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STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS, and TEDDY BROE, individually and on behalf of a class of similarly situated persons
Plaintiff-Appellees

v.

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Defendant-Appellant

MSC No. 156389
COA No. 333181

Court of Claims
Case No. 2015-000202-MM
Hon. Cynthia Diane Stephens

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MICHIGAN LEAGUE FOR PUBLIC POLICY'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEES' RESPONSE TO DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. Over 30 years ago, two justices of this Court theorized that a claim for money damages for an alleged violation of the Michigan Constitution could be possible in appropriate circumstances. The decades between then and now have not provided clear guidance on what those appropriate circumstances might be. Should this Court grant leave to appeal to consider whether such a judicially inferred remedy is an appropriate exercise of judicial power?

> Appellant's answer: Yes.
> Appellees' answer: No.
> Court of Claims' answer: Did not directly answer.
> Court of Appeals' answer: Did not directly answer
> but encouraged by the
> concurring judge.

2. Assuming a judicially inferred money damages remedy is theoretically appropriate, did the Court of Appeals clearly err in concluding that plaintiffs pled a viable constitutional tort claim where they failed to identify a policy or custom that caused the deprivation of their procedural due process rights, and where all applicable factors weigh against inferring a money damages remedy?

> Appellant's answer: Yes.
> Appellees' answer: No.
> Court of Claims' answer: No.
> Court of Appeals' answer: No.

STATEMENT OF INTEREST

The Michigan League for Public Policy ("MLPP") is a Michigan-based, non-partisan policy institute dedicated to economic opportunity for all. These efforts include but are not limited to examining the impact of state revenues and expenditures on low-income people and advocating for families and individuals facing poverty. As an organization, MLPP works with 2,500 organizations, human services professionals, concerned citizens, businesses, labor groups, policymakers, and others to ensure economic security for the people of Michigan. Unemployment-related issues leave Michigan citizens and their families in precarious financial situations. Unfortunately, the Unemployment Insurance Agency ("the Agency")'s actions can exacerbate the issues facing Michigan families by driving claimants deeper into poverty and into other dire circumstances, such as bankruptcy, foreclosure, and homelessness. The Court of Appeals correctly found that judicially inferred money damages are an appropriate remedy for due process violations. MLPP believes it is in the best interest of Michigan families for the Michigan Supreme Court to deny Defendant-Appellant's Application for Leave to Appeal.

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PROCEDURAL HISTORY

Amicus curiae MLPP adopts the procedural history as stated in plaintiff-appellees' Response to Defendant-Appellants' Application for Leave. For the purposes of this brief, the argument focuses on the general facts surrounding the Unemployment Agency's implementation of the Michigan Integrated Data Automation System ("MiDAS").

STANDARD OF REVIEW

The Supreme Court "review[s] *de novo* a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159, 934 NW 2d 665, 670 (2019). MCR 2.116(C)(8) provides that summary disposition may be granted if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). "A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint." *El-Khalil*, 504 Mich at 159 (emphasis in original). Thus, "a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *Id.* "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

It is "improper" to attempt to argue, through a (C)(8) motion, "the strength of plaintiff's case and the evidence available to support it. Such arguments are well beyond the scope of review on a motion under MCR 2.116(C)(8)." *McNeal v. Dortch Enterprises, LLC,* COA NO. 344642 (Mich. App. Dec. 17 2019)(citing *El-Khalil*, 504 Mich at 162; slip op at 9 ("While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot . . . . The relative strength of the evidence offered by plaintiff and defendants will matter if the court is asked to decide whether the record contains a genuine issue of material fact. But that is only a question under MCR 2.116(C)(10).").

