

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

MICHIGAN IMMIGRANT RIGHTS
CENTER,

Plaintiff,

v.

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

Defendant.

Supreme Court Case No. 167300, 167301

Court of Appeals Nos. 361451 & 362515
(Feeney, P.J., and M.J. Kelly and Rick, J.J.)

Court of Claims No. 21-000208-MZ (Hon.
Elizabeth L. Gleicher)

PLAINTIFF MICHIGAN IMMIGRANT RIGHTS CENTER'S
REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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I. INTRODUCTION

Defendant's Opposition Brief ("Def's Opp'n") confirms that if the Court of Appeals' decision stands, the government will use it to eviscerate precedent, undermining the judiciary's role in halting unlawful and unconstitutional conduct.

Start with the rules regarding claim accrual. Defendant and the Court of Appeals argue that a plaintiff cannot sue for a wrong that occurred yesterday, is occurring today, or will occur tomorrow, if the defendant subjected the plaintiff to a similar wrong outside the statutory time limit. A State agency with a policy of refusing to promote Black workers cannot be sued by a plaintiff denied a promotion two years ago, even if the plaintiff was denied another promotion this morning. A political party cannot seek to enjoin a law outlawing ballot boxes if that law took effect 366 days ago. Defendant tries rewriting MIRC's claims to make this appear more palatable here. But Defendant cannot distinguish the precedents of this Court and other panels of the Court of Appeals, which hold claims based on recent wrongs are timely, even if they are part of a series of misconduct, and particularly if the plaintiff solely seeks prospective equitable relief. Pl's Appl at 18-30. Those rules must be enforced to allow MIRC to proceed, or courts will protect the most persistent scofflaws.

Defendant and the Court of Appeals' articulation of sovereign immunity is, if anything, more alarming. They read MCL § 600.6431 as a necessary waiver of sovereign immunity. But this Court's and other Court of Appeals decisions establish the State has no immunity to waive if, as here, an official is sued for prospective equitable relief, or a plaintiff sues over constitutional violations. Contra that case law, the Court of Appeals held "[t]here is no exception to sovereign immunity for claims merely because those claims seek prospective equitable relief" and rejected the constitutional claims "exception to sovereign immunity." *Compare* App'x at 5–6 *with* Pl's

Appl at 30–41. Defendant thus argues MIRC can only proceed if it complies with § 600.6431, as that is the only instance in which the legislature waived sovereign immunity. *E.g.*, Def’s Opp’n at 9. In other words, based on the decision below, Defendant insists courts need a permission slip from the political branches before they can tell the State to stop violating the law. This Court should not accept a rule that neuters its constitutional role.

Like the Court of Appeals, Defendant asserts that *Christie v Wayne State University*, 511 Mich 39; 993 NW2d 203 (2023), establishes the State’s ability to create immunity. But *Christie* dealt with whether the COCA applies to a case seeking retrospective damages for nonconstitutional claims. *Christie* said nothing about immunity in cases seeking prospective equitable relief against constitutional violations.

This Court should grant review. This case presents an ideal vehicle to clarify the applicability of *Christie* and § 600.6431 in cases seeking to halt unlawful and unconstitutional government action. Reversal is necessary to uphold the judiciary’s role in preventing and correcting such misconduct.

II. MIRC’S CLAIMS ARE TIMELY UNDER MCL § 600.6431

To conclude MIRC’s claims are untimely, the Court of Appeals mischaracterized the wrongs at issue and the nature of the relief MIRC requests. MIRC does not seek to recover from some long-ago injury, but to stop a present-day “policy of applying” the Workers Disability Compensation Act, which produces an ongoing series of actionable wrongs. Def’s Opp’n at 14. MIRC seeks prospective relief from future misconduct that will injure MIRC, unless a court prevents Defendant from repeatedly unlawfully applying the Act. This Court and several panels of the Court of Appeals have held such claims are timely. Thus, this Court should grant review to

clarify that litigants may seek relief against recent and future government wrongs, even if the misconduct has persisted, and especially where, as here, they exclusively seek prospective relief.

A. A Claim Can Be Timely Even if the Plaintiff Suffers Repetitive Wrongs

Assuming MIRC needs to show a claim accrued within a year prior to its complaint as Defendant contends, MIRC did so. Defendant plucks out some dates from the Complaint to argue those are the only times MIRC suffered injuries, and none occurred within the one-year period of § 600.6431. Def's Opp'n at 12–14. But those events merely evidence the kinds of harms MIRC repeatedly experiences. As Defendant acknowledges, MIRC alleges “a policy” of wrongdoing effective throughout the year prior to filing the Complaint, and indeed continuing today. *See id.* at 14; *see also* App'x 9 (Compl ¶ 1). When, under that policy, undocumented workers are wrongfully denied benefits, new harms come to MIRC by draining its resources. Due to Defendant's persistent conduct, MIRC “has seen no decline in workers' compensation intakes” since it began its farmworker and immigrant rights project in 2017. App'x 27 (Compl ¶ 80).¹

This Court has squarely held repetitive misconduct produces timely claims for any wrongs falling within a statutory time limit. “[A] plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature.”

