STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Feeney, P.J., and M.J. Kelly and Rick, JJ.

MICHIGAN IMMIGRANT RIGHTS CENTER,

Plaintiff-Appellant,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,

Defendant-Appellee.

Supreme Court Nos. 167300, 167301
Court of Appeals Nos. 361451, 362515
Court of Claims No. 21-000208-MZ

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMERICAN CIVIL LIBERTIES UNION, AND MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union of Michigan ("ACLU of Michigan") is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Michiganders. The American Civil Liberties Union ("ACLU"), with approximately 1.6 million members, is among the oldest, largest, and most active civil rights organizations in America. For decades, the ACLU of Michigan and the ACLU have litigated questions involving civil liberties in the state and federal courts.

Among the liberty interests crucial to the ACLU of Michigan and the ACLU is access to the judicial system. Preserving the justiciability of legal issues—thus ensuring that provisions in state and federal constitutions are not just words on paper but meaningful guarantees for the people—is essential to our democracy. The ACLU of Michigan and the ACLU have addressed these issues in cases in this Court and throughout the country. See, e.g., Amicus Curiae Brief of the American Civil Liberties Union of Michigan and the National Lawyers Guild, Michigan-Detroit Chapter, *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022); Brief for ACLU of Utah and ACLU as Amici Curiae Supporting Appellants, *Natalie R v State of Utah* (Utah, November 9, 2022) (Docket No. 20230022-SC); Brief for ACLU of Montana and ACLU as Amici Curiae Supporting Appellees, *Held v Montana* (Montana, March 20, 2024) (Docket No. DA 23-0575).

The mission of the Michigan Association for Justice ("MAJ") is to promote a fair and effective justice system. It aims to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan's

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

courtrooms, even when taking on the most powerful interests. In the courtrooms across Michigan, MAJ is the voice of those who often have no other public voice. Its clients are those members of the public whose rights are most likely to be jeopardized by barriers to recovery such as a restriction on the ability to file suit against those who have harmed them.

As members of Michigan's bar, and as officers of the court, MAJ members recognize their responsibility to help the Court develop the State's jurisprudence. This is especially so when it comes to the right of the public to seek redress against governmental harms. It is MAJ's mission to assist the Court in reaching decisions where all voices are heard and represented in areas of law in which its members devote their professional lives.

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been the rule in Michigan that members of the public may sue government officials in their official capacity to obtain forward-looking relief that brings an end to government illegality. In this case, plaintiff Michigan Immigrant Rights Center ("MIRC") relied on this rule to sue the Governor, whose office is responsible for administering the workers' compensation system, for the allegedly unlawful practice of denying benefits to injured workers on account of their immigration status.

Despite the well-trodden path that MIRC followed to bring its claims, the Court of Appeals held that those claims must be dismissed because MIRC waited too long to give notice to the state of its litigation plans. In the Court of Appeals' view, a provision in the Court of Claims Act ("COCA"), MCL 600.6431, required MIRC to give the state government notice within one year of experiencing its first injury from a wrongful benefit denial, even though MIRC sought only to end an ongoing constitutional violation and even though MIRC alleged that it continued to suffer recurring harms as a result of the ongoing violation. Because the Court of Appeals concluded that MIRC exceeded that time limitation (hereinafter, the "one-year provision"), it held that the Governor is immune from suit by MIRC forever after. Thus, the Court of Appeals' decision stands for the proposition that governmental actors may continue to violate the Constitution for as long as they like, and that the judicial branch is powerless to intervene, if a plaintiff endures the violation for at least a year before turning to the courts for equitable relief.

That is not the law, and this Court should grant the application for leave to appeal so that it can reverse the Court of Appeals' misguided decision and remand for further proceedings.

First, MCL 600.6431 does not apply to MIRC's claims because the statute applies only to claims against "this state." MIRC's claims, in contrast, are against the Governor in her official capacity, and suits against officials for prospective, equitable relief are not suits against the state.

Because the plain text of MCL 600.6431 and surrounding statutory provisions distinguish between the state and its officials, this Court is bound to apply the law as written. In any event, the distinction between the Governor and the state under MCL 600.6431 is confirmed by longstanding legal principles, both under this Court's precedent and in the context of federal jurisprudence dating to *Ex Parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908). To the extent there is any ambiguity in the text of the one-year rule, it must be understood against this legal backdrop, which predates MCL 600.6431's adoption and establishes that officials may always be sued to enjoin ongoing illegal conduct.

Second, even if the Court of Appeals were correct that MCL 600.6431 applied on its face to MIRC's claims, MIRC surely complied with the statute. As the Court of Appeals recognized, where there is an ongoing series of wrongful acts, "a new cause of action can arise from each" of those acts. *Mich Immigrant Rights Ctr v Governor*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2024 (Docket Nos. 361451 and 362515), p 5. That is precisely what MIRC alleges here in stating that the Governor's "improper application of the Workers' Compensation Act will continue to cause MIRC to divert resources and be harmed." Verified Compl ¶ 95. And that is why statutory time limitations are generally no barrier to claims for prospective, equitable relief that prevents unlawful conduct going forward. Although the Court of Appeals found Michigan's abolition of the "continuing harms" doctrine important to analyzing whether MIRC gave timely notice, that doctrine—which allows individuals to recover damages for past harms falling outside of a limitations period—is irrelevant to this case.

