STATE OF MICHIGAN

IN THE SUPREME COURT

GRANT BAUSERMAN and TEDDY BROE, individually and on behalf of similarly situated persons,	**Supreme Court No. 160813**
Plaintiffs-Appellees,	**Court of Appeals No. 333181**
-vs-	**Court of Claims No. 15-202-MM**
MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,	
Defendant-Appellant.	

_____/

PLAINTIFFS-APPELLEES' BRIEF SUBMITTED PURSUANT TO THE COURT'S NOVEMBER 25, 2020 ORDER

ORAL ARGUMENT REQUESTED

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiffs-Appellees
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

PITT, MCGEHEE, PALMER & RIVERS, P.C.

JENNIFER L. LORD (P46912)
MICHAEL L. PITT (P24429)
KEVIN M. CARLSON (P67704)
Attorneys for Plaintiffs-Appellees
117 West Fourth Street, Suite 200
Royal Oak, Michigan 48067
(248) 398-9800

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authority

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS PROPERLY CONCLUDE THAT PLAINTIFFS HAVE ALLEGED A COGNIZABLE CLAIM UNDER THE DUE PROCESS CLAUSE OF THE MICHIGAN CONSTITUTION, CONST. 1963, ART 1, §17, UNDER WHICH THEY CAN RECOVER DAMAGES FOR THE VIOLATION OF THEIR CONSTITUTIONAL RIGHTS?

Plaintiffs-Appellees say "Yes"

Defendant-Appellant says "No"

STATEMENT OF FACTS

This case arises out of the decision of the Michigan Unemployment Insurance Agency ("the Agency") to implement an automated decision-making system, the Michigan Data Automated System (MiDAS), to process and adjudicate suspected instances of unemployment insurance fraud. As a federal district court judge who is presiding over other claims arising out of the operation of the MiDAS system has noted with some amount of understatement:

> By most accounts, the system did not work well, as it lacked human oversight, it detected fraud by certain claimants where none existed, it provided little or no notice to the accused claimants, it failed in many instances to allow administrative appeals, and it assessed penalties and forfeitures against individuals who were blameless.

Cahoo v SAS Institute Inc, 322 F.Supp. 772, 784 (ED Mich 2018), *aff'd in part*, *rev'd in part*, *Cahoo v SAS Analytics, Inc*, 912 F3d 887 (6th Cir 2019). The named plaintiffs in this case, Grant Bauserman and Teddy Broe, are former recipients of unemployment compensation who, through the operation of the MiDAS system, saw their property unlawfully seized after they were erroneously determined to have engaged in fraud in conjunction with their claim for unemployment benefits.

On September 9, 2015, Mr. Bauserman filed this class action against the Agency in the Michigan Court of Claims. The following month Mr. Bauserman, joined by two other named plaintiffs, Mr. Broe and Karl Williams, filed a First Amended Complaint. App Vol 1, at 7a-48a. Plaintiffs' complaint contains a single count, a cause of action based on Const 1963, art 1, §17, the Due Process Clause of the Michigan Constitution. The First Amended Complaint alleges that the Agency, through the adoption and implementation of the MiDAS system, denied plaintiffs' fundamental due process rights:

> Michigan utilizes and automated decision-making system to detect possible cases of fraud and to determine that claimants are guilty of fraud. This automated decision-

> making system determines the outcome of fraud cases without meaningful notice, adjudication or an opportunity for claimants to be heard.

First Amended Complaint, at 10; App Vol I, at 17a. The complaint also alleges:

> By utilizing an automated decision-making system for the detection and determination of fraud cases, whereby the computer code in the automated decision-making process contains the rules that are used to determine a claimant's guilt, and those rules change the substantive standard for guilt or are otherwise inconsistent with the requirements of due process.

Id., ¶164F; App Vol I, at 40a. The complaint further asserts that the Agency violated the plaintiffs' and class members' rights by improperly intercepting tax refunds, garnishing wages, and forcing repayments of previously paid unemployment benefits:

> a. without providing the required notice of the bases asserted for disqualification;
>
> b. without providing at least 60 days for claimants to present evidence;
>
> c. without consideration of the federal basis or proof for or against the finding of culpable conduct;
>
> d. without a hearing;
>
> e. without providing claimants an opportunity to be heard at a meaningful time and in a meaningful manner.

Id., ¶164 a-e; App Vol I, at 39a-40a. In lieu of filing an answer to the complaint, the Agency on October 5, 2015, filed a motion to dismiss based on MCR 2.116(C)(4), (7), and (8). Motion to Dismiss; App 1b-22b. In its original motion and in a supplemental motion filed in November 2015, Supplemental Motion, App 23b-46b, the Agency made a number of arguments in support of its claim that plaintiffs' cause of action should be dismissed in its entirety. First among these arguments was that the plaintiffs did not comply with the presuit notice requirement applicable in Court of Claims cases under MCL 600.6431.

Following briefing and an oral argument, Court of Claims Judge Cynthia Diane Stephens issued a written decision on March 10, 2016, denying the Agency's motion. App Vol II, at 31a-41a.

The Agency appealed the denial of its motion to dismiss to the Michigan Court of Appeals. On July 18, 2017, a panel of that Court reversed the Court of Claims, concluding that plaintiffs had not complied with MCL 600.6431's notice provision. App Vol II, at 42a-52a.

Plaintiffs applied for leave to appeal in this Court and, on April 5, 2019, the Court issued a unanimous opinion concluding that the claims being asserted by two of the three plaintiffs, Mr. Bauserman and Mr. Broe, were not barred by MCL 600.6431, since both had provided notice to the defendant within six months of the accrual of their claims. *Bauserman v Unemployment Insurance Agency*, 503 Mich 169, 180-192; 931 NW2d 539 (2019) (*Bauserman I).* In the final footnote of its April 5, 2019 opinion, the Court indicated that the Court of Appeals was on remand to consider "the Agency's argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional claims." 503 Mich at 193, fn. 20.

Following remand from this Court, the Court of Appeals issued a published decision on December 5, 2019, affirming the remainder of the Court of Claims decision denying the Agency's motion to dismiss. *Bauserman v Unemployment Insurance Agency (On Remand)*, 330 Mich App 545; 950 NW2d 446 (2019) (*Bauserman II).* In its opinion on remand, the Court of Appeals recognized that it was reviewing a Court of Claims determination that was predicated on MCR 2.116(C)(8). 330 Mich App at 559. Based on the standards applicable to the review of such a motion, a two-person majority of the Court of Appeals ruled that plaintiffs had properly alleged a claim based on Const 1963, art 1, §17 for the violation of their due process rights caused by a policy or custom of the defendant. 323 Mich App at 563-567. The Court of Appeals majority further

concluded, based on a number of factors, that this was an appropriate case in which to enforce a damage action predicated on a violation of the Michigan Constitution's due process clause. *Id*., at 567-576.

Judge Michael F. Gadola concurred in the result reached by the majority "given the controlling legal precedent cited in that opinion, as applied to the facts alleged in the plaintiffs' complaint." *Id*., at 577. While Judge Gadola agreed that plaintiffs had alleged a cognizable claim for damages under the Michigan Constitution under existing Michigan law, he expressed the view that the imposition of such liability was best left to the Michigan Legislature. *Id*., at 582-583.

The Agency applied for leave to appeal in this Court from the Court of Appeals December 5, 2019 decision. On November 25, 2020, this Court issued an order directing the Clerk to schedule oral argument on the Agency's application for leave. *Bauserman v Unemployment Insurance Agency,* ___ Mich ___; 950 NW2d 737 (2020). The Court's November 25, 2020 order instructed the parties to file supplemental briefs "addressing whether the appellees have alleged cognizable constitutional tort claims allowing them to recover a judicially inferred damages remedy."

ARGUMENT

I. THE COURT SHOULD AFFIRM THE COURT OF APPEALS DETERMINATION THAT PLAINTIFFS HAVE ALLEGED A COGNIZABLE CLAIM FOR DAMAGES UNDER THE DUE PROCESS CLAUSE OF THE MICHIGAN CONSTITUTION, CONST. 1963, ART. 1, §17.

Plaintiffs' sole claim in this case is predicated on article 1, section 17 of the Michigan Constitution. That provision states:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

The Court has ordered the parties to address the question of whether the plaintiffs have alleged a viable claim for damages under this provision in the Michigan Constitution. In the Supplemental Brief that it has filed, the Agency has argued for the complete elimination of any claim for damages predicated on violations of the Michigan Constitution. It further argues that this is not an appropriate case for embracing a damage remedy for the due process violations alleged herein.

For the reasons that follow, this Court should reaffirm the determination made by a majority of the Court in *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), and conclude that a cause of action in damages exists under the Michigan Constitution. The Court should further conclude that this is an appropriate case in which the plaintiffs can pursue a claim for damages for the violation of their constitutional rights.

A. The Court's Prior Decisions On Direct Claims For Damages Based On Violations Of The Michigan Constitution.

In addressing the issues that the Agency raises in its Supplemental Brief, this Court does not

write on a clean slate. There have been several prior decisions of this Court on the subject of direct actions for damages under the Michigan Constitution.[1] These cases provide an appropriate starting point for the analysis of the issues that Agency now raises.