¹ Defendant states that MIRC is not harmed by “each individual denial of benefits” because “MIRC does not allege that every worker denied benefits is calling MIRC for a consultation.” Def's Opp'n at 15. Of course not every worker impacted by Defendant's policy calls on MIRC, but Defendant's repeated application of its policy ensures some do — as MIRC alleges occurred in the year prior to the Complaint and will occur in the future. MIRC is one of the state's most prominent providers of non-profit legal services to noncitizen workers. Thus, given Defendant's consistent policy, it would be shocking if MIRC *stopped* receiving intakes. Nonetheless, if this Court believes MIRC needed to allege more specifically such an incident in the year prior to filing, this Court should modify the dismissal to allow MIRC to amend its Complaint and provide that specificity, so it may proceed.

See Twp of Fraser v Haney, 509 Mich 18, 28; 983 NW2d 309 (2022); *accord Sunrise Resort Ass’n, Inc v Cheboygan Cnty Rd Comm’n*, 511 Mich 325, 330; 999 NW2d 423 (2023).

Despite this case law, the Court of Appeals held a court must look to the *first* time a controversy arose between the parties, and nothing after that point matters. App’x at 4. Defendant picks up on this to assert that this “lawsuit originated” when *Sanchez*, the justification for Defendant’s unlawful policy, was decided, regardless of Defendant’s subsequent applications of its policy, Def’s Opp’n 12 — although Defendant, like the Court of Appeals, also inconsistently suggests some later injuries could also have been actionable, *id.* at 14 (2019 is the “latest” MIRC’s claims accrued).

Yet, plaintiffs cannot be required to file “claims at the first” moment or “forever lose their leverage to urge the government to remedy defects.” *Sunrise*, 511 Mich 340. Rather, *Haney* and *Sunrise* provide that when a defendant engages in repetitive misconduct *each* act producing an injury is actionable. *Haney*, 509 Mich at 28–29

This Court should not let the Court of Appeals’ disagreement with that precedent fester. Defendant does not dispute the decision below deepens a split between different panels of the Court of Appeals over how to read *Haney* and *Sunrise*. Pl’s Appl at 23–25 (describing split).

Moreover, the Court of Appeals’ position has perverse consequences. Defendant does not contest that under her and the Court of Appeals’ view, a company with a policy of overcharging customers could not be sued by a plaintiff who first overpaid outside the statutory time limit. *See* Pl’s Appl at 29. Similarly, a group denied the opportunity to rally at the State Capitol could not challenge that decision if it was also denied a permit more than a year ago. While Defendant focuses on the fact that a newly harmed individual could challenge that conduct, *see* Def’s Opp’n at 16–17, the effect of Defendant’s and the Court of Appeals’ position is to deny judicial review

to those most frequently subject to misconduct and thus who will suffer the most injuries. That defies “[t]he logic of [this Court’s precedent].” *Sunrise*, 511 Mich 339. This Court should not allow such outcomes to propagate.

B. Claims for Prospective Relief are Always Timely

Defendant and the Court of Appeals also misread this Court’s case law on prospective relief. Def’s Opp’n at 13–14; App’x at 4. “[I]n no way does MIRC seek to hold the State liable for . . . past harms.” Pl’s Appl at 10. MIRC does not, as Defendant asserts, retrospectively seek to “overturn[]” or “vacate” *Sanchez*, nor request a declaration that *Sanchez* “was wrongly decided.” See Def’s Opp’n at vi, 1, 2, 14–16. Rather, MIRC seeks prospective equitable relief: an injunction and a declaration that given subsequent state and federal precedent and two decades of experience, Defendant’s policy of how it enforces *Sanchez* is unlawful and unconstitutional.

Because MIRC requests prospective equitable relief, the courts need not wade through the accrual rules above; its claim is by definition timely. As this Court explained, “[b]ecause a suit for [prospective equitable] relief may seek to prevent a future wrong, the cause of action necessarily arises before the wrong occurs.” *Taxpayers All for Const Tax’n v Wayne Cnty*, 450 Mich 119, 127; 537 NW2d 596 (1995). That makes it “unnecessary . . . to describe plaintiff’s [prospective equitable] claim in a way that makes it fit” within claim-accrual time limits. *Id.*; see also *Sunrise*, 511 Mich at 339 (explaining accrual analysis is distinct between claims “seek[ing] a remedy for those long-past . . . problems” and claims that “seek[] an injunction” against ongoing and future wrongdoing); *Haney*, 509 Mich at 25 n14 (similarly distinguishing between seeking damages for past wrongdoing and “an injunction — a remedy . . . against current and future violations”).

