

Case No. A23-1544

FILED

January 27, 2025

State of Minnesota
In Supreme Court

OFFICE OF
APPELLATE COURTS

CHRISTOPHER THIGPEN,

Appellant,

vs.

BEST HOME CARE, LLC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF

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I. LEGAL ISSUE

Appellant Christopher Thigpen worked 20 to 40 hours a week as a personal care attendant for Best Home Care when he started a part-time job at Target. Thigpen continued his job at Best Home Care, uninterrupted, but applied for unemployment benefits after separating from Target. Thigpen then filed 104 consecutive weekly requests for payment of unemployment benefits. In each payment request, Thigpen lied and reported that he did not work or have earnings that week. Based on his answers, Thigpen was paid standard unemployment benefits and federal benefits under various CARES Act programs he was not entitled to receive.

An applicant who knowingly lies and receives unemployment they were not entitled to receive has committed misrepresentation and must repay the unemployment benefits they were not entitled to receive and pay a penalty of 40 percent of the amount overpaid, with interest. The applicant is ineligible for future unemployment benefits for any week they have an outstanding misrepresentation overpayment balance, for up to ten years after the date of the initial determination of overpayment penalty.

An unemployment law judge determined that Thigpen obtained unemployment benefits through misrepresentation and CARES Act benefits through fraud and assessed a penalty equal to 40 percent of the overpayment, with

interest. Thigpen will be ineligible for unemployment benefits for any week that he still has an outstanding misrepresentation overpayment balance, for up to ten years.

Does the misrepresentation penalty violate the Minnesota and United States Constitutions' prohibition against excessive fines?

Thigpen did not raise the issue to the unemployment law judge. The Minnesota Court of Appeals determined that, because the misrepresentation penalty was not grossly disproportional to the gravity of the offense, it was not excessive under the United States and Minnesota Constitutions.

II. STATEMENT OF THE CASE/STATEMENT OF FACTS¹

In 2019 and 2020, Appellant Christopher Thigpen worked for Best Home Care as a personal care attendant (PCA).² Thigpen worked each week, his hours fluctuating between 40 and 20 hours per week.³ After beginning work with Best Home Care, Thigpen took a part-time job with Target.⁴

Thigpen maintained the Best Home Care job but separated from Target.⁵ Thigpen applied for unemployment benefits with the Department of Employment and Economic Development (“DEED”).⁶ Thigpen established a benefit account

¹ These two sections are combined for ease of understanding this matter.

² T. 22-23; R-2A, E. 22, pp. 11-18. Transcript references will be indicated “T.” with the page number following. Exhibits in the record for Issue ID 48681520 (earnings issue) will be indicated “R-2A.” with the exhibit number following. Exhibits in the record for Issue ID 48894042 (misrepresentation issue) will be indicated R-2B.” with the exhibit number following. Exhibits in the record for Issue ID 49097671 (FPUC 1 issue) will be indicated “R-2C.” with the exhibit number following. Exhibits in the record for Issue ID 49097672 (FPUC 2 issue) will be indicated “R-2D.” with the exhibit number following.

³ T. 22-23; R-2A, E. 22, pp. 11-18.

⁴ T. 84. Thigpen’s characterization that Target was his “main employment” (Thigpen Brief, p. 11) is not supported by the record. Thigpen stated in his application that he started working for Best Home Care on April 4, 2019, and testified on September 8, 2022, that he continued to work there. T. 22. Best Home Care’s records, which Thigpen did not dispute, showed that Thigpen typically worked 20 to 40 hours per week and earned \$13.25 to \$14.40 per hour. R-2A, E. 11, pp. 7-18. Thigpen stated in his application that he worked for Target from November 25, 2019, to March 12, 2020, worked an average of 25 hours per week, and earned \$13 per hour. R-2A, E. 9, p. 10.

⁵ T. 83; R-2A, E. 9, pp. 9-10.

⁶ T. 83; R-2A, E. 9, pp. 9-10.

effective March 22, 2020, with a weekly benefit amount of \$370.⁷ DEED mailed Thigpen an unemployment insurance handbook.⁸ The handbook had a section titled “Report work when requesting benefits,” that instructed applicants to report work and earnings during a week for which they request to be paid unemployment benefits. Thigpen testified not remembering receiving the handbook.⁹

Thigpen requested and was paid unemployment benefits.

Each week between March 22, 2020, and March 19, 2022, Thigpen worked and had earnings through uninterrupted employment at Best Home Care. Thigpen used the unemployment insurance online self-service system to complete continued requests for benefits for each of these weeks.¹⁰ For each week during the 104-week period, Thigpen was asked, “Did you work or have a paid holiday

⁷ R-2A, E. 9, p. 15.

⁸ T. 14; R-2A, E. 4, pp. 151-58. Thigpen stated that “there is no evidence in the record that a handbook was mailed to Thigpen.” Thigpen Brief, p. 13. The ULJ asked Thigpen if he received the handbook. T. 14. Thigpen replied, “I’m not sure about that.” *Id.* The ULJ then stated, “It is the Department’s practice to mail it to every applicant. Do you have any reason to dispute that?” *Id.* Thigpen stated, “I just do not remember if I got one when I first applied for unemployment.” *Id.* See Minn. R. 3310.2923 (2022)(stating that a ULJ may take official notice of facts within the judge’s specialized knowledge of unemployment insurance if ULJ gives the parties “an opportunity to contest the noticed facts”).