This Court's 1987 decision in *Smith* is widely considered the first case in which this Court embraced the concept of a damage remedy to redress a violation of the Michigan Constitution. According to the defendant, *Smith* represents the "starting point" in this Court's recognition of such a constitutional claim. Defendant's Supplemental Brief, at 11. This is not correct. This Court actually recognized the availability of such a constitutionally-based damage action long before *Smith* was decided. The Court did so nearly one hundred years ago in its 1924 decision in *Bishop v Vandercook*, 228 Mich 299; 200 NW 278 (1924).

In *Bishop*, the governor dispatched a detachment of state national guard troops to Monroe County in an effort to deter rumrunners who were illegally importing liquor into Michigan from Ohio. The troops assigned this task decided to accomplish their mission by periodically placing a 12-foot long log across Dixie Highway on a portion of that highway located between Toledo and Detroit. The plaintiff suffered both property damage and personal injuries when he drove his vehicle into that log as it stretched across Dixie Highway.

The plaintiff in *Bishop* filed suit for damages against the officers in command of the troops responsible for placing the log on Dixie Highway and he obtained a jury verdict against those defendants. On appeal, the defendants claimed they were immune from such a suit by statute. The

---

[1]The cases to be discussed in this section of plaintiffs' brief represent only those cases from this Court addressing direct actions *for damages* predicated on violations of the Michigan Constitution. As will be seen, there is a substantial body of caselaw from this Court involving direct actions based on violations of the state Constitution seeking forms of relief other than damages.

plaintiff countered that argument by relying on Article II, § 6 of Michigan's 1908 Constitution, which provided that, "[t]he military shall in all cases and at all times be in strict subordination to the civil power."

This Court in *Bishop* rejected the defendant's claim of immunity, stressing "[w]e cannot approve of the contention that the state troops in a time of peace, are privileged from civil accountability for wrongs committed. . ." *Id.*, at 306. After disposing of defendant's immunity argument, this Court added the following holding based on Article II, § 6 of the 1908 Constitution:

> The emphatic provision of the Constitution of the state, that 'the military shall in all cases and at all times be in strict subordination to civil power,' is not an empty phrase, but the wisdom of the ages expressed in a succinct mandate. *Any transgression of this fundamental law by military officers renders them liable to respond in damages for injury done no matter how high the command to so act can be traced*.

Id., at 310 (emphasis added). This Court specifically found in *Bishop* that an action for damages could be predicated on a governmental violation of a provision in the Michigan Constitution. *Smith*, therefore, did not represent the first time that this Court embraced such an action for damages predicated on the Constitution.[2]

In 1986, this Court issued its decision in *Smith*, in which it again addressed the viability of a damage action based on a state agency's alleged violation of a provision in the Michigan Constitution. In *Smith,* the plaintiff sought damages for what he alleged to be his unconstitutional institutionalization. The plaintiff sought damages against several defendants including the

[2]The Agency has placed a considerable emphasis in its Supplemental Brief on the rise and purported fall of a direct claim for damages under the United States Constitution that was first adopted by the Supreme Court of the United States in *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388 (1971). It should be noted that this Court's adoption in *Bishop* of a damage action based directly on a violation of the Michigan Constitution predated *Bivens* by 47 years.

Department of Public Health on various theories. Included in those theories of liability were claims based on the Due Process and Equal Protection Clauses of the 1908 Michigan Constitution.

Among the issues presented to the Court in *Smith* was whether the plaintiff could recover damages for injuries sustained as a result of the defendants' violation of the Michigan Constitution. This issue divided the Court, leading to four separate opinions on the subject.[3] Because none of the separate decisions garnered four votes, the Court in *Smith* took the somewhat unusual step of beginning its reported decision with a Memorandum Opinion identifying seven holdings on which a majority of the Court were in agreement. Included in that Memorandum Opinion were two holdings of relevance here:

> 5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> 6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

Id., at 544. Of the four opinions written in *Smith*, the one with the most comprehensive analysis of the constitutional tort issues raised and the one most consistent with the holdings announced in paragraphs 5 and 6 of the Memorandum Opinion was that written by Justice Boyle. For these reasons, in the nearly 35 years since the *Smith* decision was rendered, Justice Boyle's opinion has

---

[3]Six members of the Court participated in *Smith*. Justice Brickley, in an opinion joined by Chief Justice Riley, concluded for various reasons that it would not be prudent to recognize a damage claim based directly on the Michigan Constitution. 428 Mich at 612-632. Justice Boyle, in an opinion joined by Justice Cavanagh that will be discussed further in this brief, concluded that there was a right to recover in damages for a violation of the Michigan Constitution in certain cases. Justices Levin and Archer wrote separate opinions in which they agreed with Justice Boyle that a damage action exists to recover for injuries sustained as a result of a violation of the Michigan Constitution, but they would have construed the right to recover damages against a state agency for such a violation more expansively than did Justice Boyle. *Id.*, at 652-658.

taken on great significance. *Bauserman II*, 330 Mich App at 560; *Reid v Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000).

In her opinion in *Smith*, Justice Boyle first addressed the question of whether immunity could bar the plaintiff's constitutionally-based damage claim. She first found that the statute that provides for governmental immunity, MCL 691.1407, "does not, by its terms, declare immunity for unconstitutional acts by the state." 428 Mich at 641.

Justice Boyle further concluded that common law sovereign immunity could not be interposed as a defense to a constitutional damage claim since that defense had been abrogated by this Court eleven years earlier in *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976). But even absent that abrogation, Justice Boyle noted that the "Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount." *Id.*, at 640. As a result, Justice Boyle ruled, "the provisions of the state constitution would perforce eclipse the vitality of a claim of common-law sovereign immunity in a state court action for damages." *Id.*, at 641-642.

Justice Boyle in her *Smith* opinion also addressed the contours of a viable claim for damages against the state or one of its agencies for a violation of the Michigan Constitution. She noted that the state's liability for damages could be premised either on its direct liability or as a product of its vicarious liability for the unconstitutional acts of its agents under the concept of respondeat superior. *Id.*, at 642-643. In Justice Boyle's view, for prudential reasons, only the former should suffice to fix damage liability against the state or one of its agencies for a violation of the Michigan Constitution. *Id.* Thus, drawing from the Supreme Court of the United States holding in *Monell v New York City Dep't of Social Services*, 430 US 658 (1978), on the subject of municipal liability in an action based on the federal civil rights act, Justice Boyle concluded, "[f]or 'constitutional torts', liability should

only be imposed on the state in cases where a state 'custom or policy' mandated the officials' or the employee's actions." 428 Mich at 642.

Finally, after determining that a cause of action for damages could be recognized for the state's violation of the constitution, Justice Boyle turned to the factors that a court might consider in deciding whether to apply that remedy in a particular case. Justice Boyle noted that the Supreme Court of the United States in *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388 (1971), embraced the existence of a damage claim against federal agents for violation of a provision of the United States Constitution. *Id.*, at 644-645. Justice Boyle further cited various state court decisions that have inferred damage actions for violations of their own state constitutions. *Id.*, at 646. Justice Boyle then concluded in *Smith*:

> We would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases. As the *Bivens* Court recognized, there are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy. On the other hand, there are circumstances in which a damage remedy would not be appropriate. The absence of any other remedy would, as in *Bivens*, heighten the urgency of the question. Justice Harlan, concurring in *Bivens*, states that "[t]he question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."

Id., at 647. Following this Court's decision in *Smith*, the Michigan Court of Appeals addressed damage claims based directly on violations of the Michigan Constitution in a number of cases,[4] but this Court did not consider such a claim again until 2000 when it decided *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). In that case, the plaintiff brought a suit for damages against two Detroit

[4] *See e.g. Cremonte v Michigan State Police*, 232 Mich App 240; 591 NW2d 261 (1999); *Carlton v Dep't of Corrections*, 215 Mich App 490; 546 NW2d 671 (1996); *Johnson v Wayne County*, 213 Mich App 143; 540 NW2d 66 (1995); *Marlin v Detroit (After Remand)*, 205 Mich App 335; 517 NW2d 305 (1994); *Pawlak v Redox Corp*, 182 Mich App 758; 453 NW2d 304 (1990); *Burdette v Michigan*, 166 Mich App 406; 421 NW2d 185 (1988).

police officers for the unlawful entry into her home. Among the theories advanced by the plaintiff was that the officers' conduct violated her rights under the Michigan Constitution.

The *Jones* case proceeded to trial at which the jury returned a verdict against one of the officers based on plaintiff's claim for damages directly under the Michigan Constitution. On appeal, the defendant challenged the judgment entered against him on several grounds. Included in the defendant's arguments was that a constitutional damage claim could not be inferred in *Jones* because the plaintiff had an alternative remedy against the defendant officer.

