, Prosecutor filed and served *no* briefs. Violating 2.111(C) and (D) by simply stating "Deny" to the allegations of Henry's motion, Prosecutor's unsupported denials reject many well established legal principles, such as regulations must give citizens fair warning as to what is illegal (¶14), and townships may not enact regulations repugnant to the Constitution (¶15).
[110] by failing to comply with the requirements of MCR 2.116(G)(4) and MCR 2.111(C) - (E).
[111] by failing to comply with the requirements of MCR 2.116(G)(a) and MCR 2.119(A)(2).

46 (1975). Indeed, it's "as much [Prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v US*, 295 US 78, 88 (1935). For it's by "the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers." *Ex Parte Milligan* at 119.

Since it is the court's role to "protect public confidence in the judicial system,"[112] and the constitutional rights of the accused, the trial court has authority to act where the actions or decisions of the prosecutor are unconstitutional, illegal, or ultra vires,[113] intervening for an abuse of discretion by the prosecutor. *Id*; see also, *Herndon* at 392. And just like the court, a prosecutor "necessarily abuses its discretion when it makes an error of law"[114] (such errors of law discussed throughout this appeal). So, it's the judge's *duty* to step in when the prosecutor fails to follow the law, court rules or rules of ethics, or constitution. Yet, regardless of Prosecutor's *many* violations of statutes,[115] court rules and rules of ethics, and constitutional prohibitions, instead of holding Prosecutor to *any* standards, the court mocked Henry,[116] plainly disregarded clear violations by Prosecutor,[117] and denied Henry's motion to dismiss *without* reviewing *any* substantive reasons for the request.

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[112] *Grove* at 457, overruled on other grounds by *Franklin* (Mich 2012).
[113] *People v Morrow,* 214 Mich App 158, 161 (1996), *citing People v Williams* 186 Mich App 600, 608-613 (1990); *People v Gillis*, 474 Mich 105 (2006); see also, *People v Herndon,* 246 Mich App 371, 392 (2001).
[114] *See, Duncan* at 723; *PF v JF* at 4, citing *TM v MZ*, 326 Mich App 227, 235-236 (2018); *People v Franklin,* 894 NW2d 561, 566 (2017), citing *Pirgue v United Servs Auto Ass'n*, 499 Mich 269, 274 (2016).
[115] See, e.g., MCL 600.1825 (3) and MCL 750.543z.
[116] Henry was astounded by Prosecutor's response: "it violated about every court rule and professional rule of ethics that you can possibly do in one six page document. You can't argue the law and the motion without relying on the brief. The court rules are pretty clear about that, MCR 2.119. . . . 2.116 requires that if you want to argue against a C10 motion . . . where there's no issue of material fact, then you have to do so . . . through affidavit and other admissible evidence. There was nothing submitted here. There were no affidavits, there was no brief by the prosecutor, so today is I'm confused about why a hearing would take place because by the very clear words of the court rule [Prosecutor] forfeited that opportunity to argue the law. And when you have an attorney who submits a responsive pleading to a 2.116 C10 motion, G4 says that they cannot argue any facts unless . . . they have introduced [] their own affidavits and exhibits. So, . . . the court rule [says] I would win as a matter of law on that one part of. . . one of four motions alone." App 234. The court sarcastically responded "defendant asked why there was even a hearing being conducted on this matter and that's a rather perplexing question since it was defendant herself that requested this motion and oral argument. So, that's why we're having this." *Id* at 25.
[117] I.e., equivocating Prosecutor's overly-simplistic 6 page "response" (meeting *no* requirements of a brief) with a court-rule-compliant brief. Inasmuch, the court asked Prosecutor "anything that you would like to say other than what's in your briefs?" Henry said "Your Honor, I object. There were no briefs submitted. This is improper for him to be arguing the law," to which the court said "Your objection is overruled." App 241.