Rather than engage with *Taxpayers* — including failing to defend the Court of Appeals’ erroneous reading of it, Pl’s Appl at 26–28 — Defendant doubles down on her claim that “this case . . . is based on an alleged *past* wrong.” Def’s Opp’n at 16. But Defendant is unable to

maintain that charade. *Id.* at 14–15 (recognizing MIRC objects to Defendant’s policy, the applications of which “is causing it harm”). Accordingly, Defendant does not dispute that there is now a split in the Court of Appeals on how to treat claims for prospective relief. *See* Pl’s Appl at 27–29 (collecting contrary Court of Appeals decisions).

Defendant does offer that “*Taxpayers* did not consider MCL 600.6431” but rather a statute of limitations. Def’s Opp’n at 16 & n5. Yet even the panel below declined to adopt this argument, because Defendant presents a distinction without a difference. Pl’s Appl at 22 n62. Section 600.6431 turns on when a claim accrues. And there is “no meaningful distinction” in the accrual inquiry whether the time limit appears in a statute of limitations or a condition precedent to suit. *Bauserman v Unempl Ins Agency*, 503 Mich 169, 183; 931 NW2d 539 (2019) (interpreting § 600.6431 by reference to *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017), a statute of limitations case).

Preventing a plaintiff from seeking prospective relief to stop future misconduct because similar acts harmed the plaintiff in the past “would truncate . . . right[s].” *Taxpayers*, 450 Mich 127. This Court should grant review to affirm *Taxpayers*’ rule that prospective relief from future wrongs is always timely, and thereby resolve the undeniable dispute among the lower courts on this issue.

III. DEFENDANT’S AND THE COURT OF APPEALS’ IMMUNITY ANALYSIS IS WRONG AND DANGEROUS

Defendant and the Court of Appeals characterize § 600.6431 as a “waiver of sovereign immunity” with which MIRC must comply. *See* Def’s Opp’n at 8, 9; App’x at 5. But MIRC need not meet the conditions for a waiver of sovereign immunity because the State cannot waive immunity it never had. Defendant has no immunity because MIRC seeks prospective equitable relief and alleges constitutional violations. *Christie*, on which Defendant and the Court of Appeals

rely, never suggests otherwise. Because they mistake this precedent, both Defendant and the Court of Appeals offer no basis for this Court to accept the disturbing consequence of their position: simply by enacting laws asserting complete immunity, the political branches can disregard Michiganders' rights without oversight or accountability. This Court should not allow that notion to go unaddressed.

A. Precedent Establishes that the State Has No Sovereign Immunity from MIRC's Claims

Defendant and the Court of Appeals assert the State has sovereign immunity from prospective equitable relief and constitutional claims because the legislature said so in § 600.6431. Def's Opp'n at 9–11; App'x at 6. This is a genuinely terrifying vision of government. As this Court explained just two years ago, “[i]f 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 Unempl Ins Agency*, 509 Mich 673, 692; 983 NW2d 855 (2022) (“*Bauserman II*”). Either the judiciary is a guardian against government abuse, or the legislature may strip the courts of their ability to halt ongoing unlawful and unconstitutional government wrongdoing. Both cannot be true.

Defendant, like the Court of Appeals, whistles past a century-plus of precedent explaining that government defendants are not immune from official-capacity suits for prospective equitable relief. Defendant never even mentions, much less tries distinguishing, this Court's decisions enshrining the principles of *Ex parte Young*, 209 U.S. 123; 28 S Ct 441; 52 L Ed 714 (1908), into state law — including refusing to defend the Court of Appeals' view that one such decision of this Court was not binding on it. See Pl's Appl at 31–37 (collecting cases). Nor does Defendant try justifying the split between the panel's holding that “[t]here is no exception to sovereign immunity for claims merely because those claims seek prospective equitable relief,” and other Court of

Appeals decisions coming to the opposite conclusion. *Compare* App’x at 5, *with* Pl’s Appl at 37–38 (demonstrating split).

Further, Defendant, like the Court of Appeals below, ducks the well-established rule that government actors may not claim immunity for their constitutional violations. *See* Pl’s Appl at 38–41. Accordingly, Defendant offers no basis to reconcile the opinion below with *Bauserman II*, 509 Mich at 688, *Mays v Governor*, 506 Mich 157, 187; 954 NW2d 139 (2020), *Smith v State*, 428 Mich 540, 544; 410 NW2d 749 (1987), or *Duncan v State*, 284 Mich App 246, 268–69; 774 NW2d 89 (2009). And Defendant does not attempt to explain the Court of Appeals’ decision to assume MIRC *does* have standing, App’x at 4, while simultaneously reasoning MIRC *does not* have standing to sue over constitutional violations that harm individual workers as well as MIRC, *id.* at 6; *see also* Pl’s Appl at 39. In fact, although the Court of Appeals left open the possibility the State has no immunity from claims regarding certain constitutional rights (albeit not MIRC’s claims), App’x at 6; *see also* Pl’s Appl at 40 (explaining why that distinction is unworkable), Defendant extends the Court of Appeals’ reasoning to assert that because § 600.6431 mentions constitutional claims, the legislature can and has enacted immunity against *anyone*’s claim the State has violated *any* constitutional right. Def’s Opp’n at 9–12.