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ARGUMENT

I. The Agency's Actions Should be Seen as Part of a Systemic Deprivation of Due Process for Unemployment Insurance Claimants

The Agency asserts that the egregiousness of their action (including, inter alia, using a computer system devoid of human intervention to automatically determine claimant guilt and impose exorbitant penalties in suspected instances of unemployment fraud without giving claimants a meaningful opportunity to rebut those allegations) should not be a factor in inferring a claim for money damages. See January 16, 2020 Agency Application for Leave to Appeal, p 33. The Agency claims, more specifically, that this factor was created by the Michigan Court of Appeals, and it "has no basis" in binding precedent. *Id.* This assertion is both demonstrably false and blatantly self-interested. The Agency's actions here are part and parcel of a systematic deprivation of due process for unemployment insurance claimants which can, and should, be reined in by inferring a claim for money damages. Moreover, the egregiousness of a perpetrator's actions continue to have a presence in legal precedent.

a. Recognizing the Egregiousness of the Agency's Actions Puts Them in Context and Allows the Court to Consider their Ramifications

The Agency's motivation for its outright dismissal of an egregiousness factor becomes abundantly clear when we view its actions from a slightly wider scope. Though it suggests that allowing a wider scope would "encourage plaintiffs to load-up their complaints with egregious allegations with the hope that a court would give considerable weight to this factor," *id.*, it would also serve to contextualize outrageous nature of the Agency's actions. Their actions damaged tens of thousands of people in one of the most vulnerable times of their lives – recovering from losing a job. Put in context, the Agency's actions to the putative Plaintiffs in this case cannot be seen as a one-off mistake. Nor were they a mere technical violation of plaintiffs' rights. Nor can

this Court be fully convinced that "[i]t is the policy of the Agency to provide notice and opportunity to be heard, and any failure to provide that opportunity would not be in furtherance of the Agency's policy, but instead in violation of it." *Id.* at 18. The Agency's actions here, whether or not explicitly codified in Agency policy, are part of a systematic deprivation of the due process rights of unemployment insurance claimants.

i. The Agency Let a Computer Adjudicate Unemployment Fraud without Human Intervention

The sheer scope of harms created by implementation of the MiDAS system is worth considering, even though it is derivatively discussed in this case. The computer system was allowed to run, virtually unattended by human intervention at the Agency, for almost two years between October 2013 and August 2015, despite the fact that Michigan law commands the Agency to "designate representatives who shall promptly examine claims and make a determination on the facts." MCL 421.32(a). Michigan's legislature did not classify computers as "representatives." During this period of robo-adjudication, MiDAS issued 62,784 fraud allegations. Mich Talent Inv Agency, *Michigan's Unemployment Agency Completes Review of Fraud Determination Cases* (2018) (hereinafter "TIA Press Release") (included with this brief as Appendix 1).

After intervention by the U.S. Department of Labor and a federal district court, the Agency was eventually forced to review those fraud decisions. *Id.*; Stipulated Order of Dismissal, Maurice & Jane Sugar Law Ctr v. Arwood, No. 2:15-cv-11449 (ED Mich, February 2, 2017). Seventy percent of the Agency's allegations have been reversed, and the number continues to grow. See TIA Press Release. But even if the Agency eventually reverses the machine's decision, the putative plaintiffs still suffer.

ii. The Agency Ignores Statutory Commands to Exercise Discretion

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MiDAS was neither the beginning nor the end of the Agency's willful ignorance of its due process obligations. Numerous other state provisions require careful consideration of a claim by the Agency. The Agency flagrantly ignores them all. Michigan law states that the Agency, in an allegation of fraud, "*may* also recover damages equal to 4 times" the amount obtained by the alleged fraud. MCL 421.54(b)(ii) (emphasis added). Moreover, Michigan law commands the Agency to waive recovery of improperly paid benefits if the payment wasn't the fault of the individual and the recovery would be contrary to equity and good conscience. MCL 421.62(a).

Despite being given discretion to consider the individual circumstances of particular claimants and a command to waive penalties when they are contrary to equity, the Agency ignores its obligations and universally assesses maximum penalties. The Agency failed to use their statutorily mandated discretion for all of the victims of their state-made false fraud scandal – it universally charged 400% penalties to all of them for years.

iii. The Agency Mechanically Applies Statutory Obligations with Absurd Results

Instead of a policy of providing opportunities for claimants to be heard, the Agency has a policy of mechanically applying what it sees as its statutory obligations without regard to the nuances of any particular case or the harm such mechanical application wreaks. See, for instance, *Prater*, where the Agency alleged fraud against a claimant for statements made by his employer. *Prater v. Target Corp*, unpublished opinion of the Michigan Compensation Appellate Commission, issued May 22, 2018 (Appeal Docket No. 17-007898-253546W) (included with this brief as Appendix 2).