Third, if the Court of Appeals were correct that the text of MCL 600.6431 applied to MIRC's claims *and* rendered the Governor immune from suit for threatened, future unlawful acts, then MCL 600.6431 would violate the Michigan Constitution and could not be enforced as to

MIRC. Under the Michigan Constitution's Separation-of-Powers Clause in Article 3, § 2, it is for the courts to say what the law is, and particularly in the context of constitutional claims like those asserted here, the Legislature has no authority to immunize the conduct of government officials from judicial scrutiny.

The Court of Appeals' decision, although unpublished, dangerously undermines the ability of Michiganders to stop the government from perpetrating ongoing constitutional violations. Under the Court of Appeals' view, a gay couple who endured decades of state-sanctioned discrimination could not later file suit as social norms evolved to argue that the Constitution guarantees their right to marry or adopt children. A lifetime firearm owner who wished to enjoin a longstanding legal restriction on firearm ownership could not do so. Or an incarcerated person held in solitary confinement for over a year would be unable to sue alleging that the terms of their confinement were unconstitutional. Thus, the Court of Appeals' decision is one of significant public interest involving legal principles of major significance to the state's jurisprudence, and failure to grant MIRC's application will cause material injustice and conflict with long-established case law from this Court. See MCR 7.305(B)(2)–(3). Accordingly, leave for MIRC to appeal to this Court is both warranted and sorely needed.

BACKGROUND AND FACTS

Under the Worker's Disability Compensation Act ("WDCA"), an employer has no obligation to compensate an employee "for periods of time that the employee is unable to obtain or perform work because of . . . commission of a crime." MCL 418.361(1). In *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 663, 673; 658 NW2d 510 (2003), the Court of Appeals held that undocumented workers are "employees" under the WDCA, and are thus bound by its exclusive remedy, but that undocumented workers' acceptance of employment constitutes a "crime" within the WDCA's exception to coverage, thus leaving such workers without compensation for injuries.

In 2021, MIRC filed this case to establish (1) that MCL 418.361(1)'s crime exception violates undocumented workers' state and federal due process rights to the extent it excludes those workers from compensation, and (2) that reading MCL 418.361(1)'s crime exception to apply to undocumented workers' acceptance of work is contrary to federal immigration law (and thus the Supremacy Clause of the United States Constitution) and Michigan Supreme Court precedent. MIRC named as the sole defendant Governor Whitmer in her official capacity, emphasizing her responsibility to oversee the workers' compensation regime. Verified Compl ¶ 26. It filed suit in the Court of Claims seeking prospective declaratory and injunctive relief; it did not request damages. *Id.* ¶ 24. MIRC explained that the Governor, in reliance on MCL 418.361(1) and *Sanchez*, had repeatedly denied compensation to undocumented workers due to their immigration status and would continue to do so absent a court order barring this practice. *Id.* ¶¶ 10–11, 13, 15, 79. MIRC also alleged that individuals suffering from benefit denials were seeking MIRC's legal assistance and ultimately forcing MIRC to divert its resources from other mission-oriented tasks to focus on workers' compensation claims. *Id.* ¶¶ 69–71, 73, 75–78.

The Court of Claims denied the Governor's motion for summary disposition, holding that MIRC had standing, that no administrative-exhaustion requirement barred MIRC's claims, and that the one-year rule in MCL 600.6431 did not apply. See generally *Mich Immigrant Rights Ctr*, unpub op at 2 & n 2.

The Court of Appeals reversed on the ground that MIRC had not complied with the one-year notice requirement under MCL 600.6431(1). The Court emphasized that this statute "sets forth a condition precedent to maintaining a suit against the state." *Mich Immigrant Rights Ctr*, unpub op at 3. Because it concluded that MIRC did not satisfy this condition before the one-year time period expired, the Court of Appeals held that the Governor was immune from suit and

MIRC's claims had to be dismissed. *Id.* at 2. In so doing, the Court held that Michigan's abolition of the continuing harms doctrine was relevant and precluded MIRC's claims. *Id.* at 5. The Court also recognized that under Michigan precedent, the government cannot immunize itself from prospective, equitable relief, but it concluded this precedent did not apply to MIRC, which alleged a violation of its clients' constitutional rights, and not its own. *Id.* at 6.

MIRC now seeks leave to appeal.

ARGUMENT

I. The Plain Text of the One-Year Rule Applies Only to Claims "Against This State" and Is Irrelevant to MIRC's Claims Against the Governor.

The one-year rule central to the Court of Appeals' decision is set forth in MCL 600.6431, which the Legislature first adopted in 1961. That provision states:

> [A] claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies. [MCL 600.6431(1).]