This Court in *Jones* affirmed the Court of Appeals reversal of the judgment entered against the defendant. The *Jones* Court began its analysis of this issue by reaffirming the holdings reflected in paragraphs 5 and 6 of the *Smith* Memorandum Opinion. 462 Mich at 336. The *Jones* Court, thus, repeated *Smith*'s holding that a claim for damages against the state for a violation of Michigan's Constitution would be recognized in appropriate cases. The Court held, however, that *Smith*'s recognition of a damage action for a violation of the Michigan Constitution represented, "a narrow remedy against the state on the basis of the unavailability of any other remedy." *Id.*, at 337. Since *Jones* did not involve an action against the state and because the plaintiff had an available remedy against the defendant officer under 42 USC § 1983, the Court ruled in *Jones* that a constitutional damage action would not be inferred. 462 Mich at 337.[5]

---

[5]The Court's description in *Jones* of this exception to a direct constitutional action for damages recognized by the Court's majority in *Smith* was clouded somewhat by the *Jones* Court's choice of words. The penultimate paragraph of that opinion contained the essential holding in the case. That paragraph began by noting that the adoption of a constitutionally-based damage remedy in *Smith* had to be based on "the unavailability of any other remedy." 462 Mich at 557. At the conclusion of that paragraph, the *Jones* majority wrote that the case was not an appropriate one for the adoption of a constitutional tort claim for damages because "a plaintiff may *bring* an action against an individual defendant under §1983 and common-law theories." *Id.* (emphasis added). But the mere fact that a plaintiff might be able to *bring* a § 1983 claim against

The year after *Jones* was decided, the Court was presented with another case involving a claim for damages based directly on an alleged violation of the Michigan Constitution in *Lewis v State of Michigan*, 464 Mich 781; 629 NW2d 868 (2001). In *Lewis*, the plaintiff alleged that he had been discriminated against in his employment as a State Police trooper on the basis of his race and sex. The plaintiff's claim for damages was grounded exclusively in Const. 1963, art. 1, §2, the Michigan Constitution's Equal Protection Clause.[6]

This Court in *Lewis* again repeated the holding from the *Smith* Memorandum Opinion that, "[a] claim for damages against the state arising from a violation of the Michigan Constitution may be recognized in appropriate cases." 464 Mich at 786. The *Lewis* Court found that this was not an appropriate case for a court to impose a damage remedy due to the language contained in the final sentence of Const. 1963, art. 1, §2, specifying that "the legislature shall implement this section by

---

an officer does not guaranty that a remedy will be available to the plaintiff under these theories. It is, therefore, the *availability* of an alternative remedy that would counsel against resort to a damage claim predicated directly on the Michigan Constitution. This point was clarified one year later in the Court's decision in *Lewis v State of Michigan*, 464 Mich 781; 629 NW2d 868 (2001). There, this Court rejected plaintiff's constitutional tort theory premised on the Michigan Constitution's Equal Protection Clause, Const. 1963, art. 1, §2. But, in addition, the Court in *Lewis* also rejected the reasoning of the Court of Appeals on another point. The Court of Appeals had concluded that plaintiff's equal protection claim also failed because of an alternate remedy provided in the Michigan's Civil Rights Act, MCL 37,2101, *et seq*. This Court rejected that reasoning, pointing out in *Lewis* that the Civil Rights Act did not afford the plaintiff a remedy and "this unattainable remedy should not be a part of the justification of precluding a plaintiff from an inferred damages remedy. . ." under the Michigan Constitution. *Lewis*, 464 Mich at 785-786.

[6]This provision in the Michigan Constitution states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

appropriate legislation." The Court ruled in *Lewis*:

> On its face, the implementation of Const. 1963, art. 1, § 2 is given to the Legislature. Because of this, for this Court to implement Const. 1963, art. 1, § 2 by allowing, for example, money damages, would be to arrogate this power given expressly to the Legislature to this Court. Under no recognizable theory of disciplined jurisprudence do we have such power.

464 Mich at 787. In May 2019, this Court granted leave to appeal in another case involving a constitutional tort claim, *Mays v Governor*, 503 Mich 1030; 926 NW2d 803 (2019), a case arising out of the Flint water crisis. Among the issues that the Court asked the parties to brief in *Mays* was whether the Court of Appeals erred in recognizing a substantive due process claim for damages under Const. 1963, art. 1, §17.

The *Mays* decision, announced on July 29, 2020, did not produce a majority opinion. *Mays v Governor*, 506 Mich 157; 954 NW2d (2020). With respect to the constitutional tort issues on which the Court had requested briefing, three justices concluded that the plaintiff had a viable claim under the Due Process Clause for which a damage remedy was available. Justice David Viviano was the only other justice to address these questions. Justice Viviano, after concluding that the plaintiffs' claims in *Mays* failed for other reasons, expressed skepticism concerning the continuing vitality of the constitutional tort concept adopted by this Court in *Bishop* and *Smith*. *Mays*, 506 Mich at 245-263 (Viviano, J., concurring in part and dissenting in part.).

B. The Agency's Separation Of Powers Argument.

The principal thrust of the Agency's argument for the elimination of the constitutional damage action recognized by this Court in *Bishop, Smith, Jones* and *Lewis*, is predicated on separation of powers concerns. According to defendant, this Court must, in deference to the role of the Legislature in our constitutional scheme, refrain from imposing any damage remedy for an injury

arising out of the violation of the Michigan Constitution by the state or one of its agencies unless it has been given the authority to do so by the Legislature. According to defendant, because the Legislature has not provided for such a cause of action, this Court is constitutionally restrained from adopting any claim for damages based on injuries sustained as a result of the violation of the Michigan Constitution by the state or one of its agencies.

There is, of course, a separation of powers provision in the Michigan Constitution. Const. 1963, art. 3, § 2 specifies that, "[t]he powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch should exercise powers properly belonging to another branch except as expressly provided in this constitution."

While the Constitution calls for three separate branches of government, this Court has recognized that the boundaries between these branches are not "airtight" and that "the separate powers were not intended to operate with absolute independence." *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014); *Kent Co Prosecutor v Kent Co Sheriff (On Rehearing)*, 428 Mich 314, 322; 409 NW2d 202 (1987). The "true meaning" of the separation powers doctrine, this Court has found, "is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." *Makowski*, 495 Mich at 482, quoting *Local 321, State, Co, & Muni Workers of America v City of Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945).

In the arguments it has made based on its conception of the separation of powers doctrine, the Agency appears to assume that the recognition of a constitutional tort as well as the imposition of a damage remedy for such a constitutional violation rest solely within the "legislative power"

specified in Const. 1963, art. 4, § 1. This assumption does not fully account for the "judicial power" established in Const. 1963, art. 6, § 1. Nor does it account for the special role that this Court possesses in the protection of the rights enshrined in Michigan's Constitution.

This Court has recognized that the "judicial power" provided in Const. 1963, art. 6, §1, is a "matter of considerable constitutional significance." *National Wildlife Federation v Cleveland Cliff's-Iron Co*, 471 Mich 608, 614; 684 NW2d 800 (2004), *overruled on other grounds, Lansing Schools Ed Ass'n v Lansing Board of Ed*, 487 Mich 349; 792 NW2d 686 (2018). The judicial power vested in the courts, "is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation." *Lee v Macomb Co Board of Comm'rs*, 464 Mich 726, 738; 629 NW2d 900 (2001); *Johnson v Kramer Freight Lines*, 357 Mich 254, 258; 98 NW2d 586 (1959); Cooley, Constitutional Limitations (7th ed), at 132 ("To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."). In exercising this judicial power, "the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate breach of the government." *Judicial Attorneys Ass'n v State of Michigan*, 459 Mich 291, 300; 586 NW2d 894 (1998), quoting *Gray v Clerk of Common Pleas Court*, 366 Mich 588, 595; 115 NW2d 411 (1962).

In its constitutionally assigned role of hearing and adjudicating individual controversies, the judiciary is the administrator of a whole body of law – the common law – that enjoys constitutional status of its own, see Const. 1963, art. 3, § 7, and one that is designed to operate independently of the Michigan Legislature. Thus, while the common law may certainly be subject to change through legislative amendment, *Phillips v Mirac, Inc*, 470 Mich 415, 430; 685 NW2d 174 (2004), in shaping

the rights and the remedies available under the common law, this Court does not need to await legislative approval.

It is, therefore, not at all foreign to the concept of judicial power as set out in Const. 1963, art. 6, § 1 for this Court to do what it did in *Bishop* and *Smith.* In those cases, the Court identified a right guaranteed by the Michigan Constitution and it adopted the prospect of a compensatory remedy that is "'necessary' or 'appropriate' to the vindication of the interest asserted." *Smith*, 428 Mich at 647 (Boyle, J.). *Mays*, 506 Mich at 122 ("That the judicial power includes the ability to fashion a remedy is a principle as old as the republic.") (McCormack, CJ, concurring). As one writer on the subject of constitutional torts has noted, "[i]n the context of *Bivens*' remedies, the notion that the judiciary is invading congressional turf has little force. *Bivens* represents the idea of a remedy for a particular individual before the court, and in that sense is quintessentially judicial." Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S Cal L.Rev 289, 304 (1995).