Unfortunately, we cannot chalk this up to a simple mix-up at the Agency – it continued to press the case through multiple administrative bodies before being stopped by a Michigan Circuit

Court. *Prater v. Target Corp*, unpublished opinion of the Washtenaw County Circuit Court, issued March 21, 2019 (Case No. 18-695-AE) (included with this brief as Appendix 3). We should also consider *Taylor*, where the Agency refused to grant good cause for a late appeal even though the Agency knew he never received the Agency's determination because the Agency received back the same determinations as undeliverable. *Taylor v. Epoch Catering DSO Inc*, unpublished opinion of the Michigan Office of Administrative Hearings and Rules, issued June 20, 2019 (Case No. 556384) (included with this brief as Appendix 4).

iv. The Agency Takes Advantage of its Own Mistakes

Prater and *Taylor* are worrisome for another reason – what seems to be the Agency's strategic use of its "mistakes." In both of these cases, the Agency mailed determinations to an incorrect address for each claimant. *Prater*, unpub op of the Michigan Compensation Appellate Commission, p 3 (Appendix 2); *Taylor*, unpub op at 9 (Appendix 4). By the time each claimant discovered the allegations against them, their 30-day no-questions-asked review period for each notice had passed. See MCL 421.32a. To challenge the Agency's determinations beyond that period each claimant had to show "good cause" for their late appeal (which, in the experience of this *amicus curiae*, is never granted – despite that the administrative rules governing the Agency state that they "shall" find good cause for many reasons, including when the mail never reached the claimants). *Id.*; see Administrative Rule 421.270.

In effect, the Agency's "mistake" (multiplied by 60,000 or more individual violations) serves to shield its "fraud" allegations from review. If claimants don't appeal a decision "on time," their fraud charge stands and the computer's meritless auto-adjudication becomes final. This Agency gamesmanship, combined with the fact that the Agency now reads the Michigan Employment Security Act ("The Act") as allowing it to allege fraud over benefits claimed six

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years ago, means the Agency takes six years to allege fraud while claimants have only 30 days to rebut those allegations.[1]

Further, reaching back six years means that the Agency alleged fraud to anyone who collected benefits between 2007-2015, which was during the Great Recession. Given that it had been years since many claimants received any benefits from the Agency, they continued with their lives and many even moved to new addresses. But the Agency allegedly mailed these robo-adjudications to the last address on its file.[2] Many of the tens of thousands of Michiganders who serve as the putative plaintiffs in this case only learned of the fraud robo-adjudication against them because of the constitution harm of this case – their money was seized. But many of them never received the Agency's decisions, so they could not appeal. And many of those decisions are still "final" despite never having reached the claimants.

v. The Agency's Actions Cripple the Act and Potential Remedies Have Been Resisted

The ramifications of allowing the Agency to sweep aside its obligations and trample over the needs of claimants is clear: far fewer eligible unemployed workers will claim unemployment insurance as the Agency's overaggressive fraud prosecutions will necessarily chill claimants' use of a state remedial resource. A system designed to provide for the "general welfare of the people of this state," MCL 421.2, will not serve its purpose.

[1] The Act allows the Agency to begin collecting restitution within 6 years if fraud is alleged, but that same provision does not give the Agency the ability to also charge fraud – charging fraud is governed by another provision of the statute. See MCL 421.62, MCL 421.32, MCL 421.32a. This statutory interpretation question is currently pending before the Supreme Court and the Court of Appeals with cases both before, during, and after the Agency's robo-adjudication scandal.

[2] For the claimants who may have received these notices, the notices themselves were essentially a blank piece of paper and devoid of information for the claimant to understand what charge was being levied against them. See Section II.