Although the one-year rule in MCL 600.6431 serves some purposes that overlap with a statute of limitations, the two are distinct. Compare MCL 600.6431(1) with MCL 600.6452(1) ("Every claim against this state, cognizable by the court of claims, is forever barred unless the claim is filed . . . within 3 years after the claim first accrues."). In particular, compliance with MCL 600.6431(1) is important so that "the proper state entity" can "create reserves to cover potential liability," since a lawsuit seeking damages from the state may be filed months or years after the initial notice required by MCL 600.6431. *Christie v Wayne State Univ*, 511 Mich 39, 63; 993 NW2d 203 (2023).

To apply MCL 600.6431(1), the Court of Appeals necessarily—but implicitly—concluded that MIRC's prospective, equitable claims against the Governor are claims "against this state" and are therefore covered by the COCA's one-year rule. That conclusion was erroneous.

The COCA does not define the term "state" for the purpose of the notice rule. Accordingly, the term should be construed according to its common meaning. See MCL 8.3a. That word is commonly understood to mean an "institution of self-government within a larger political entity," or a "political system of a body of people who are politically organized." *Black's Law Dictionary* (12th ed, 2024); *Merriam-Webster Online* <https://www.merriam-webster.com/dictionary/state> (accessed October 2, 2024) (defining state to include "a politically organized body of people," a "government or politically organized society," or "one of the constituent units of a nation").

Dictionaries in circulation at the approximate time of the one-year rule's adoption in 1961 define "state" similarly. E.g., *American College Dictionary* (1953) ("any of the commonwealths or bodies politic, . . . which together make up a federal union, as in the United States of America"; "the body politic as organized for supreme civil rule and government"); *Webster's Seventh New Collegiate Dictionary* (1963) ("a politically organized body of people usu. occupying a definite territory; *esp:* one that is sovereign"; "one of the constituent units of a nation having a federal government <the United *States* of America>"; identifying as obsolete a reference to "a person of high rank (as a noble)"); *Random House Dictionary of the English Language: College Edition* (1968) ("any of the territories . . . that are combined under a federal government"; "civil government, as distinguished from individuals, ecclesiastical authority, etc."); *American Heritage Dictionary of the English Language* (1969) ("supreme public power within a sovereign political entity"; a "body politic"; a "territorial and political unit[] composing a federation under a sovereign government").

In this case, the only defendant is Governor Gretchen Whitmer. She has been sued in her "official capacity" because she "is in charge of administering Michigan's workers' compensation regime." Verified Compl ¶ 26. MIRC did not sue the "State of Michigan." Nor, even, did it name as a defendant the Workers' Disability Compensation Agency, or any other "department[], commission[], board[], institution[], arm[], or agenc[y]" entitled to notice with respect to a claim "against this state" under MCL 600.6431. Accordingly, under the "plain language" of the statute—to which this Court must defer, *Christie*, 511 Mich at 52—the rule does not apply to MIRC's claims against an individual government official in their personal or official capacity.

That conclusion is confirmed by other COCA provisions that expressly refer to state officials when they mean to include officials in their reach. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (explaining that statutory interpretation begins with the text, "taking into account the context in which the words are used"). MCL 600.6419, for example, describes the scope of the Court of Claims' jurisdiction to include claims and demands "against the state or any of its departments *or officers*." MCL 600.6419(1) (emphasis added). As the term "or officers" demonstrates, when the Legislature intends to refer to claims against individuals, it surely knows how to "use the term . . . when it wants to." *People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010) (citation and quotation marks omitted). Similarly, MCL 600.6421 provides that nothing in the chapter deprives courts other than the Court of Claims from hearing a claim for which there is a right to a jury trial, "including a claim against an individual employee of this state." Like MCL 600.6419, this provision distinguishes between claims against the state itself and claims against those who work for the state.

Other Michigan statutes likewise treat individual government officials as distinct from the state or government bodies for purposes of legal liability. For example, the Government Tort

Liability Act ("GTLA"), which authorizes suits against the state sounding in tort, provides that an agency may indemnify and defend a state "officer, employee, or volunteer" but that the statute "does not impose liability on a governmental agency." MCL 691.1408; see also, e.g., MCL 691.1401 (GTLA provision defining state to mean "this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces," including "a public university or college"); MCL 15.271 through MCL 15.273 (Open Meetings Act provisions separately authorizing suit against a "public body" and against a "public official").

Although the Court of Appeals overlooked the textual problem with applying MCL 600.6431 to individual officer suits, it considered precisely this issue in a prior case and came to the conclusion urged here. In *Pike v Northern Mich Univ*, 327 Mich App 683, 697; 935 NW2d 86 (2019), a litigant argued that she was not required to provide notice of a tort claim against an individual state employee because MCL 600.6431 applies only to claims against the state. The Court of Appeals agreed, emphasizing that "[t]here are no references anywhere in MCL 600.6431 to claims against individuals." *Id.* Given the text, the court refused "to revise an unambiguous statute under the guise of interpretation." *Id.*

In a concurrence, Judge SWARTZLE surveyed other notice-of-claim provisions in Michigan statutes, finding that they, too, focused on claims against the state itself, not individual officers, likely because notice provisions are intended to help the state prepare for litigation, including through preservation of financial reserves. *Id.* at 699–700 (SWARTZLE, J., concurring). Those concerns are far more limited, if not eliminated, in the context of individual officer suits, particularly ones such as this that seek only prospective, equitable relief, not damages affecting the public fisc. Judge SWARTZLE also looked at the history of MCL 600.6431, noting that the COCA's notice rule for claims "against the state" pre-dated 2013 PA 164, which brought certain

officer suits within the Court of Claims' jurisdiction for the first time. *Id.* at 700–701.