MCR 2.116(I)(1) already requires dismissal, but Prosecutor's recurrent disregard of court rules and rules of ethics laid grounds for MCR 2.504(B)(1) involuntary dismissal, too, which Henry argued in substance, not by name, at the hearing. An "appellate court reviews de novo a trial court's ruling on a motion for an involuntary dismissal."[118] The court should have even entered a (B)(1) dismissal *sua sponte*, as "there is another consideration - the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence,"[119] especially where "no distinction can be taken between the Government as prosecutor and the Government as judge." *Id* (citation omitted). Lacking subject matter jurisdiction negates the very authority to bring Henry to trial.[120] With that lack of jurisdiction being "a complete defense to a criminal prosecution," *id,* and "the Constitution guarantee[ing] criminal defendants a meaningful opportunity to present a complete defense,"[121] refusing Henry the right to present *legal* defenses robs her of this fundamental constitutional guarantee. So here, a "review of the transcript clearly reveals that the judge ruled that the issue . . . was one for the jury to determine; . . . Thus, the court did not address the issue as a matter of law, and its ruling must be reversed." *Charles* at 604.

II. Conclusion

Allegan County officials argue this is just a simple case of *Prohibited Parking*, but it is nothing short of a *Constitutional Catastrophe*. Regardless of Prosecutor's spin on this case, in order to convict Henry of trespass, Prosecutor must prove beyond a reasonable doubt Henry had no authority to be in the public parking lot, *and* the clerk had authority to remove Henry from the lot. Remember, the clerk has no inherent source of authority, rights, or property ownership because government acts *on behalf of* the people with its authority *derived from* the people. Here, Allegan

[118] *PF v JF* at 4, citing *Adair v Michigan*, 497 Mich 89, 99 (2014).
[119] *Mapp* at 647, quoting *Elkins v US*, 364 US 206, 222 (1960).
[120] *People v New,* 427 Mich 482, 490, 495 (1986); see also, *People v Hall*, 97 Mich App 143, 146 (1980); *People v Cook*, 323 Mich App 435, 443-444 (2018).
[121] *Holmes v South Carolina*, 547 US 319, 324 (2006), citing *Crane v Kentucky,* 476 US 683, 690 (1986); *People v Unger*, 749 NW 2d 272, 300 (Mich App 2008), citing *People v Kurr*, 253 Mich App 317, 326 (2002).

officials claim the clerk derived her authority to act from the *resolution.* Mere *resolutions* can *never* be used as authority to provide criminal punishments against a citizen. But this resolution also fails to give the clerk authority to act as it: is not narrowly tailored to serve a compelling interest, doesn't provide explicit standards the clerk must use, regulates *Election Day* affairs being preempted by *Michigan Election Law*, regulates *parking* being preempted by state *parking* laws.

Further, *if* this was an enforceable *parking* regulation, as Prosecutor contends, it would be merely a *parking* violation, for which you cannot get jail time or a criminal record. Sure, you can get heftier charges if you park your car in front of a fire hydrant or in the middle of an interstate, but then you would be breaking *other* laws. State law is clear - a *parking* violation is a *civil infraction* only. Thus, stretching a *criminal* trespass statute to prosecute for an alleged *parking* violation is an outrageous violation of her Eighth Amendment protections against cruel and unusual punishment.

We the people get our blessings of freedom from Almighty God, *not* the government. So, we only need to worry about government "permission" when exercising our own rights infringes on the rights of others. As such, there exists *no crime* of *trespassing* on property open to the general public. In other words, Henry's mere presence on *public* property constituted no crime; her petitioning activities were not only constitutionally protected core political speech, but statutorily protected from prosecution; and her presence in her role as an attorney exempted her from this very misdemeanor charge. Consequently, the prosecution failed to state a claim on which relief can be granted; the undisputed facts show Henry is entitled to judgment as a matter of law; and the court is entirely without subject matter jurisdiction to hear this case. (Therefore, laying the grounds for dismissal under MCR 2.116(C)(4), (8) and (10).) Such motions are undeniably applicable in misdemeanors, and MCR 2.116(I)(1) provides ample basis for a dismissal *with* prejudice.

The state has an interest in securing the just, speedy and economical determination of every action, both civil and criminal, MCR 1.105, and wants to secure simplicity in procedure and the

elimination of unjustifiable expense and delay.[122] So, too, the public has an "interest in the prompt and efficient administration of justice."[123] Summary judgment "allows the speedy disposition of a controversy without the need for trial." Black's at 1476. In fact, a "judgment of conviction pronounced by a court without jurisdiction is void" and a "judge of the United States . . . should be alert to examine the facts for himself when if true as alleged they make the trial absolutely void."[124] Thus, granting Henry's requested appellate relief promotes judicial economy, *Paul*, *passim*, avoiding the time and expense of obtaining a conviction that has no legal force whatsoever.