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The breadth of Agency lawlessness shows it evidently has no internal drive to improve its processes. Unfortunately, federal prodding has also been insufficient to spur the Agency to more responsibly administer unemployment insurance in Michigan. The Agency openly flouts binding federal guidance about what constitutes adequate due process. Despite the fact that "unemployment insurance is a joint state-federal program" where "[t]he federal government establishes minimum standards which state laws must comply with," *Cabais v Egger*, 690 F2d 234, 240 (DC Cir 1982); see also US Dept of Labor, Empt & Training Admin Advisory Sys, Unemployment Insurance Program Letter No. 01-96 (October 5, 1995) (included with this brief as Appendix 5) (hereinafter "DoL Letter") (Noting in response to states who argued that "since the interpretations in [Department of Labor] directives are not found in the Code of Federal Regulations, they have no legal effect" that "these directives do, in fact, have legal effect"), the Agency considers Department of Labor guidance to be "non-binding." October 29, 2018 Agency Brief, p 13, *Austin v Hospice North Ottawa Community*, Case No. 18-003840-AE (Muskegon County Circuit Court, February 5, 2019) (included with this brief as Appendix 6).

Not only is the Agency flouting federal guidance, it are also falsely inflates its caseload to obtain more funding from the federal government. Darren Cunningham, *Is the UIA Raking in Millions of Federal Dollars It Doesn't Deserve?,* <https://fox17online.com/2015/09/01/is-the-uia-raking-in-millions-of-federal-dollars-it-doesnt-deserve/> (accessed February 27, 2020).

This Court has the opportunity to steer the Agency away from increasingly more egregious due process deprivations, saving already vulnerable unemployment insurance claimants financial and emotional stress. We urge the Court to utilize the strong medicine of a money damages remedy to fix the distraught Michigan unemployment insurance system

b. Egregiousness of a Perpetrator's Actions Has Been Recognized by Both the U.S. Supreme Court and Michigan State Courts

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Egregiousness is recognized in U.S. Supreme Court precedent. In both *Lewis* and *City of Cuyahoga Falls*, the Court considers the egregiousness of executive action in determining whether a due process deprivation occurred. *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S. Ct. 1389, 1396 (2003). Egregious is also recognized in Michigan court precedent. The Court of Appeals has cited to a similar factor in analyzing alleged deprivations of due process on numerous occasions. In *Mettler Walloon, LLC*, the Court stated that "[i]n disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental action." *Mettler Walloon, LLC v. Melrose Twp*, 281 Mich App 184, 197 (2008). In *Mays*, the Court stated plainly that "[w]e agree that the egregious nature of the defendants' alleged constitutional violation weighs considerably in favor of recognizing a remedy." *Mays v. Snyder*, 323 Mich App 1, 72 (2018).

Contrary to the assertions of the Agency, the egregiousness of their conduct certainly has a basis in the recognition of a due process deprivation and judicially inferred money damages remedy. A generous reading of the Agency's assertions would be that the egregiousness of their conduct is a factor in determining whether the plaintiffs have a *cause of action* but not a factor in inferring *relief* in the form of money damages. The Agency conflates these two issues. See generally *Smith v. Department of Public Health*, 428 Mich 540, 616-17 (1987). Federal and state precedent confirm that the egregiousness of state conduct is dispositive in determining a cause of action. Egregiousness of conduct was plainly a factor in recognizing a money damages remedy in *Mays*. All of the cases at issue, even if they disagree about whether egregiousness is dispositive, certainly establish that it is a factor.

II. Due Process Deprivations & Other Technical Violations are Not Harmless

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Due process deprivations and other technical violations often do not result in immediate harm, but have a domino-like effect on the harmed party's ability to make their case. Take, for instance, insufficient notice. According to the Department of Labor, sufficient notice must contain enough information to enable claimants "to understand the basis for the determination . . . and must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences."[3] DoL Letter at 2.