Although this Court has not yet considered the rationale set forth in *Pike*, see *Progress Mich v Attorney General*, 506 Mich 74, 90; 954 NW2d 475 (2020), the decision's statutory analysis is correct and would directly resolve this appeal in MIRC's favor. This Court should therefore grant leave to appeal to resolve the conflict between *Pike* and the Court of Appeals' decision in this matter and to remedy a material injustice that is clearly erroneous and will encourage constitutional violations by allowing the government to engage in indefinite violations of the Constitution if it gets away with doing so for the first year.

II. Longstanding Immunity Principles Confirm That the One-Year Rule Does Not, and Could Not, Apply to Officer Suits for Prospective Relief.

"[W]hether compliance with the [one-year rule in] COCA is a question of immunity or a question of compliance with the rules of the forum" remains unsettled. *Progress Mich*, 506 Mich at 89 n 8; see also *Mays v Governor*, 506 Mich 157, 181; 954 NW2d 139 (2020) (plurality opinion by BERNSTEIN, J.) (a "procedural requirement[] on a plaintiff's available remedies"). In the past, however, this Court has indicated that "while MCL 600.6431 does not confer governmental immunity, it establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431." *Fairley v Dep't of Corrections*, 497 Mich 290, 297–298; 871 NW2d 129 (2015) (cleaned up).[2] The Court of Appeals assumed a

[2] While "sovereign immunity" and "governmental immunity" are often used interchangeably, they refer to slightly different concepts. "Sovereign immunity" protects the State and its instrumentalities, while "governmental immunity" protects other divisions of government, like cities, but only when they engage in "governmental" functions. *Pohutski v Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002), citing *Myers v Genesee Auditor*, 375 Mich 1, 6, 8–9; 133 NW2d 190 (1965). The distinction matters little here because the question of "governmental function" is not at issue, and the Governor is a state official anyway.

statutory basis for the Governor's immunity in this case and asked only whether an exception existed. *Mich Immigrant Rights Ctr*, unpub op at 6.

To the extent MCL 600.6431 implicates immunity, it makes sense to cabin its textual limitation on claims "against this state" because doing so is consistent with bedrock immunity principles under federal and state law. See, e.g., *Ford Motor Co v Woodhaven*, 475 Mich 425, 439–440; 716 NW2d 247 (2006) (recognizing "that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation"), quoting *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994); *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012) ("We must presume that the Legislature 'know[s] of the existence of the common law when it acts.'"), quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).

Indeed, as described below, to the extent that MIRC's claims allege violations of *federal* law, see Verified Compl ¶¶ 45–47, 57–63, *Ex Parte Young*, a landmark federal ruling distinguishing between suing the state and suing a state official in their official capacity for injunctive relief would directly apply, even in state court. And as to MIRC's state-law claims, Michigan courts have long recognized that state sovereign immunity does not preclude suits against officers to enforce state common-law, statutory, and constitutional rights. The Court of Appeals' reading of MCL 600.6431 would place the one-year notice rule at odds with these longstanding principles.

A. Through *Ex Parte Young*, federal law has long distinguished between suits against the state and suits against officers for prospective relief.

Since the United States Supreme Court decided *Ex Parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908), more than a century ago, it has made clear that federal principles of sovereign immunity do not bar suits that "allege[] an ongoing violation of federal law and seek[] relief

properly characterized as prospective." *Verizon Md, Inc v Pub Serv Comm of Md*, 535 US 635, 645; 122 S Ct 1753; 152 L Ed 2d 871 (2002) (cleaned up). See also *Va Office for Protection & Advocacy v Stewart*, 563 US 247, 254–255; 131 S Ct 1632; 179 L Ed 2d 675 (2011); cf. *Armstrong v Exceptional Child Ctr, Inc*, 575 US 320, 326–327; 135 S Ct 1378; 191 L Ed 2d 471 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.").

In *Ex Parte Young*, a company's stockholders challenged Minnesota laws that reduced the rates railroads were permitted to charge. 209 US at 130–131. The federal circuit court enjoined Edward Young, the Minnesota attorney general, from enforcing the rates. *Id.* at 133. Ignoring that order, Young brought an enforcement action in state court, and the federal court held him in contempt. *Id.* at 126. Young argued that sovereign immunity prevented the federal court from enjoining performance of his official duties. *Id.* at 134. The United States Supreme Court rejected that claim, holding that a state official who performs an unconstitutional act "proceed[s] without the authority of . . . the state" and "comes into conflict with the superior authority of [the United States] Constitution," such that he is "stripped of his official or representative character." *Id.* at 159–160.