What is also of significance in considering whether this case rests within the "judicial power" found in Article 6 of the Constitution is the nature of the interests being asserted here. Plaintiffs are alleging a claim under a provision in the Declaration of Rights contained in the Michigan Constitution. This Court has a unique and historical role in the protection of these rights. The role that this Court possesses in the preservation of these constitutional rights was rather eloquently stated by Justice Talbot Smith in *Lockwood v Commissioner of Revenue*, 357 Mich 517; 98 NW2d 753 (1959), another case in which the Court was presented with a due process challenge to state action:

> The reasons behind this "most pressing rule" are clear if we will but bear in mind, with Marshall, that it is a Constitution we are construing, our basic charter of government. Here the people have erected their safeguards, not only against tyranny and brutality, but against the oppression of temporary majorities, and the rapacious demands of government itself. Here are found words that are beyond words,

> principles for which men have died and reckoned not the cost. It is a charter heavy with history, pregnant with the pride of a free people. In it they have said to the government itself, in clause after clause: Thus far you may go, but you shall not cross the line we draw. In our country their prohibition is ironclad. It may refer to encroachment on the citizen's person, on his property, or on his purse. That this is "merely" a tax limitation and not one on freedom of speech, or worship, is immaterial. There are no differences in degrees of protection afforded in the constitutional safeguards. *With equal alacrity we halt in his tracks, once his foot crosses the line, the inquisitor, the policeman, the tax collector, the legislator, or the executive. Our question is not how far he has passed over the forbidden line, how serious his encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself.*

Id., at 557-558 (emphasis added). The last three sentences of this quotation from *Lockwood* aptly capture the special role that this Court has in the protection of the fundamental rights guaranteed by the Michigan Constitution. *See also Daugherty v Thomas*, 174 Mich 371, 383; 140 NW 615 (1913) ("The courts are not the guardians of the rights of the people of the state, *except as those rights are secured by some constitutional provision which comes within the judicial cognizance.*") (emphasis added); *Mays*, 506 Mich at 222 ("Ultimately, this Court has a duty to protect the state constitutional rights of Michiganders. The judiciary serves as a check on our coequal branches of government and ensures their acts are constitutional.") (McCormack, CJ, concurring). *Bivens*, 403 US at 407 ("the judiciary has a particular responsibility to assure the vindication of constitutional interests.") (Harlan, J., concurring.)

Within the last year, in a major decision addressed to the doctrine of separation of powers under the Michigan Constitution, this Court aptly described the unique responsibility that this Court has in the preservation of the rights guaranteed by that constitution. In *In re Certified Questions From The United States District Court*, ___ Mich ___; ___ NW2d ___(2020); 2020 WL 5877599, this Court emphasized "when a case or controversy comes within the judicial competence, the

Constitution does not permit judges to look the other way, we must call foul when the constitutional lines are crossed." 2020 WL 5877599, *18. The Court in *In re Certified Question* directly spoke to the authority that the courts of this state possess under Article 6 of the Constitution:

> And specifically relevant to the instant case is the authority of the judicial branch, *in which the judiciary must identify whether the Constitution has been breached and undo such breaches*, *in order that the rights of the people may be upheld* or that facets of our constitutional structure, including its separated powers and checks and balances that preserve and protect these same rights, may be upheld.

Id.,*17 (emphasis added). This Court's description in *In re Certified Question* of the appropriate role of the judiciary in our constitutional system was precisely what this Court was doing when it recognized a potential damage action for violations of constitutional rights in *Bishop* and *Smith*. In those cases, the Court identified violations of the Michigan Constitution and, in holding out the prospect of a damage remedy to redress those violations, the Court was doing what was necessary to "undo such breaches."

This Court's recent opinion in *In re Certified Question* contains one other important insight that should be considered in the face of the separation of powers argument that the Agency advances here. This Court recognized in *In re Certified Questions* that, "[t]he principal function of the separation of powers. . . is to. . . protect individual liberty[.]." 2020 WL 5877599, *11, quoting *Clinton v City of New York*, 524 US 417, 482 (1998) (Breyer J., dissenting). Under the Agency's vision of the separation of powers doctrine that it asks this Court to adopt, some violations of the Michigan Constitution would be declared beyond the reach of this state's judiciary to redress unless and until the Legislature allows the courts to do so. This hardly serves a constitutional doctrine designed, as this Court recognized in *In re Certified Question*, "to protect individual liberty."

For these reasons, this Court should reject the separation of powers argument that the Agency

raises in this Court. Under article 6, §1 of the Michigan Constitution, this Court has the authority to resolve individual controversies against the state or a state agency for alleged violations of the Michigan Constitution. This Court further possesses the constitutional authority to provide an appropriate remedy to redress such violations.

There are, however, additional reasons why the Court should reject the separation of powers argument that the Agency presents. The substance of the defendant's argument is that this Court requires legislative approval before it can consider a case in which the state or one of its agencies violates a citizen's constitutional rights. This argument, however, overlooks a substantial body of caselaw in which this Court has undertaken consideration of challenges to governmental action predicated directly on the Michigan Constitution.

On numerous occasions, this Court has entertained cases challenging governmental action which were predicated directly on the Michigan Constitution.[7] In these cases seeking declaratory or injunctive relief, the plaintiffs alleged that actions taken by the state or a political subdivision violated rights guaranteed by Michigan's Constitution and they sued directly under the Michigan

[7]While by no means exhaustive, this list of cases would include the following: *Johnson v Secretary of State*, ___ Mich ___; 951 NW2d 310 (2020) (direct action under Const. 1963, art. 6, § 4); *Council Of Organizations And Others For Education About Parochiaid v State of Michigan*, ___ Mich ___, ___NW2d ___ (2020) (direct action under Const. 1963, art. 8, §2 and art. 4, §30); *AFT Michigan v State of Michigan*, 501 Mich 939; 904 NW2d 417 (2017) (direct action under Const. 1963, art. 1, §10); *Duncan v State of Michigan*, 488 Mich 957; 866 NW2d 407 (2010) (direct action under Const 1963, art 1, §20); *Sidun v Wayne County Treasurer*, 481 Mich 503; 751 NW2d 453 (2008) (direct action under Const. 1963, art. 1, §17); *Sharp v City of Lansing*, 464 Mich 792; 629 NW2d 873 (2001) (direct action under Const. 1963, art. 1, §2); *Sitz v Department of State Police*, 443 Mich 744; 506 NW2d 209 (1993) (direct action under Const. 1963, art. 1, §11); *Shavers v Kelly*, 402 Mich 554; 267 NW2d 72 (1978) (direct action under Const. 1963, art. 1, §2 and art. 1, § 17.); *Traverse City Sch Dist v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971) (direct action under Const 1963, art 8, §2).

Constitution to enforce those rights.

What is significant about these cases is that this Court, in entertaining these cases, has never expressed reservations about its ability to adjudicate these claims based directly on the Michigan Constitution. Moreover, in these cases, this Court has never suggested that, on separation of powers grounds, it was without authority to entertain these direct constitutional actions unless the Michigan Legislature first provided the courts with express authority to decide them.[8]

The remedy being sought in these other cases is obviously different from the damage remedy recognized in *Bishop* and *Smith*. But in Michigan law, it is the equitable remedy sought in these cases that is the extraordinary remedy, available only where a legal remedy is unavailable. *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010). Moreover, from a separation of powers perspective, the equitable relief that this Court has the authority to impose in these cases could have a far more disruptive effect on the other branches of government than an individual damage award. See Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law of Torts In Bell v Hood*, 117 U Pa L Rev 1, 6 and 22-27 (1968) ("legal relief has traditionally been viewed as the standard, effective method, and the one that presents the least danger of interference with the proper functioning of government.")

---

[8]In its Supplemental Brief, the Agency makes reference to another constitutional provision, Const. 1963, art. 11, §5, part of the classified civil service provision in the Constitution. That section has a provision specifying that "any violation of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state." The various cases cited in footnote 7 of this brief demonstrate that no Michigan court has ever expressed doubts about its ability to entertain a direct constitutional claim for equitable belief on the ground that language similar to that contained in Const. 1963, art. 11, §5 was missing. In other words, no Michigan case has ever suggested that language such as that contained in Const. 1962, art. 11, §5, is necessary before a court may entertain an equitable claim based on a violation of the Michigan Constitution.