A claimant sent a legally insufficient notice is not immediately harmed upon receipt but is handicapped in their pursuit to reverse a determination they believe is incorrect. An example from one of the Agency's fraud allegations is informative here to see just how insufficient notice can be. In another matter before the Court of Appeals, the Agency sent the following fraud allegation to a claimant and demanded nearly $84,000 in principal and fraud penalties:

> Issues and Sections of Michigan Employment Security Act Involved: Misrepresentation and 62(b). Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive. Benefits will be terminated on any claims active on September 01, 2012.[4]

Such a notice, which was sent to thousands of claimants, raises more questions than it answers. A claimant would likely ask at least the following: What actions indicated I misled or concealed information? When did those actions occur? What benefits are at issue? How do my actions constitute fraud, rather than a mistake? A claimant seeking to challenge an Agency determination given such little information is surely at a massive disadvantage. Indeed, "[u]nless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose –

[3] Note that while this information seems to be the bare-bones foundation for informing someone that they've been deprived of expected benefits, it is also the federal guidelines which the Agency considers merely aspirational.
[4] Full determination included with this brief as Appendix 7.

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and resembles more a scene from Kafka than a constitutional process." *Cosby v. Ward*, 843 F2d 967, 982 (CA 7, 1988).

The Agency designed these essentially blank notices when it implemented MiDAS. Before MiDAS, the notices included the facts surround the fraud and it was individualized to the claimants' wrongdoing. This robo-takeover of the adjudications process removed vital information within the notices and was designed to make it harder for claimants to combat the Agency's blanket allegations. The Agency issued these blanket robo-adjudications to the tens of thousands of Michiganders who make up the putative plaintiffs in this case.

Another technical violation that can severely harm claimants serves in part as a limitation on the Agency's power: statutes of limitation. The Act outlines specific timelines within which the Agency must reverse a benefit determination if it so chooses. See, e.g. MCL 421.32a (Noting that reconsiderations of determinations or redeterminations must be made "within 1 year after the date of mailing or personal service of the original determinations on the dispute issue or, if the original determination involved a finding of fraud, within 3 years after the date of mailing or personal service of the original determination").

Unemployment insurance is remedial in nature, serving to counter "[e]conomic insecurity due to unemployment," which the Act declares "is a serious menace to the health, morals, and welfare of the people of this state." MCL 421.2. Particularly in the unemployment insurance context, statutes of limitation serve as a further measure of security: that benefits can, after some measure of time, be safely spent on much needed necessities without the danger that they will be called back. When the Agency ignores or belittles technical violations – like due process, adequate notice, or statutes of limitation – it should be remembered that each serves an important purpose, even if that purpose isn't always immediate.

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III. Economic Harms Require Economic Remedies

Plaintiffs here are entitled to economic relief because the harm caused by the deprivation of their due process rights was unequivocally economic. The Michigan Constitution declares that the due process clause "secures an absolute right to an opportunity for a meaningful hearing and an opportunity to be heard before individuals are deprived of their property." Const 1963, art 1, § 17. The Agency's articulation of the flexibility of procedural due process obscures the real harm that was done to claimants by the deprivation of their economic property without a meaningful hearing. Despite the economic nature of the deprivation, the Agency argues that money damages are not an appropriate remedy for the Michigan residents who were injured by the Agency's systematic use of MiDAS. Justice Harlan, concurring in *Bivens*, provides guidance for when money damages are appropriate. Compensatory relief is "necessary or appropriate" depending on the interest asserted. *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388, 407 (1971). Judge Boyle in *Smith* similarly noted that "there are circumstances in which a constitutional right can only be vindicated by a remedy and where the right itself calls out for a remedy." *Smith*, 428 Mich at 647. Precedent established by both the Supreme Court of the United States and this Court therefore mandates that the nature of the violated right inform the remedy.

The Agency posits that "the lack of specificity as to what constitutes due process in a given case weighs against inferring a money damages remedy." January 16, 2020 Agency Application for Leave to Appeal, p 27. Here, the economic nature of the well-documented violation Michigan workers suffered when they were deprived of their property without due process calls out for an economic remedy. The Agency charged tens of thousands of workers with fraud and then ordered them to pay excessive fraud penalties. It cemented automated fraud

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allegations with no foundation; it failed to provide meaningful opportunities for claimants to be heard; and it took citizens' federal and state income taxes as its own with no adequate notice.