Despite the word games and the "way it's always been done in Allegan County," everything about this case is an assault on our Constitution. There is simply no legitimacy in arguing this is just a case of *Prohibited Parking*. Henry had authority to be on the property, and the township clerk had *no* authority to remove her, so there was no "trespass" *as a matter of law*. The clerk and deputies engaged in malicious prosecution and abuse of process. The deputies also committed assault and battery, false arrest and false imprisonment, and intentional infliction of emotional distress. With how many constitutional provisions, state and federal laws, court rules and rules of ethics that have been violated, this case can be characterized as none other than a *Constitutional Catastrophe.* This is, therefore, a prime example why a *pretrial* dispositive motion must be granted.[125]

A. Requests for Relief

Henry seeks dismissal of this case *with prejudice*, and an order for "the arrest record [to] be removed from the internet criminal history access tool (ICHAT)," pursuant to MCL 764.26a(1)(a). Further, Henry asks this court to order that 60 days from the order of dismissal the "arrest record, all

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[122] MCR 6.002. *Grove.* "MCR 6.001(D) provides that [civil rules] apply to criminal cases. . . . Reading [criminal and civil rules like 2.401 or 2.116] together . . . is in harmony with MCR 6.002, which states that these rules 'are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." (Rev'd on other grounds by *People v Franklin,* 813 NW2d 285 (Mich 2012).)
[123] *People v Aceval,* 282 Mich App 379, 387 (2009); *People v Krysztopaniec*, 170 Mich App 588, 598 (1988).
[124] *Johnson v Zerbst*, 304 US 458, 468 (1938)(citations omitted); *Clement* at 394; *Erwin* at 64-65. "[P]rotection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." *People v D'Angelo*, 401 Mich 167, 174 (1977), quoting *Sorrells v US*, 287 US 435, 457 (1932).
[125] *People v White*, 411 Mich 366, n 8 (1981) (Moody, J., concurring in part, dissenting in part, aff'd in *New*).

biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate," and "any entry concerning the charge shall be removed from LEIN," pursuant to MCL 764.26a(1)(b).

III. Substantial Harm to Henry without Immediate Appellate Relief [126]

Failure to grant immediate appellate relief will cause significant harm to our state's judicial integrity and the public's confidence in our judicial system, but also substantial and irreparable harm to Henry, from significant detrimental impacts on her personal life, legal work, and political efforts.

Henry's constitutionally protected freedoms were trampled by the clerk, who harassed her and had her forcefully removed. The deputy, knowing Henry was coming just to speak with him about the law, refused to do that, instead enlisting two other deputies to help physically and forcibly restrain Henry with handcuffs, violently taking her into custody. He repeatedly told Henry he was taking her to jail, impounding her car, and having CPS take her 6-year-old daughter. He refused to allow her to call her husband to pick up her daughter or her car, and threatened those present with arrest if they tried to exercise control over her car or supervision over her child.

After all she endured on Election Day, Henry at least had hope that Prosecutor, as an officer of the court "sworn to uphold the federal and state constitutions" would quickly dismiss this case. MRPC 6.5 Official Comment. Surely, while all attorneys have a "duty to uphold legal process,"[127] a prosecutor has a special responsibility to ensure the accused is accorded procedural justice and that her rights are protected. MRPC 3.8, Official Comment. But, Prosecutor continues this case *without probable cause*, violating statutes, court rules and ethics rules repeatedly, thus subjecting Henry to continuous denials of her protected liberties. The trial court has ravaged her due process rights and ignored its lack of subject matter jurisdiction over this case. No matter how you look at it, "the state never had the power to proceed against her in the first place,"[128] so the "very initiation of the proceedings against [Henry] thus operated to deny [her] due process of law." *Blackledge* at 30-31.

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[126] "Moreover, justice requires that a court decide the issues of law in the instant case. If the plaintiff's position is accepted, then errant juries may find a defendant liable on the basis of an incorrect interpretation of the law, and that finding may become immune from effective judicial review." *Charles* at 593-594.
[127] *Id.* See also, MRPC 1.6, Official Comment.
[128] *Beckner* at 169, citing *Johnson* at 439-444, *Blackledge*, *Parney*.