The Agency's separation of powers argument simply cannot account for the fact that this Court has on numerous occasions exercised its authority to consider equitable claims predicated directly on the Michigan Constitution. See *Bivens*, 403 US at 400 (Harlan J, concurring); see also Dellinger, *Of Rights And Remedies: The Constitution As A Sword*, 85 Harv L Rev 1532, 1541 (1972) (criticizing the dissenting opinions in *Bivens* for failing to "undert[ake] to distinguish the settled practice of granting injunctive relief premised directly upon the Constitution, or to explain why the Court has the power to develop some remedies (such as the exclusionary role) but not others (such as damages), or to distinguish the judicial power to develop compensatory remedies based on federal statutes.")[9]; see also Hill, *Constitutional Remedies*, 69 Colum L.Rev. 1109, 1112-1113

[9]Professor Dellinger's comments point out another inconsistency in the defendant's suggestion that courts are without authority to infer a damage remedy for a constitutional violation – courts may on occasion infer a damage remedy based on a statute in the absence of express statutory authorization for such a cause of action. A number of state appellate courts that have recognized a direct constitutional damage claim under their state constitutions have viewed judicial recognition of a constitutional tort as merely an extension of the judiciary's authority to infer a cause of action to enforce the provisions of a statute. In doing so, these state courts have frequently relied on the provisions of Restatement (Second), Torts, §874A. That section of the Restatement specifies that where a statute or constitutional provision protects a class of persons by prohibiting certain conduct but does not provide a civil remedy, courts may adopt one. *Dorwart v Caraway*, 312 Mont 1; 58 P3d 128, 135 (2002); *Spackman ex rel Spackman v Brd of Educ of Box Elder Cty Sch Dist*, 16 P3d 533, 538 (Utah 2000); *Binette v Sabo*, 224 Conn 23; 710 A2d 688, 693-694 (1998); *Brown v State*, 89 NY2d 172; 674 NE2d 1129; 652 NYS2d 223, 232 (1996); *Shields v Gerhart*, 163 Vt 219; 658 A2d 924 (1995). In its Supplemental Brief, the Agency suggests that this Court's decision in *Smith* is somehow suspect because it was the product of an era in this Court's jurisprudence in which it took an expansive approach to inferring a cause of action under §874A of the Restatement. Defendant's Supplemental Brief, at 19. In *Gardner v Wood*, 429 Mich 290, 414 NW2d 706 (1987), a decision that was written less than three months after *Smith*, this Court did, in fact, cite §874A of the Restatement with favor as it adopted a four part test to determine when a cause of action could be inferred based on the defendant's violation of a statute. 479 Mich at 301-302. Contrary to defendant's argument, however, the approach to inferring a cause of action from a statute was far from "freewheeling" at the time *Smith* was decided since the Court in *Gardner* ultimately concluded that it would *not* infer a cause of action based on the defendant's violation of the statute involved in that case. *Id.*, at 310-312. Later, this Court in *Lash v City of Traverse City*, 429 Mich 180; 735 NW2d 618

(1969).

The Agency's separation of powers argument also fails to fully come to grips with the implications of this Court's decision in *Lewis*. In that case, the Court held that it could not infer a damage remedy in plaintiff's claim against the State of Michigan based on a violation of the Michigan Constitution's Equal Protection Clause, Const 1963, art 1, §2. The Court ruled that such a damage action could not be judicially inferred because the final sentence of that provision specifies that the Legislature was to implement this section "through appropriate legislation." The Court held in *Lewis* that in light of this language, to award money damages for a violation of the equal protection clause of Michigan's constitution would "arrogate . . . power given expressly to the Legislature." 464 Mich at 787.

The Michigan Constitution's due process clause, the clause at issue in this case, does not contain the implementation language that led to the Court's decision in *Lewis*. In contrast to the Equal Protection Clause that was at issue in *Lewis*, this Court has long-recognized that other provisions of Michigan's constitution are self-executing, meaning that they require no express legislative action for their implementation. *House Speaker v Governor*, 443 Mich 560, 591-592; 506 NW2d 190 (1993); *Hamilton v Secretary of State*, 227 Mich 111, 115; 198 NW 843 (1924);

(2007), again cited §874A of the Restatement and the same four part test set out in *Gardner*. There are two points to be drawn from *Gardner*, *Lash* and this Court's embrace of §874A of the Restatement in those two cases. First, the Agency is incorrect in suggesting that the Court's ruling in *Smith* was written at a time when this Court was overindulgent in inferring causes of action based on the violation of a statute. But *Gardner* and *Lash* do, in fact, demonstrate that this Court's precedents support the view that, in appropriate cases, this Court *will* employ the rationale of §874A and infer a cause of action for damages based on the violation of a statute. This raises the question that the state court opinions cited earlier in this footnote present – if it is appropriate for a court to infer a damage remedy for the violation of a statute in the absence of express legislative approval of such a remedy, why should it be any different for the violation of a constitutional provision?

Costantino v City of Detroit, ___ Mich ___; 950 NW2d 707 (2020) ("The provision [Const 1963, art 2, §4] is self executing meaning the people can enforce this right even without legislation enabling them to do so and that the legislature cannot impose additional obligations in the exercise of this right.") (Viviano, J., dissenting).

The Due Process Clause of the Michigan Constitution requires no legislation for its implementation; it is self-executing. *See Mays v Governor*, 323 Mich App 1, 32, fn. 6; 916 NW2d 227 (2018); *cf Rusha v Dep't of Corrections*, 307 Mich App 300, 308-310; 859 NW2d 735 (2014); *NAACP v Dearborn*, 173 Mich App 602, 614; 434 NW2d 444 (1988). As a self-executing provision of the Michigan Constitution, not only is implementing legislation unnecessary to its enforcement, but "the legislature may not act to impose additional obligations on a self-executing constitutional provision." *Wolverine Golf Club v Sect of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). Here, unlike *Lewis*, this Court need not await legislative action to enforce the provisions of the Michigan Constitution's Due Process Clause. For this reason as well, the Court should reject the Agency's separation of powers argument.[10]

Finally, in assessing the respective roles of the Legislature and the judiciary in the treatment of direct constitutional claims, particularly those brought under the Due Process Clause, the Court should also consider the implications of its decision in *In re Petition By Treasurer of Wayne County*

[10]A number of state appellate courts that have adopted the concept of a constitutional tort and allowed a claim for damages based on a state constitution have relied on the fact that the constitutional provisions that the plaintiffs were claiming were self-executing. *See e.g. Godfrey v State*, 898 NW2d 844, 868-873 (Iowa 2017) (enforcing the Iowa Constitution's Due Process Clause); *Shields v Gerhart*, 163 Vt 219; 658 A2d 924, 934 (1995); *Spackman ex rel Spackman v Board of Educ of Box Elder County Sch Dist*, 16 P3d 533, 535-536 (Utah 2000) (construing the Utah Constitution's Due Process Clause); *Corum v University of North Carolina*, 330 NC 761; 413 SE2d 276, 289-290 (1992); *Brown v State of New York*, 89 NY2d 172, 186-187; 674 NE2d 1129, 1137-1138; 652 NYS2d 223 (1996).

Treasurer, 478 Mich 1; 732 NW2d 458 (2007). In that case, a judgment of foreclosure was entered on a piece of property owned by the respondent despite the fact that the respondent did not receive notice of the foreclosure proceedings. The respondent sought relief from the foreclosure and a return of its property in a court action, arguing that its due process rights had been violated. In response, the petitioner argued that a statute, MCL 211.78*l*(l), precluded the respondent's due process claim seeking return of the property and limited respondent solely to an action for monetary damages.[11]

This Court held in *In re Petition* that the statute preventing the respondent from pursuing a due process claim was unconstitutional:

> As noted above, the statute permits a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer's property, and sell the property, leaving the circuit court impotent to provide a remedy for the blatant deprivation of due process. *That interpretation, allowing for the deprivation of due process without any redress would be patently unconstitutional*. . . Because the *Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute purporting to limit the circuit court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process*.

478 Mich at 10-11 (emphasis added). What is noteworthy about this Court's decision in *In re Petition* is that a statutory scheme that precluded the respondent from raising a due process claim, leaving the respondent "with no recourse for the violation of his Constitutional rights," was found to be unconstitutional. Not only did the respondent in that case have the right to proceed to court to directly enforce its constitutional due process rights, but any effort by the Legislature to preclude plaintiff from seeking judicial enforcement of those rights was found by this Court to be

[11]That statute provided in relevant part that "the owner of any extinguished . . . interest in property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section."

unconstitutional. This Court in *In re Petition* obviously found that the judiciary had a role to play in the protection of the respondent's due process rights that could not be taken away through legislation.

For all of the reasons discussed herein, the Agency's separation of powers argument should be rejected. The Court should affirm what it did in *Bishop* and it should reaffirm what a majority of this Court held in *Smith* and later repeated in both *Jones*, 462 Mich at 336, and *Lewis*, 464 Mich at 786: "[a] claim for damages against the state arising from a violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544.

C. This Is An Appropriate Case In Which To Impose A Damage Remedy For The Violation Of Plaintiffs' Due Process Rights.

The Agency further argues in its Supplemental Brief that, even if its separation of powers argument is rejected and this Court reaffirms the right to recover damages for a violation of the Michigan Constitution committed by the state or one of its agencies, the Court should nonetheless conclude that this is not an appropriate case for imposing such a damage remedy.