The consequences of the Court of Appeals’ and Defendant’s position also go unaddressed, because they prove their approach is untenable. Could the legislature pass a law outlawing prayer? Or requiring state troopers to pull over every driver of Hispanic descent? Defendant, relying on the Court of Appeals, would answer yes, so long as the legislature includes a clause in that statute extending immunity to any official who might be sued. This Court should intercede to enforce the principle that the legislature may not “‘approve’ acts by the state which violate the state

constitution by cloaking such behavior with statutory immunity.” *Smith*, 428 Mich. at 641 (opinion of Boyle, J.).²

B. This Court Should Grant Review to Clarify that *Christie* Does Not Provide Effectively Boundless Immunity

The Court of Appeals and Defendant invoke *Christie* for the proposition “that [MCL § 600.]6431 applies to *all* claims against the state,” which they state establishes the novel rule the legislature can statutorily create immunities the sovereign never had. Def’s Opp’n at 7; App’x at 6. But *Christie* dealt only with whether § 600.6431 applies in suits that are brought outside the Court of Claims. Thus, when *Christie* said § 600.6431 applies to “all” claims against the State, it meant it applied in all *venues* — an issue far afield from this case.

Moreover, *Christie* involved only statutory claims for retrospective damages. Thus, *Christie*’s statement that the COCA provides a mechanism to “overcome immunity” did not consider how § 600.6431 works when a plaintiff seeks prospective relief to stop constitutional violations, where the state has no immunity to “overcome.” *Compare* 511 Mich at 61, with *Bauserman II*, 509 Mich at 688 (no immunity for constitutional violations), and *Thompson v Auditor Gen*, 261 Mich 624, 629–30; 247 NW 360 (1933) (no immunity for prospective equitable relief against government officials in state court). *Christie* had nothing to do with such cases, so it

² Defendant notes the legislature may create a Court of Claims and establish statutes of limitations for constitutional claims. *See* Def’s Opp’n at 11. MIRC does not question the legislature’s ability to channel judicial review into a given court, only the legislature’s ability to invent immunity to preclude review of unlawful government action in any court. Nor does MIRC contest that the legislature could enact a reasonable statute of limitations on constitutional claims. But if § 600.6431 is a statute of limitations, MIRC wins. Defendant asserts that *Taxpayers*, which held that prospective relief is always timely, does not apply because *Taxpayers* involved the application of a statute of limitations, not a condition precedent to suit. Def’s Opp’n at 16. If § 600.6431 is also a statute of limitations, then Defendant provides no reason MIRC’s request is untimely.

is unsurprising that *Christie* did not engage with — much less overrule — the relevant precedent establishing Defendant has no immunity here.

This case presents an ideal and apparently necessary vehicle for this Court to clarify the limits of *Christie* and the COCA in cases seeking prospective equitable relief from unlawful and unconstitutional government action. It would allow this Court to reaffirm the “first principle, inherent in our tripartite separation of powers,” that “if the rights guaranteed in our Constitution are to be enforceable, then enforcement must fall to [the courts], absent an explicit constitutional provision limiting our authority in this regard.” *Bauserman II*, 509 Mich at 693.

IV. CONCLUSION

This Court should grant leave to appeal and reverse the decision of the Court of Appeals.

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CERTIFICATE OF COMPLIANCE & WORD COUNT

I, John C. Philo, for Plaintiffs-Applicants, certify that the *Plaintiff Michigan Immigrant Rights Center's Reply In Support Of Application For Leave To Appeal* complies with the formatting and word limitations of MCR 7.212 and 7.305.

This brief uses a 12-point proportional font (Times New Roman), has at least one-inch page margins, and its text is double-spaced, except for quotations and footnotes, which are single-spaced. According to the word count feature of Microsoft Word, the word processing program used to prepare the document, the sections of the brief (including footnotes) not excluded under MCR 7.212 (B)(2) contain 3,133 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2024, I electronically filed the attached *Plaintiff Michigan Immigrant Rights Center's Reply In Support Of Application For Leave To Appeal* with the Clerk of the Michigan Supreme Court using the MiFILE system, which will send notification of such filing to all electronic case filing participants.

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