Accordingly, under *Ex Parte Young*, "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Stewart*, 563 US at 255 (cleaned up). Where plaintiffs seek relief against some action that the state official himself might take, the "concern of sovereign immunity—whether the suit is against an unconsenting State, rather than against its officers"—disappears. *Stewart*, 563 US at 259.

In this case, to the extent that MIRC alleges violations of federal law, see Verified Compl ¶¶ 45–47, 57–63, *Ex Parte Young* would plainly foreclose immunity for the Governor. That is so because the United States Supreme Court has held that the principles of *Ex Parte Young* also "extend[] to state-court suits" asserting federal-law claims. *Alden v Maine*, 527 US 706, 733, 747–748; 119 S Ct 2240; 144 L Ed 2d 636 (1999). Otherwise, "[i]f a suit against state officers" for violating federal law could "be forbidden by a state to its courts . . . . , without power of review by" the United States Supreme Court, states could easily "prevent the enforcement of many provisions of the [federal] Constitution." *General Oil Co v Crain*, 209 US 211, 226–227; 28 S Ct 475; 52 L Ed 754 (1908). Cf. *Howlett v Rose*, 496 US 356, 380–383; 110 S Ct 2430; 110 L Ed 2d 332 (1990) (holding that under the federal Supremacy Clause, federal and state courts alike are bound to apply federal law abrogating state sovereign immunity for federal claims).[3]

And even as to MIRC's state-law claims, this Court should presume that the Legislature that crafted MCL 600.6431 was aware of the federal immunity doctrine's longstanding distinction between the state and its officials. Against this federal legal backdrop, if the Legislature had intended to equate the state with its officials for the purpose of restricting access to state courts,

[3] Even if the one-year rule were construed as a non-immunity-related requirement, it still could not be applied to federal constitutional claims. Under the Supremacy Clause, when state and federal law conflict, including where state law stands as an obstacle to accomplishing federal aims, "state law must give way." *PLIVA, Inc v Mensing*, 564 US 604, 617–618; 131 S Ct 2567; 180 L Ed 2d 580 (2011) (cleaned up); *United States v Locke*, 529 US 89, 109; 120 S Ct 1135; 146 L Ed 2d 69 (2000). See, e.g., *Felder v Casey*, 487 US 131, 141–142; 108 S Ct 2302; 101 L Ed 2d 123 (1988) (holding that a state notice-of-claim requirement was preempted as applied to federal claims under 42 USC 1983 because it aimed "to minimize governmental liability," thus undermining a "uniquely federal remedy"); *Haywood v Drown*, 556 US 729, 733–734; 129 S Ct 2108; 173 L Ed 2d 920 (2009) (holding that a state correctional law was preempted where the state "strip[ped] its courts of jurisdiction" over Section 1983 damages claims and instead forced plaintiffs to sue the state directly in a court of claims without access to "the same relief, or the same procedural protections," as would otherwise apply in a case under 42 USC 1983).

which have concurrent jurisdiction over nearly all federal claims, *Peden v Detroit*, 470 Mich 195, 201 n 4; 680 NW2d 857 (2004), it surely would have said so.

B. Background state-law immunity principles support cabining MCL 600.6431 to suits against the state, and not covering MIRC's claims.

To the extent the one-year notice rule serves as a condition on the government's waiver of immunity, as this Court has suggested, see *Fairley*, 497 Mich at 297–298, bedrock principles of state immunity law also support reading MCL 600.6431 as inapplicable to claims against state officials for prospective, equitable relief because those officials enjoy no immunity to those claims in the first place.

In *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961), the Court abolished governmental common-law immunity for torts, recognizing it as an "ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts." *Id.* at 250. And in *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976), the Court subsequently extended *Williams* to the sovereign immunity context, abrogating any common-law basis for state immunity from tort liability. Accordingly, since *Pittman*, any immunity in state courts must be based in statute, subject to constitutional constraints. *Pittman*, 398 Mich at 49 n 8.

The Legislature responded to *Pittman* (or, in fact, had already preemptively responded) by passing the GTLA, which this Court has interpreted as a permissible exercise of legislative authority to limit the state's tort liability for damages. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 605–606; 363 NW2d 641 (1984). But the Court has never held that the GTLA immunizes officials from injunctive or declaratory relief when they engage in ongoing rights violations.

Instead, both before and after *Pittman*, Michigan courts have recognized that state officials are not immune from suit for prospective, equitable relief. Nearly a century ago, this Court

concluded that "[i]f cases of mandamus and injunction may be brought in the federal courts" under *Ex Parte Young*, "there can be no reason why as liberal a rule ought not to prevail in the courts of the state." *Thompson v Auditor General*, 261 Mich 624, 628–630; 247 NW 360 (1933) (considering whether immunity barred a plaintiff's action to compel the auditor general to "publi[sh] the descriptions of real estate delinquent for taxes" as required under state law). In *Progress Michigan*, the Court similarly described the history, stating that there had "always been exceptions to the background rule of absolute sovereign immunity for the state recognized at common law," and it pointed to "[c]ommon-law writs of mandamus and habeas corpus" that predated statutory waivers of immunity. 506 Mich at 87 n 6; see also *Mays*, 506 Mich at 187–190 (plurality opinion by BERNSTEIN, J.).