In this process, the Agency did more than simply reclaim benefits that rightfully belonged to Michigan residents, as bad as that is; it used 400% penalties and escalating interest rates to reach into claimant's "own monetary funds." December 5, 2019 Opinion of the Court of Appeals, p 16. In 2015, more than $15 million was seized from claimants. Paul Egan, *State Taps Unemployment Insurance Fund to Balance Books*, <https://www.freep.com/story/news/local/michigan/2016/12/15/state-taps-unemployment-insurance-fund-balance-books/95416100/> (accessed February 2, 2020) (hereinafter "Egan, *State Taps Unemployment Insurance Fund*"). Compounded by penalties and interest, individuals were forced to payback tens of thousands of dollars, an amount considered excessive even by agency officials. David Eggert, *State Apologizes for Fraud Fiasco, Wants to Reduce Penalties,* <https://www.apnews.com/c0e2346e85854a5b827ca42653c1fb40> (accessed February 27, 2020) (hereinafter "Eggert, *State Apologizes*") ("Talent Investment Agency Director Wanda Stokes, whose agency includes the state Unemployment Insurance Agency, added that lawmakers should consider reducing what she said are the country's highest financial penalties for unemployment fraud"). Given the nature of the harm caused, a vindication of claimants' due process rights necessitates money damages; it is both appropriate and necessary to remedy the economic harm the plaintiffs here suffered when their due process rights were violated by returning the funds taken from these claimants.

a. The Act Supports an Inference of Money Damages

The structure and purpose of unemployment insurance itself calls out for money damages because the relationship the Agency has with Michigan residents is inherently economic.

Claimants only initiate a relationship with the Agency because of economic insecurity. The Act itself recognizes the danger of economic harm in its statement of purpose:

> Economic insecurity due to unemployment is . . . a subject of general interest and concern which . . . so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life.
>
> MCL 421.2.

For many claimants, the relationship it has with the Agency is supposed to be temporary. That most claimants don't continue a relationship with the Agency past their benefit year is a sign of the program's success. The benefits they receive provide a necessary economic lifeline they need while unemployed, and buoyed by this social safety net, they rejoin the workforce without the economic loss that the legislature recognized would have a ripple effect across the state. Here, the Agency reached back to claimants who had not received benefits for six years in order to accuse them of fraud. Ted Roelofs, *Broken: The Human Toll of Michigan's Unemployment Fraud Sage*, <https://www.bridgemi.com/michigan-government/broken-human-toll-michigans-unemployment-fraud-saga> (accessed February 13, 2020) (hereinafter "Roelofs, *Broken*"). But, the Agency is well aware that claimants do not expect to continue monitoring their online accounts once they have re-entered the workforce, especially when they have not been alerted to anything out of the ordinary in their receipt of benefits.

The Agency is charged with preventing the cascades of economic harm that can occur when workers become unemployed. It prevents these effects by providing benefits. The Agency's sole purpose is to protect claimants from economic harm when, through no fault of their own, they are made economically vulnerable. Here, the Agency's aggressive automated system made those who turned to this vital social safety net for support more vulnerable, when

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through no fault of their own, they were accused of fraud, received no adequate notice, and subsequently had their wages and tax returns garnished. Now, the Agency posits moneys damages should not be inferred even though it is only because of the economic nature of its relationship to claimants that it was able to capitalize on the false fraud scandal by exacting 400% penalties when there had been no hearing on the merits and by subsequently intercepting citizen's income taxes and wages. The Agency's position in its Application for Leave fails to address the lasting impact this procedural due process violation caused its claimants; it ignores the reality that its violation caused unequivocally widespread and economic harm.