1. Policy or Custom.

The Agency first argues that plaintiffs' constitutional claim should be rejected on its merits because plaintiffs cannot establish a policy or custom that led to the violation of their constitutional rights.[12] Defendant argues in its Supplemental Brief that plaintiffs can neither establish that the

[12]This discussion of policy or custom is a product of Justice Boyle's concurring opinion in *Smith*. In that opinion, Justice Boyle noted that a state agency could be held liable for the violation of constitutional rights under two distinct theories. 428 Mich at 642 (Boyle J. concurring). Either the agency could be held liable for a constitutional violation for which it was directly responsible through its policies or customs or it could be held liable on a theory of respondeat superior, with the agency being held vicariously liable for the unconstitutional acts of its agents. *Smith*, 428 Mich at 642 (Boyle, J concurring). Justice Boyle, in her opinion in *Smith*,

violation of their due process rights was a product of a custom or policy of the defendant or that this custom or policy caused the violation of their constitutional rights.

The Agency's arguments on these two points are couched in terms of the purported inadequacy of plaintiffs' proofs. Defendant suggests that plaintiffs have failed to "show" or "demonstrate" a policy or custom or the causal relationship between that policy or custom and the denial of plaintiffs' due process rights. Defendant's Supplemental Brief, at 26. Despite the fact that this case was filed in the Court of Claims over five years ago, this case has not yet reached the proof stage. As the Court of Appeals correctly determined, the motion to dismiss filed by the Agency in October 2015, at least insofar as it sought dismissal of plaintiffs' constitutional tort claims, was

---

drew from the Supreme Court of the United States decision in *Monell v New York City Dep't of Social Services*, 436 US 658 (1978), and determined that liability in damages for the violation of the Michigan Constitution should not be based on vicarious liability. 428 Mich at 642-643. Instead, Justice Boyle was of the view that, consistent with *Monell*, a state or state agency's liability for a constitutional tort under the Michigan Constitution should only be recognized where the violation of the plaintiff's constitutional rights was the result of the defendant's policy or custom.

There is good reason to question Justice Boyle's incorporation of a *Monell* standard of liability in this context. It is true that the United States Supreme Court in *Monell* concluded that municipal liability in an action under the federal civil rights act could not be premised on vicarious liability, but had to be based on the violation of an individual's constitution rights due to the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . ." 436 US at 694. But what is clear from the *Monell* decision is that the limitation on municipal liability for constitutional violations adopted in that case was based on the *Monell* Court's extensive review of the legislative history behind the Civil Rights Act of 1871. 436 US at 665-689. Thus, the *Monell* Court's rejection of a vicarious liability standard in 42 USC §1983 cases brought against municipalities was based solely on the Court's assessment of the intent of the 1871 Congress when it passed the civil rights act. There is no reason why the intent of Congress in passing the 1871 Civil Rights Act should serve as a basis for the construction of Michigan's Constitution as it pertains to the recovery of damages for the violation of rights that it guarantees. *See* Gildin, *Redressing Deprivations Of Rights Secured By State Constitutions Outside The Shadow Of The Supreme Court's Constitutional Remedies Jurisprudence*, 115 Penn St L Rev 877, 892-898 (2011).

based on MCR 2.116(C)(8). *Bauserman II*, 330 Mich App at 559.[13]

The fact that this case comes before the Court on a motion filed under MCR 2.116(C)(8) is significant. A motion filed under that court rule "tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Corley v District Board of Education*, 470 Mich 274, 277; 681 NW2d 342 (2004). This Court in *El-Khalil vs Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019), outlined the standards that govern a court's review of a motion filed under MCR 2.116(C)(8). In considering such a motion, "a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." 504 Mich at 160. The Court must also construe the allegations contained in the complaint in the light most favorable to the plaintiffs. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). In *El-Khalil*, the Court emphasized the difference between a motion filed under MCR 2.116(C)(8) and one that is based on MCR 2.116(C)(10): "A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. . . A motion under MCR 2.116(C)(10), on the other hand, tests the *factual sufficiency* of a claim." 504 Mich at 159-160 (emphasis in original). Thus, at this stage, the sole question presented to the Court is whether the allegations in plaintiffs' complaint are legally sufficient, not whether there are sufficient facts to support plaintiffs' claims.

As noted, the Agency does not argue in its Supplemental Brief that plaintiffs have failed to

[13]Further complicating review of the "policy or custom" arguments that the Agency now offers in its Supplement Brief is that neither the original motion to dismiss that the Agency filed in the Court of Claims in October 2015 (App 1b-22b) nor the Supplemental Motion that it filed the following month (App 23b-46b) made any mention at all of the *Monell* liability standard. Thus, there was no discussion at all of "policy" or "custom" in the numerous arguments the Agency made in support of its request for dismissal.

adequately *allege* a custom or policy that resulted in the violation of their due process rights;[14] their argument is addressed to the quality of plaintiffs' *proofs* bearing on these issues. But, as *El-Khalil* makes clear, that is not the appropriate focus of a motion that is filed under MCR 2.116(C)(8).

Properly seen as an issue governed by the review standards applicable to motions premised on MCR 2.116(C)(8), it is obvious that there is no merit to the Agency's argument with respect to policy or custom. Construing the allegations contained in plaintiffs' complaint in a favorable light to the plaintiffs, *Kuznar*, 481 Mich at 176, it is clear that plaintiffs have alleged that the constitutional claim being asserted against the Agency is *not* based on a theory of vicarious liability for the unconstitutional acts of its agents. Rather, plaintiffs' due process claim arises out of the Agency's decision to adopt an automated system, MiDAS, to detect and process suspected instances of fraud. And, as alleged in plaintiffs' complaint, it was the failings of that system adopted by the Agency that led to the denial of due process rights that is at the center of this case. The essence of plaintiffs' constitutional claim is captured in this paragraph from the complaint:

> Michigan utilizes an automated decision-making system to detect possible cases of fraud and to determine that claimants are guilty of fraud. This automated decision-making system determines the outcome of fraud cases without meaningful notice, adjudication or an opportunity for claimants to be heard.

First Amended Complaint, at 10; App Vol I, at 17a. At the present stage, this allegation of both a policy decision to adopt the MiDAS system and that system's role in causing the constitutional violations being alleged in this case is sufficient to defeat the Agency's arguments addressed to the *Monell* liability standards. *Johnson v Vanderkooi*, 502 Mich 751, 765; 918 NW2d 785 (2018) ("we

[14]Moreover, if the Agency in its motion to dismiss had challenged the adequacy of plaintiffs' allegations with respect to a policy or custom (which it did not), plaintiffs would have had an opportunity under the mandatory language of MCR 2.116(I)(5) to correct any such pleading deficiency by amendment.

also believe that a municipality may be held liable for unlawful actors that it sanctioned or authorized, as well as those it specifically ordered.")

Judge Michael Gadola, in his concurring opinion in the Court of Appeals, did a good job of summarizing just how inadequate the Agency's argument on this point is:

> The harms plaintiffs allege resulted from a series of policy decisions and practices the Agency consciously and intentionally adopted over a considerable period of time. One would be hard-pressed to conclude that these decisions and practices were not the result of government policy or custom, and I am unable to do so.

Bauserman II, 330 Mich App at 579 (Gadola, J concurring).

2. Other Factors To Be Considered

Beyond its discussion of whether plaintiffs have sufficiently demonstrated a policy or custom, the remainder of the Agency's arguments focus on a number of factors that could be weighed in adopting a damage remedy based on a constitutional tort that were noted by Justice Boyle in her concurring opinion in *Smith*. 428 Mich at 647-651 (Boyle, J., concurring).

With two exceptions, the various factors that were mentioned by Justice Boyle in her opinion in *Smith* have not been adopted by a majority of this Court. Justice Boyle suggested that the text of the specific constitutional provision at issue should be considered in determining whether a damage remedy for a constitutional violation is appropriate. *Id.*, at 650. That is precisely the analysis that the Court was engaged in in *Lewis* when it held that, because of the legislative implementation language contained in the last sentence of Const. 1963, art 1, §2, the Court could not infer a damage remedy in an action to enforce the Michigan Constitution's Equal Protection Clause in the absence of legislative authorization. *Lewis*, 428 Mich at 787-788.

Justice Boyle in *Smith* also cited "the availability of another remedy" as a consideration that

would counsel against adoption of a damage remedy for a constitutional tort. 428 Mich at 651 (Boyle J., concurring). In its 2000 decision in *Jones*, this Court held that the damage remedy recognized in *Smith* represented "a narrow remedy against the state on the basis of the unavailability of any other remedy." *Jones*, 462 Mich at 337.

This Court's decision in *Jones* means that a claim against the State of Michigan or one of its agencies for damages resulting from a violation of a citizen's rights protected by the Michigan Constitution may only proceed if there is no other remedy available to the plaintiff. Plaintiffs would suggest that this Court recognize that, at least with respect to the violation of constitutional rights identified in the Michigan Constitution's Declaration of Rights, the limitations on a damage remedy already identified by this Court in *Jones* and *Lewis* should be the *only* factors to be considered in determining whether a damage remedy is appropriate. If a plaintiff is suing the state or a state agency to redress a violation of one of the fundamental rights guaranteed in the Constitution's Declaration of Rights and that plaintiff has no alternative remedy to address that violation, a damage remedy should be available.