Examples where this Court has applied that rule abound. See *Nowack v Auditor General*, 243 Mich 200, 203–204; 219 NW 749 (1928) (mandamus action recognizing common-law right to access public records with no indication that the state was immune from such an action); *Lash v Traverse City*, 479 Mich 180, 196–197; 735 NW2d 628 (2007), abrogated on other grounds by *Stegall v Resource Technology Corp*, __ Mich __; __ NW3d __ (2024) (Docket No. 165450) (holding that employee's claim for damages for statutory violation was barred but that he could still "enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)"); *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019) (same holding regarding a different statutory scheme); *McDowell v Mackie*, 365 Mich 268, 269–270; 112 NW2d 491 (1961) (dismissing tort claims against the government but noting that "[n]o question of abatement of a nuisance, or of *other relief a court of equity might properly grant* is . . . before us" (citation omitted) (emphasis added)).

Lower courts in Michigan have likewise applied this principle to both constitutional and non-constitutional claims. See, e.g., *Burdette v State*, 166 Mich App 406, 408; 421 NW2d 185 (1988) ("Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution."); *Duncan v State*, 284 Mich App 246, 269; 774 NW2d 89 (2009) ("An action that establishes unconstitutional conduct 'may not be limited except as provided by the Constitution because of the preeminence of the Constitution.' "), quoting *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546; 688 NW2d 550 (2004) (citation omitted).

Moreover, as to *constitutional* torts specifically, this Court has held:

> [The GTLA] does not, by its terms, declare immunity for unconstitutional acts by the state. The idea that our Legislature would indirectly seek to 'approve' acts by the state which violate the state constitution by cloaking such behavior with statutory immunity is too far-fetched to infer from the language of MCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature. [*Mays*, 506 Mich at 189 (plurality opinion by BERNSTEIN, J.).]

See also *Diggs v State Bd of Embalmers & Funeral Directors*, 321 Mich 508, 514–517; 32 NW2d 728 (1948) (collecting cases that demonstrate a longstanding cause of action cognizable in equity "to restrain the enforcement of a statute . . . on the ground of its unconstitutionality").

Under the GTLA and the common law before it, state officials like the Governor in this case have never been immune from claims seeking prospective, equitable relief, and it would make no sense to read MCL 600.6431 as a condition on the waiver of that non-existent immunity.

The Court of Appeals did not acknowledge the long history of Michigan courts permitting claims like those MIRC asserts against the Governor, or identify a statutory basis to justify the Governor's claimed immunity to which MCL 600.6431 might serve as a condition. Instead, the Court focused on this Court's decision in *Li v Feldt (After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992) (opinion by CAVANAGH, C.J., for a plurality). That case is not necessary to the

arguments set forth by MIRC and amici, and in any event, it supports amici's position, contrary to the Court of Appeals' misreading of the decision.

Li rejected a public nuisance exception to governmental immunity, but in so doing, a plurality explained that "[t]he distinction between the government's liability for prospective equitable relief and its liability for retrospective damages or compensation, and the principle that the former kind of liability is generally not barred by sovereign immunity, are fundamental to sovereign immunity law." *Id.* at 462, 469 (opinion by CAVANAGH, C.J., for a plurality).

The Court of Appeals dismissed this description of immunity law in *Li*, as "it commanded no majority." *Mich Immigrant Rights Ctr*, unpub op at 6. But *Li* was just repeating what other Michigan cases, including *Thompson*, had already established. See *Li*, 439 Mich at 469–470 (opinion by CAVANAGH, C. J., for a plurality) (compiling cases); *id.* at 468–469, 475 (distinguishing *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913)). In addition, while the *Li* plurality included three justices, two others took a *more* expansive view of when the government could be liable, notwithstanding immunity created by the GTLA. See *Li*, 439 Mich at 480 (BOYLE, J., concurring) (arguing that a nuisance exception to immunity may exist, but it did not "reach the facts" of the cases before the Court); *id.* at 485 (LEVIN, J., concurring in part) (criticizing the plurality's narrowing of the nuisance exception to governmental immunity). And neither justice suggested that they disagreed with the plurality's distinction between claims for damages and for injunctive relief. Thus, while the *Li* plurality's clear annunciation of longstanding immunity principles may not be *binding*, it is, in fact, *correct* and should be recognized as such by this Court.

* * *

Given the immunity principles that have long applied in Michigan and federal courts, this Court should grant leave to appeal and hold that the one-year rule does not apply to MIRC's claims.