While the trial court ruled the accused in misdemeanors never have a right to raise legal issues, to "deprive a citizen of his only effective remedy," which at this point is an interlocutory appeal, "would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice." *Zerbst* at 467 (citations omitted). Fortunately, "the availability of an interlocutory appeal affords protection in those cases where an innocent accused should have been screened out."[129] Screened out from what? From the emotional and financial cost of defending a charge that cannot properly be brought. ICLE, Michigan Criminal Procedure, § 2.3. Circuit Court Judge Dennis Kolenda puts it this way:

> Even criminal cases, which have preference on the docket, take time to bring to trial, and when it finally occurs, a trial is, we all know, expensive and a difficult experience, not only for the defendant, but for the victim and the witnesses, and waiting for a trial causes anxiety and concern for those same people and deprives the defendant of liberty, be it pre-trial confinement or the restrictions of bond. Many things can be done to shorten the night . . . one of them [is] the use of pre-trial motions to end criminal cases without the long wait for trial. Many a potentially dispositive pre-trial motion can be well presented within just weeks of the initiation of the prosecution. Doing so, and getting the case resolved as soon as possible, is to everyone's advantage. *Potentially Dispositive Pre-Trial Motions* (2015), App. 279-84.

Likewise, the Michigan and US Supreme Courts have noted that:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends. . . . [An efficient adjudication of the case will reduce the] substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges . . . . Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.[130]

The state has no interest in punishing Henry,[131] and the court has *no* authority to continue presiding over this case,[132] so Henry suffers substantial harm the longer it drags on. That is why our

[129] *People v Torres,* 452 Mich 43, 61 (1996), quoting *People v Hall*, 435 Mich 599, 615 (1990).
[130] *People v Sierb*, 456 Mich 519, n 19 (1998), quoting *US v MacDonald*, 456 US 1, 8-9 (1982).
[131] *Johnson* at 444; The government has an interest in convicting those guilty of crime, but also of ensuring the innocent are not wrongfully accused. Where Henry is charged with something that is not a crime, the state has no interest in obtaining a conviction. *People v New,* 427 Mich 482, 490 (1986); see also, *People v Hall*, 97 Mich App 143, 146 (1980); *People v Cook*, 323 Mich App 435, 443-444 (2018).
[132] *People v Lown*, 488 Mich 242, 268 (2011); *People v Washington,* 944 NW2d 142, 146 (Mich App 2019) (Subject matter jurisdiction is an absolute requirement for court.); see also, *Clement* at 394; *Zerbst* at 468.

Supreme Court prefers the accused ask "that leave be granted to ensure that the issue" is resolved before the accused is required to endure a needles trial. *Torres* at 70. So, she must not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial"[133] when the "practical result" of a successful challenge to subject matter jurisdiction "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."[134]

In addition to Henry's personal life, there's substantial harm to her legal work, too. Henry, as "an officer of the legal system . . . having special responsibility for the quality of justice," MRPC 1.0 Preamble, who must "be mindful of deficiencies in the administration of justice," *id,* takes these responsibilities seriously and fights hard everyday to remedy such deficiencies. Many attorneys make such claims, but Henry has done more than most in this regard. For 20 years (as of this June), Henry has fought justice deficiencies by serving in two states as: a public defender in misdemeanors, abuse/neglect cases, and juvenile delinquencies; a lawyer (MN), guardian at litem (MN & MI), and LGAL (MI) for children in abuse/neglect and divorce/custody cases; a restorative justice facilitator in schools and juvenile courts; a mediator in child protection, special education, adult guardianship.

In the last 12 months, as officials in all three branches at all levels of government have set aside their constitutional oaths, Henry has helped thousands of Michiganders: business owners, parents, employees, those losing their livelihood because of COVID shutdowns, and those denied essential goods and services due to medical and/or religious mask exemptions. Henry assisted with several election fraud cases and has been asked to represent the accused in several recent high profile cases. Having to research and write *every single day* since February 4th (the day of the motion hearing) on the substantive and procedural due process appeals in *this* case, she is cheated of the time to fight in these cases "for the quality of justice" all citizens deserve. MRPC 1.0, Preamble.