The record of the Michigan constitutional convention confirms that the rights that were ultimately enshrined in the Constitution's Declaration of Rights were to have a special status. Before that convention began, then governor John B. Swainson drafted a letter to the delegates on December 15, 1961, designed to accent the importance of a Declaration of Rights:

> The drafting of a declaration of rights that will incorporate the distilled wisdom of the past and provide for the protection of individual rights emerging from the social and economic ferment of the twentieth century could very well be the most important and lasting contribution that this convention can make to the preservation of the democratic ideal.

1 Official Record, at 400-401. The importance of the principles contained in the Declaration of

Rights was again stressed when the Committee on the Declaration of Rights reported its recommendation. The very first recommendation made by that Committee, one that was ultimately adopted by the convention, was that the enumeration of rights, which had been contained in the second article of Michigan's 1908 Constitution, should be repositioned to reflect the primacy of these rights:

> In the committee's opinion the liberties of the people are so fundamental to the Michigan constitution and to free representative government generally that the declaration of rights which establishes the fundamental principles of liberty and sets up the basic legal guideposts for their implementation and enforcement, should appear as the first article in the new constitution.

Official Record, p. 466. Professor James Pollock, the chairman of the Declaration of Rights Committee, introduced the Committee's recommendations with the following:

> I think it is not necessary for me to emphasize again this evening the basic importance of the matters dealt with in the declaration of rights. *This is the keystone in our governmental arch*. And if ever we deserve wisdom, or rather if ever we deserve to use wisdom, we deserve to use it in connection with this article of the constitution. Organs of government may change. Procedures may change. These inalienable rights must be very carefully weighed and understood.

Id., at 471 (emphasis added). These quotations represent only a small sampling of numerous statements from the constitutional convention indicating that the contents of the Declaration of Rights were of supreme importance to the delegates. The rights guaranteed in the Declaration of Rights are fundamental to the citizens of this state. As this Court has noted, the Declaration of Rights was "drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses." *Sitz v Dep't of State Police*, 443 Mich 744, 760; 506 NW2d 209 (1993), quoting *Woodland v Citizens Lobby,* 423 Mich 188, 204; 378 NW2d 337 (1985)..

By arguing various factors that are to be considered in weighing the availability of a damage

remedy for a violation of the Michigan Constitution beyond those identified in this Court's decisions in *Jones* and *Lewis*, the Agency is advocating a position that in some to-be-determined class of cases, the state's violation of a fundamental constitutional right would go completely unredressed. There is, in plaintiffs' view, no justification for such a result.

If the state or one of its agencies causes injury by violating one of the basic rights in the Constitution's Declaration of Rights and no other remedy exists to redress that injury, Michigan courts must make a damage remedy available. Such a result is consistent with the important principle announced in *Marbury v Madison*, 5 US 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury. One of the first duties of government is to afford that protection."

This Court expressed a similar sentiment in *Durant v State of Michigan*, 456 Mich 175; 566 NW2d 272 (1997). In that case, a mandamus action to enforce provisions of the Headlee Amendment to the Michigan Constitution, Const. 1963, art. 9, §29, the Court imposed a damage remedy against the defendant. In doing so, the Court noted that "[a]ny other remedy, particularly one that would grant declaratory relief alone, *would authorize the state to violate constitutional mandates with little or no consequence*." *Id*., at 206 (emphasis added). As *Durant* highlights, there must be consequences where the state or its agencies violate the fundamental rights set out in the Constitution's Declaration of Rights. And, if no other remedy is available for that violation other than damages, the courts of this state must allow the imposition of such a remedy.

For these reasons, plaintiffs would suggest that this Court need not consider any factors other than the lack of an alternative remedy imposed in *Jones* in deciding whether a damage remedy is appropriate to redress the due process violations alleged by the plaintiffs here. But even if the

additional factors suggested by Justice Boyle in her *Smith* concurrence were to be enshrined in a majority opinion of this Court, these factors are met in this case, and this Court must deem this an appropriate case for the imposition of a damage remedy to redress the violations of plaintiffs' due process rights.

The first "observation" offered by Justice Boyle on this point in her concurring opinion in *Smith* was that a court assessing the appropriateness of a damage remedy for a constitutional tort, should consider the "text, history, and previous interpretations" of the constitutional provision involved. *Smith*, 428 Mich at 650 (Boyle J., concurring). According to Justice Boyle, these factors might be relevant because the constitutional provision "may commit creation of a remedy to the Legislature rather than the courts." *Id*., at 650-651.

It was obvious that it was this consideration that led to the Court's decision in *Lewis* construing the Constitution's Equal Protection Clause. But, as noted previously, the language in Const. 1963, art. 1, §2 that led the Court to its decision in *Lewis* is not contained in the Due Process Clause of the Michigan Constitution.

There is, moreover, at least some evidence in the history of the constitutional convention supporting the conclusion that the delegates to that convention envisioned that both legal and equitable remedies would be available for any violation of the Michigan Constitution. This evidence comes from the convention debates over the formation of the Civil Rights Commission, the section of the Constitution that was to become Const. 1963, art 5, §29.

During the course of the debates on the Civil Rights Commission, a convention delegate, Ann Elizabeth Donnelly, proposed what was to be known as the Donnelly Amendment to the provision establishing the Civil Rights Commission. The Donnelly Amendment proposed to add the sentence,

"[t]his provision shall not be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state." Official Record, at 1946

During the debate on the Donnelly Amendment that followed, Ms. Donnelly spoke in favor of her proposal. She described the purpose of her proposed amendment as ensuring that the formation of the Civil Rights Commission would not be seen as displacing the ability of citizens to present claims directly to the courts in the first instance. Ms. Donnelly advised the convention's delegates what her amendment would achieve:

> The intent of this is that the commission shall not derogate the rights of legal remedy any citizen wants, that *the right that a human has to have his case go to court*, if he wants to take his case to court he should be able to take it to court immediately, and it means that if he wants his case tried immediately he should be able to go to court and get damages, if that is what the court can award him, that he can have this taken care of. *Whatever rights we have under this constitution are intended to be included in this and should also be able to be taken care of directly by any court that a person desires to take it to. They have this legal right and it should not be removed from them.*

Id. (emphasis added). What is significant about these statements by Ms. Donnelly is that she was proposing through her amendment to preserve the court's traditional role of awarding both legal and equitable remedies *and she was of the view that this preservation of traditional judicial remedies applied to all of the rights guaranteed in the Constitution*. The Donnelly Amendment was adopted by the delegates and, following drafting edits, was incorporated into the final version of Article 5, §29 of the Constitution.[15] The delegates' approval of the Donnelly amendment provides some historical basis for the conclusion that a damage remedy should be inferred for the due process violations claimed in this case.

---

[15]It its edited version, the final form of Ms. Donnelly's amendment reads: "Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state." Const. 1963, art. 5, §29.

Another factor that Justice Boyle suggested in her *Smith* concurrence was the "degree of specificity" of the constitutional provision at issue. In this case, plaintiffs have raised claims that their rights to procedural due process were violated by the implementation of the MiDAS system. In *Mays*, this Court considered a more amorphous substantive due process claim to bodily integrity.[16] By contrast, this case involves the procedural component of a due process challenge. The contours of such a claim are well established and not particularly difficult to grasp:

> "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Furthermore, "'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'"

In re Petition by Wayne County Treasurer, 478 Mich at 9, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314-315 (1950). What plaintiffs have alleged in this case are violations of these basic procedural rights on which the due process clause of the Michigan Constitution speaks with clarity.

Finally, the Agency asserts that this Court should refuse to infer a cause of action for damages in the circumstances of this case because plaintiffs have "other remedies" available to them. In making this argument, the defendant points to the administrative remedies that are available to them under provisions of the Michigan Employment Security Act (MES Act), MCL 421.1, *et seq*.

---

[16]In her opinion in *Smith*, Justice Boyle made reference to the fact that the Fourth Amendment claims brought in a case such as *Bivens* were "relatively clear cut" in comparison to equal protection or due process claims. 428 Mich at 651 (Boyle, J., concurring). In support of that statement, Justice Boyle cited a law review article for the proposition that "*substantive guarantees* of due process and equal protection are troubling in their indeterminate character." *Id.* (emphasis added). Thus, Justice Boyle's discussion of "indeterminate" due process claims in this portion of her *Smith* opinion was a reference to substantive due process theories, not the procedural due process concerns at issue here.

This argument regarding alternative remedies available to the plaintiffs is difficult for the defendant to pull off where, as here, plaintiffs have alleged that the administrative procedures on which the Agency relies were themselves undermined by the due process violations that form the core of plaintiffs' claims. Thus, for example, plaintiffs have alleged as part of their due process claim that appeals at the agency level "are ignored and claimants never receive any acknowledgment from the Agency that they were received, considered or rejected by the Agency." First Amended Complaint, ¶50; App. 19a-20a Yet, the defendant cites this procedurally flawed appellate process as proof of the fact that plaintiffs have an alternative remedy available to them.