III. Even If MCL 600.6431 Applied to MIRC's Claims, MIRC Complied with the One-Year Rule.

Even assuming that MCL 600.6431 applied here, the timing of MIRC's suit satisfied the one-year rule because the claims are continually accruing, and MIRC seeks prospective, equitable relief. The Court of Appeals held otherwise, finding that MIRC's claims are "the kind . . . that [Michigan's] abolition of the 'continuing harms doctrine' precludes." *Mich Immigrant Rights Ctr*, unpub op at 5. For all the reasons MIRC has explained, see MIRC Application for Leave to Appeal, the Court of Appeals' finding in this respect was incorrect.

Amici write to highlight three additional reasons for granting leave to appeal and reversing the decision below.

First, precedent makes plain that even where the continuing harms doctrine applies, it does not authorize the filing of claims that would otherwise be time-barred. Instead, this doctrine, which arose in federal Title VII litigation, merely allows a plaintiff to recover damages for a period going back further than the statute of limitations would otherwise permit.

In *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), this Court rejected the continuing harms doctrine for Michigan employment claims under the state Civil Rights Act ("CRA") based on differences between the statutory language of the CRA and Title VII. *Id.* at 283–284. But the continuing harms doctrine is irrelevant when a "plaintiff seeks to remedy only violations that occurred within the statutory period of limitations in the form of an injunction." *Fraser Twp v Haney*, 509 Mich 18, 28–29; 983 NW2d 309 (2022).

Garg itself demonstrates this point. The plaintiff in that case alleged in 1995 that she was facing retaliation for filing a grievance against her supervisor in 1987. *Garg*, 472 Mich at 286.

This Court held that Garg could not rely on the continuing harm principle and therefore could not receive damages for acts of retaliation that occurred prior to the three-year statute of limitations period. *Id.* But the Court still considered whether any unlawful acts of ongoing retaliation occurred within the limitations period (i.e., 1992 to 1995). *Id.* at 286–289.

Similarly, in *Haney*, while the defendants unlawfully began keeping hogs on their property in 2006, the plaintiffs did not seek an injunction until 2016. *Haney*, 509 Mich at 21–22. Defendants argued that because the alleged unlawful conduct had been ongoing for a decade the plaintiffs' suit for injunctive relief was barred by a statute of limitations. This Court rejected that argument, recognizing that "the continuing-wrongs doctrine ha[d] no bearing" on the situation because of the presence of ongoing illegality. *Id.* at 29.

Here, the Court of Appeals decision did not heed this case law, resulting in a sweeping opinion that distorts this Court's rejection of the continuing harms doctrine into a permission slip for the government to endlessly violate the rights of Michiganders in direct contravention of the very cases discussing the doctrine. On that ground alone, the Court of Appeals' decision is in defiance of this Court's well-established jurisprudence and should be reversed.

Second, the Court of Appeals improperly framed the nature of the illegality in this case. It believed that MIRC's injury stemmed from a single allegedly unlawful act, which the Court identified either as the Court of Appeals' decision in *Sanchez*, or perhaps the Legislature's earlier amendment of the workers' compensation statute to add a "crime" exception. *Mich Immigrant Rights Ctr*, unpub op at 5. That view is incorrect.

MIRC has alleged that it is suffering harm from ongoing benefit denials that are wrongfully based on an applicant's immigration status. With each new denial, the pool of individuals in need of MIRC's services grows, and as those individuals seek assistance, the pressure on MIRC to divert

its resources increases. This has "frustrat[ed] [MIRC's] ability to pursue the legal activities it was designed to pursue." Verified Compl ¶ 71. Given these factual circumstances, MIRC has alleged "*separate* [unlawful] acts" that continue by virtue of the benefits determination regime. *Mays*, 506 Mich at 185 n 10 (plurality opinion by BERNSTEIN, J.). The text of the WDCA and precedent on which the Court of Appeals relied no doubt inform these denials of benefits. But the harms to MIRC arise not from the mere existence of this text and case law, but from their continued or threatened application to individuals who then seek MIRC's assistance.

The Court of Appeals pointed to *Sunrise Resort Ass'n v Cheboygan Co Rd Comm*, 511 Mich 325, 338–340; 999 NW2d 423 (2023), for support, but nothing in that case justifies the outcome below. In *Sunrise Resort*, which began in 2020, the plaintiffs argued that a county road commission continued to respond unlawfully to flooding that had occurred in 2018. *Id.* at 330–331. Although the initial flooding occurred outside the applicable three-year statute-of-limitations period, the Court relied on *Haney* to conclude that plaintiffs' claims were timely because the sewage systems continued to be defective and freshly injure plaintiffs. *Id.* at 339–340. *Sunrise Resort* thus stands for the same proposition as *Haney* and *Garg*, namely that the continuing harms doctrine is irrelevant to equitable claims for ongoing injuries, and it supports reversal here.

Third, the Court of Appeals' decision would effectively greenlight the ongoing violation of constitutional rights, so long as those who are injured fail to complain at the outset. Under the Court of Appeals' rule, an individual repeatedly subject to involuntary commitment under an unconstitutional statute would have a sharp deadline to seek an injunction preventing state officials from continuing to enforce that act against her. Indeed, even if she were currently in state custody, her claim for declaratory and injunctive relief could be time-barred. Similarly, an advocacy group would be out of time to challenge the constitutionality of a longstanding state rule that restricts

speech, even if police threaten to apply that rule to a new protest being planned by the group. And a school district's claims to bar enforcement of a state funding formula could be too late, even if officials say with 100 percent certainty that they will use that formula next year to determine school funding. In fact, the school's claims could be dismissed even if state officials conceded that the formula would violate existing students' right to equal protection.