On both the individual and collective level, Michigan residents will be recovering from the Agency's denial of due process for years to come. While money damages may not be the remedy the Agency would prefer, the economic harm the Agency's pattern of behavior caused cannot be remedied without making Michiganders economically whole. The financial consequences for individuals affected continue to reverberate beyond lost wages and savings. Over 1,100 filed for bankruptcy as a result of their severely reduced income. Sarah Cwiek, *Attorneys in Unemployment Fraud Cases Join Forces, Call for State Review of AI in Government*, <https://www.michiganradio.org/post/attorneys-unemployment-fraud-cases-join-forces-call-state-review-ai-government> (accessed February 27, 2020). Individuals even now continue to fail credit checks or lose homes. Jonathan Oosting, *False Fraud Scandal Goes to Michigan Supreme Court*, <https://www.detroitnews.com/story/news/local/michigan/2018/10/09/false-fraud-scandal-michigan-supreme-court/1579079002/> (accessed February 27, 2020). Some of the damage caused by the Agency's perpetuation of false fraud is irreparable. Claimants were forced to delay the start of their families. Roelofs, *Broken* ("Doss and his wife, Syretta, 33, are expecting their

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first child in August. He scratches to make mortgage payments, grateful that his mortgage loan allows him an extra 15 days each month before he's considered delinquent. He said the $14,000 in pay that was diverted to the state has left him behind in putting money away for the future"). Others were forced into the untenable position of having to choose between paying penalties for a fraud they didn't commit and receiving necessary medical care. Gabe Cherry*, Built by Humans. Ruled by Computers.* *<https://news.engin.umich.edu/features/built-by-humans-ruled-by-computers/>* (accessed February 27, 2020) (Discussing Brian Russell, who cut back on medical care for his diabetes as a result of wage garnishment). Instead of lightening the force of economic insecurity which "so often falls with crushing force upon the unemployed workers and their families," the Agency's automated persecution of those it alleged committed fraud quadrupled the financial load working families had to bear.

b. The Economic Harm Caused by the False Fraud Scandal Deters New Eligible Citizens from Seeking Necessary Benefits

When the Agency charged tens of thousands of workers with fraud and ordered them to pay unconstitutionally high penalty rates, it did more than harm those workers. Unemployment benefits are meant to save claimants from facing these difficult choices, and the Agency is well aware of the real economic impact this procedural deprivation of due process caused; it is the entity charged with serving this vulnerable population. In Agency representative Wanda Stokes' own words, "[a]t the most vulnerable and stressful time in their life, they are now being accused of fraud." Eggert, *State Apologizes*. Many likely would have been better off had they not sought unemployment benefits at all. Egan, *State Taps Unemployment Insurance Fund* ("Many former claimants have told [former Unemployment Insurance Clinic Director Steve Gray] 'You will never see me apply for unemployment benefits –I don't care how poor I am.'").

The false fraud scandal warped the public's perception of the process of unemployment benefit distribution and the Agency has broken the public's trust in this essential social support. The more the Agency bolsters the perception that it will expend its resource prosecuting claimants for fraud allegations rather than use these resources to make Michiganders economically whole, the less likely it is that new claimants will apply for unemployment benefits. A system intended to protect workers from the serious economic menace of unemployment has now mutated into one capitalizing on the economic hardship unemployed workers were already facing. Citizens, who are eligible and qualify for these benefits, are now forced to decide if much-needed economic relief is worth the risk of being charged with a fraud they did not commit. Even though the penalty for fraud has since been lowered by the legislature, the Agency's demonstrated reticence to pay back the funds it owes claimants, when coupled with its repeated attempts to erase or minimize the staggering economic harm MiDAS wreaked, cries out for the appropriate remedy. Here, that remedy is judicially inferred money damages.

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CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Michigan League for Public Policy respectfully asks this Court to Deny the Agency-Appellant's Application for Leave.

_*/s/ Rachael Kohl*_________________
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Dated: March 5, 2020

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STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS, and TEDDY BROE, individually and on behalf of a class of similarly situated persons
Plaintiff-Appellees

v.

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Defendant-Appellant

MSC No. 156389
COA No. 333181

Court of Claims
Case No. 2015-000202-MM
Hon. Cynthia Diane Stephens

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing motion and brief were filed with the Michigan Supreme Court through the True Filing system and that all parties to the above case were served via the filing system on March 5, 2020.

Respectfully Submitted,
/s/ Diane Kotze
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