Moreover, in making its argument that the administrative remedies that might be available to plaintiffs counsel against the adoption of a damage remedy for the constitutional violations alleged in this case, the Agency makes two important concessions. First, defendant acknowledges that "neither the Agency nor the administrative tribunals can decide constitutional issues." Supplemental Brief, at 41; see *Wilkman v City of Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982); *Dation v Ford Motor Co*, 314 Mich 152, 159; 22 NW2d 252 (1946). Second, the defendant admits that the MES Act does "not allow for money damages." Supplemental Brief, at 39.

Thus the Agency's argument boils down to an assertion that the plaintiffs' claim for monetary damages for the violation of their constitutional *rights* should somehow be rejected because of the existence of an administrative process which can neither determine whether the plaintiffs' constitutional rights have been violated and which could not award plaintiffs damages even if it could address whether their due process rights were infringed. This Court made it clear in *Lewis* that an alternative remedy may be the basis for withhold a damage remedy for a constitutional tort only if that alternative remedy was "attainable." *Lewis*, 464 Mich at 785. That threshold cannot be met

here. This Court cannot conclude that administrative remedies will provide an alternative remedy to a constitutional damage claim in these circumstances. *Mays*, 2070 WL 4360845, *17 (holding that statutes that "do not provide a right to address constitutional violations" cannot serve to foreclose a constitutional claim) (Bernstein, J.).

For these reasons, this Court should conclude that this is an appropriate case for plaintiffs to present their claim for damages to the Court of Claims based on the Agency's violation of their constitutional rights.

D. Immunity.

In its Supplemental Brief, the Agency makes passing reference to immunity. Defendant's Supplemental Brief, at 22-26. No such immunity exists in this case. First, the doctrine of common law sovereign immunity was abrogated by this Court forty-five years ago in *Pittman*, 398 Mich at 47-50. Moreover, a majority of this Court ruled in *Smith* that governmental immunity was not a defense that could be raised to a constitutional tort based on the Michigan Constitution where, as here, plaintiffs have alleged that their rights were violated due to a policy or custom of the state or one of its agencies. 428 Mich at 544. The *Smith* Court's holding on this issue was repeated in the Court's later opinion in *Jones*, 462 Mich at 336.

E. The Federal Experience With Respect To Constitutional Torts Is Irrelevant.

Finally, in arguing against the adoption of a constitutional tort, the Agency has placed enormous emphasis on the cases from the Supreme Court of the United States on the subject of constitutional torts. Defendant argues that this Court's decision in *Smith* was written in the wake of the United States Supreme Court's recognition of a direct constitutional action under a provision

in the Untied States Constitution in *Bivens*. Citing a trend in more recent United States Supreme Court cases that have limited the reach of a *Bivens*-type claim, the Agency suggests that this Court should use this federal example as a grounds for reversing *Smith*.

In a concurring opinion written in *Mays*, Chief Justice McCormack observed that the United States Supreme Court's caselaw on the subject of constitutional torts under the federal constitution is "of limited value as we determine how to approach state constitutional torts." *Mays*, 506 Mich at 221 (McCormack, CJ, concurring). In plaintiffs' view, the Chief Justice's remarks in *Mays* may well overstate the "relevance" of the United States Supreme Court caselaw on which the Agency relies.

Initially, what should be noted about the defendant's arguments based on the *Bivens* line of United States Supreme Court decisions is that it assumes that the adoption of a direct cause of action for damages under the Michigan Constitution is tied to the *Bivens* ruling itself. But, as noted earlier in this brief, this Court in *Bishop* recognized the right of a person to sue for damages for the violation of a provision in the Michigan Constitution decades before *Bivens* was decided.

Quite apart from this fact, there is no basis for adopting the recent United States Supreme Court precedents that the Agency asks this Court to follow. The United States Constitution, as interpreted by the Supreme Court of the United States, does not dictate the meaning of the Michigan Constitution. This Court has recognized that "[a]s a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz*, 443 Mich at 762. This Court in *Sitz* further noted:

> . . .our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument

of government.

Id, at 763; see also *Mays*, 506 Mich at 217 ("We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest court in the land.") (McCormack, CJ, concurring). *cf City of Mesquite v Alladin's Castle, Inc*, 455 US 283, 293 (1982) ("a state court is entirely free to read its own State's Constitution more broadly than this Court reads the federal constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.")

The simple fact is that the Supreme Court of the United States is not the final arbiter of the meaning of Article 3, §2 of the Michigan Constitution. Nor does the Supreme Court of the United States have the final say on the scope of judicial power provided in Const. 1963, art. 6, §1. These are issues on which this Court is the final authority.

At the very most, a decision of the Supreme Court of the United States on the meaning of a federal constitutional provision might, based on the persuasiveness of its reasoning, prove of some value in the interpretation of a capable provision in the Michigan Constitution. See *In re Certified Questions*, 2020 WL 5877599, *18; *Bauserman I*, 503 Mich at 185, fn. 12. The Agency, in making its argument based on decisions emanating from Washington D.C., does not exactly stress persuasiveness. Rather, the defendant urges this Court to follow how to the decisions of the Supreme Court of the United States are "trending" on this topic.

Precisely how the decisions of the Supreme Court in Washington might be "trending" on this subject is not even of limited value in deciding the issue before this Court. It is completely irrelevant. If, as defendant claims, there is a sharp line to be drawn in the Supreme Court of the United States cases that have recognized a constitutional tort, *Bivens, Carlson v Green* 446 US 14 (1980), and

Davis v Passman, 442 US 228 (1979), and the later cases from that Court that the Agency would have this Court follow, the only limited value in these two lines of cases is which proves most persuasive to a court charged with interpreting the provisions of the Michigan Constitution. The defendant does not argue which of these is most persuasive; it merely asks this Court to follow the "trend" of these decisions.[17]

Ultimately, what the Agency asks this Court to do is to "recognize the applicability of U.S. Supreme Court caselaw limiting the judicial creation of causes of action for money damages for constitutional violations." Supplemental Brief, at 15. To adopt this view of the "applicability" of United States Supreme Court decisions when called upon to interpret the provisions of the Michigan Constitution denigrates both the substantial work of the 144 delegates who comprised the Michigan constitutional convention and the document they created.

As described in Kelman, *Foreward: Rediscovering The State Constitutional Bill Of Rights*, 27 Wayne L Rev 413 (1981):

> It is, of course, for the state courts themselves to decide whether separate meaning should be imputed to state constitutional language that tracks or resembles provisions of the federal Constitution. One choice, and it is the least defensible, is to treat the state constitution as a mirror of the federal Constitution as most recently construed by the Supreme Court, so that whatever gloss the Court places on the federal Constitution automatically defines rights under the state document and every expansion and contraction by the Court forces a corresponding adjustment of the state's jurisprudence. *Such a view renders a state bill of rights utterly functionless and, in the absence of good evidence that the framers acted without a serious prescriptive intention and inserted human rights language into the state constitution merely for its rhetorical value, judges demean the fundamental law of the state by ordering themselves to march in lockstep with the Supreme Court.*

---

[17]For an article that discusses, from multiple perspectives, the general lack of persuasiveness of the Supreme Court opinions that have followed in the wake of *Bivens*, *Carlson* and *Davis,* see Bandes*, Reinventing Bivens: The Self Executing Constitution*, 68 S.Cal L.Rev 289 (1995).

Id. 414-415. (emphasis added) The Michigan Constitution represents this state's "fundamental law to which all other laws must conform." *Smith*, 428 Mich at 640 (Boyle, J., concurring). Yet, if the defendant's position were correct, this Court would be abdicating its constitutional role as the "ultimate authority with regard to the meaning and application of Michigan law," *People v Bullock,* 440 Mich 15, 27; 485 NW2d 866 (1992); *Bauserman I,* 503 Mich at 186, fn 12, in the interpretation of the state's fundamental document.

Nor can the defendant's plea for the applicability of United States Supreme Court precedents with respect to *Bivens*-type actions be predicated on the notion that the United States Supreme Court possesses a monopoly of sorts on constitutional insight. On this particular point, this Court would do well to recall Justice Robert Jackson's pithy commentary on the subject of the United States Supreme Court omniscience: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 US 443, 540 (1953) (J. Jackson, concurring). On the subject of the meaning of the Constitution of the State of Michigan, the Supreme Court of the United States is neither infallible nor final.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellees, Grant Bauserman, *et al*, respectfully request that this Court affirm the Court of Appeals December 5, 2019 decision and remand this matter to the Court of Claims for further proceedings.

MARK GRANZOTTO, P.C.
/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Attorney for Plaintiffs-Appellees
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

PITT, MCGEHEE, PALMER & RIVERS, P.C.
/s/ Jennifer L. Lord
JENNIFER L. LORD (P46912)
MICHAEL L. PITT (P24429)
KEVIN M. CARLSON (P67704)
Attorneys for Plaintiffs-Appellees
117 West Fourth Street, Suite 200
Royal Oak, Michigan 48067
(248) 398-9800

Dated: April 20, 2021