This Court's case law does not permit such nonsensical results. Because the decision below would do so, this Court should grant leave to appeal and reverse.

IV. If MCL 600.6431 Did Bar Prospective Relief to Address Even Ongoing Constitutional Violations, It Would Violate the Michigan Constitution.

As explained above, MCL 600.6431 covers only claims against the state, not claims against government officials like those at issue here. Moreover, even if MCL 600.6431 applied to MIRC's claims, MIRC met the one-year notice requirement because the Governor has and will continue to deny benefits based on immigration status to individuals seeking MIRC's assistance and thus cause corresponding, future injury to MIRC.

But even if this Court disagreed with all of the preceding arguments, the Court of Appeals' decision is wrong, and dangerously so, for at least one additional reason: If the one-year rule were interpreted to apply to MIRC's claims, *and* the Court of Appeals were correct that it could bar all prospective relief for ongoing constitutional violations, then the one-year notice rule would violate the Michigan Constitution's Separation-of-Powers Clause and could not be enforced. See Const 1963, art 3, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

"If our Constitution is to function, then the fundamental rights it guarantees must be enforceable. Our basic rights cannot be mere ethereal hopes if they are to serve as the bedrock of our government." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 692; 983 NW2d 855

(2022). And "inherent in our tripartite separation of powers" is the principle that enforcement of the Constitution falls within the "peculiar province of the judicial department." *Id.* at 693.

Accordingly, it is axiomatic that the Legislature does not "hav[e] the power through a statute to foreclose the ability of the judicial branch to order an end to constitutional violations." *Sharp v Lansing*, 464 Mich 792, 808–809; 629 NW2d 873 (2001); *id.* at 806–807 n 14 (stating that a "court may directly grant injunctive relief against a constitutional violation without regard to the content of any statute"). Were it otherwise, the political branches would "have the power to switch the Constitution on or off at will," leading "to a regime in which [the Legislature] and the [executive], not this Court, say what the law is." *Duncan*, 284 Mich App at 340 (cleaned up).

If MCL 600.6431 were interpreted to bar all relief for ongoing constitutional violations, so long as a plaintiff did not provide notice of intent to sue within one year of the first such violation, it would eviscerate any constitutional review mechanism to which it applies. As described earlier in Parts I and II, the Court of Appeals' crabbed reading of MCL 600.6431 would leave unreviewable a wide range of unlawful government actions and sharply depart from historical practice and precedent, strong evidence of interference with this Court's authority.

This Court's decision in *Bauserman* supports that conclusion. *Bauserman* held that "money damages are an available remedy for constitutional torts unless (1) the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue, or (2) another branch of government has provided a remedy that [this Court] consider[s] adequate." 509 Mich at 687 (citations omitted). An adequate alternative remedy "must be at least as protective of a particular constitutional right as a judicially recognized cause of action and must include any remedy necessary to address the harm caused." *Id.* at 705. In this case, the Court of Appeals' reading of MCL 600.6431 would fall far short of being "at least as protective" of a right to

prospective, equitable relief traditionally recognized in Michigan courts. *Id.* Indeed, it would leave Michiganders who miss the notice deadline emptyhanded in terms of a remedy to combat even ongoing and future constitutional violations. As a result, under the standard set forth in *Bauserman*, MCL 600.6431 as the Court of Appeals construed it would violate the Separation-of-Powers Clause and could not be enforced as applied to MIRC's constitutional claims.

Moreover, even before *Bauserman*, this Court had held that limitations on a right to sue for constitutional violations were unenforceable if they were "so harsh and unreasonable in their consequences that they effectively divest[ed] plaintiffs of the access to the courts intended by the grant of the substantive right." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 126; 537 NW2d 596 (1995). To the extent this standard is less protective than *Bauserman*, the latter's more stringent standard controls. But MCL 600.6431 as understood by the Court of Appeals would be unconstitutional under the earlier standard, too. See *id.* at 125, 127–129 & n 9 (upholding as reasonable a one-year statute of limitations for taxpayers seeking a refund of an unconstitutional assessment, but relying on the taxpayers' continued ability "to prevent future violations of their rights" through suits for injunctive and related declaratory relief); *Mays*, 506 Mich at 203–207 (BERNSTEIN, J., concurring) (finding, as to an issue not addressed by the lead opinion, that if allegations of a violation of bodily integrity were proved, "the harsh-and-unreasonable-consequences exception [would] release[] the[] [plaintiffs] from the notice requirements of MCL 600.6431").

CONCLUSION

For the foregoing reasons, this Court should grant MIRC's application for leave to appeal, reverse the Court of Appeals' decision, and remand the case to the trial court for further proceedings on the merits.

Respectfully submitted,

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