All communication with the clerk and deputies was in Henry's capacity as lead attorney for RFI. As such, she is a public official, with a duty to defend legal process and the law, and need not

[133] *Torres* at 61, quoting *Abney v US,* 431 US 651, 661 (1977).
[134] *Johnson* at 442; *Blackledge* at 30; *New* at 490; see also, *Hall* at 146; *Cook* at 443-444.

obey questionable legal "obligations," and MCL 600.1825(3) and 600.901 prohibit misdemeanor charges against her, also divesting the court of jurisdiction. Yet here we are 5 months later, the case still not dismissed. If law enforcement officers are allowed to violently arrest an attorney like this - especially for an alleged *parking trespass* - how is Henry supposed to feel safe to fulfill her duties as an attorney, including the duty to protect and *inform the public*, and to challenge the rectitude of official action? So it makes sense where the accused is protected "*from* prosecution," such as here with a lack of subject matter jurisdiction, the issue must be raised and the decision must be made before trial. By its very nature, protection under MCL 600.1825 must be decided by the court as a matter of law, in pretrial proceedings, in order to establish the protection *from* trial. *Hartwick* at 213.

As if the harm to Henry's personal life and legal work wasn't substantial enough, the harm to her political efforts is, too. The circulation of a petition involves core political speech, with the strongest constitutional protections available, and entails "liberty to discuss *publicly* and truthfully all matter of public concern without previous restraint or fear of subsequent punishment." *Meyer* at 421-22. The First Amendment surely prohibits the clerk from removing Henry as she did. Further, "a prosecuting agency shall not prosecute any person . . . for conduct presumptively protected by the first amendment to the constitution." MCL 750.543z. So it makes sense that where the accused is protected "*from* prosecution," such as here, the issue must be raised and decision made before trial. By its very nature, protection under MCL 750.543z must be decided by the court as a matter of law, in pretrial proceedings, in order to establish the protection *from* trial. *Hartwick* at 213.

Although unconstitutionally vague and overbroad regulations like this resolution effectively chill free speech, this directly impacts Henry's political efforts the longer this case continues. On election day, RFI circulators across the state heard of the violent arrest of Henry, and grew nervous in continuing their own petition efforts. After election day, the residual effects were far reaching, with circulators fearful they might be similarly arrested, even if following all laws. RFI terminated its petitioning efforts within the month, but many freedom projects are ongoing. Henry still leads

Restore Freedom political efforts including a constitution social media platform, educational presentations, bill watching, legislative advocacy, a newsletter, calls to action, a constitution mobile app, etc. Before election day, Restore Freedom had thousands of volunteers across the state. But volunteering has nearly come to a grinding halt because people are afraid of government retribution as they watch Henry's case unfold, seeing what she's endured. If she doesn't receive immediate appellate relief, her statewide volunteers will likely remain too afraid of the violence and other unconstitutional government action to which their own efforts will fall prey.

Henry surely suffers substantial harm if denied this dismissal/appeal, and forced to stand trial for an act constituting no crime. Her liberty interests are *already* implicated though "constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial." *Cox* at 574 (1965). The constitution does *not* permit this case to continue, lacking such jurisdiction, so the reviewing court must act now, where it's dismissal will serve as "the refusal to permit the trial that the Constitution bars." *Robinson v Neil*, 409 US 505, 510 (1973). Indeed, this court must reverse the denial of summary disposition where it's an issue of law and the facts necessary for resolution are before it. *Paul*, supra.

Henry can raise subject matter jurisdiction any time, surely *before* an unjust trial, or, "the injury itself would have already been sustained." *Torres* at 71. The "embarrassment, expense, and ordeal of living in a continued state of anxiety created by the [] trial" can't be erased afterward on appeal, so she can only avoid these substantial harms to her personal life, legal work, and political efforts "by seeking an immediate appeal." *Id.* So, Henry asks this court to look past the fiction of *Prohibited Parking* and issue immediate appellate relief for this *Constitutional Catastrophe.*

Respectfully Submitted: April 9, 2021

/s/ Katherine L. Henry
Katherine L. Henry (P71954)