⁹ T. 14.

¹⁰ R-2A, E. 4, pp. 13-113.

during the reporting period listed above? This includes Full Time, Part Time, Temporary Work, Self Employment or Volunteer Work.”¹¹ Thigpen replied, “No,” 104 consecutive times.¹² Because Thigpen reported that he had worked zero hours and had no earnings to report, the unemployment insurance system then asked, “For the time period above, did you/will you receive income from any other source that you have not already reported to us? Answer “yes” if you applied for another source of income for the period above, but have not received that income yet. Please click [Here](#) for examples of other income sources.”¹³ Thigpen replied “No,” for each week.¹⁴ Had Thigpen answered “Yes” to the first question, the system would have prompted him to report how many hours he worked and exactly how much he earned during the week.¹⁵

Thigpen knew he was working for Best Home Care and knew he would be paid for his work.¹⁶ Thigpen understood he was being asked to report this work. Thigpen could have reported his gross earnings and hours worked each week;

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ A copy of the benefit request questions is included in DEED’s Addendum at A44.

¹⁶ T. 84.

however, he knowingly lied, reporting that he was not working or being paid any money.

Thigpen was paid 104 weeks of a combination of standard unemployment benefits and Pandemic Emergency Unemployment Compensation (“PEUC”), a federal extension program created by the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.¹⁷

Thigpen was paid FPUC payments as well.

In addition to regular unemployment benefits and PEUC benefits, Thigpen was paid Federal Pandemic Unemployment Compensation (“FPUC”) supplemental payments.¹⁸ For the weeks between March 29, 2020, and July 25, 2020, Thigpen was paid FPUC in the amount of \$600 each week.¹⁹ For the weeks between December 27, 2020, and September 4, 2021, Thigpen was paid FPUC in the amount of \$300 each week.²⁰

DEED issues determinations of ineligibility.

¹⁷ R-2A, E. 4, pp. 114-19. DEED codes standard (regular) unemployment benefits as “STUI.” DEED codes PEUC benefits as E024, E027, and E029.

¹⁸ The CARES Act provided for supplemental payments of \$600 and \$300, called Federal Pandemic Unemployment Compensation (“FPUC”), to individuals who were entitled to receive any amount of regular state unemployment benefits, PEUC, or Pandemic Unemployment Assistance (“PUA”) benefits for the week. 15 U.S.C. § 9023 (2022).

¹⁹ R-2A, E. 4, pp. 147-50.

²⁰ R-2A, E. 4, p. 138-46.

On July 15, 2022, DEED issued determinations holding Thigpen had earnings from Best Home Care that made him ineligible for unemployment benefits, or eligible for reduced benefits,²¹ and that Thigpen was paid unemployment benefits because he misrepresented, misstated, or failed to disclose a material fact and assessed a penalty in the amount of 40 percent of the overpayment.²²

Thigpen appealed and a ULJ conducted hearings.

Thigpen appealed the determinations, and an unemployment law judge (“ULJ”) held de novo evidentiary hearings, issuing final decisions on September 21 and 22, 2023. The ULJ determined that Thigpen had earnings that made him ineligible for unemployment benefits for the weeks between March 22, 2020, and March 19, 2022.²³ This decision resulted in an overpayment of unemployment benefits in the amount of \$24,005.²⁴ The ULJ determined Thigpen obtained standard (regular) unemployment benefits through misrepresentation and PEUC benefits through unemployment insurance fraud.²⁵ This decision resulted in a penalty equal to 40 percent of the unemployment benefits overpaid and 40 percent

²¹ R-2A, E. 1, pp. 1-5.

²² R-2B, E. 1, p. 1.

²³ R-6A, p. 5 (Add. A5).

²⁴ *Id.*

²⁵ R-6B, p. 10 (Add. A17).

of the PEUC benefits overpaid. The ULJ determined that Thigpen was overpaid FPUC²⁶ resulting in an overpayment in the amount of \$15,600.²⁷

Thigpen appealed the decisions to the Minnesota Court of Appeals.²⁸ Thigpen argued the decision was unsupported by substantial evidence, the ULJ applied the wrong standard of proof, that Thigpen was denied due process, and that DEED imposed an excessive fine in violation of the Eighth Amendment.²⁹ The Minnesota Court of Appeals issued a nonprecedential decision, affirming the ULJ's decision and rejecting all of Thigpen's arguments.³⁰ Relevant here, the Court of Appeals applied the three-factor proportionality test from *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547 (Minn. 2003), concluding that the 40-percent penalty was not grossly disproportional to the gravity of the offense.³¹

²⁶ R-6C, p. 10 (Add. A29); R-6D, p. 10 (Add. A41).

²⁷ R-6C, p. 9 (Add. A28); R-6D, p. 9 (Add. A40).

²⁸ See 15 U.S.C. § 9025(e)(4) (2022) (“ Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in the manner and to that extent.”).

²⁹ *Christopher Thigpen v. Best Home Care LLC*, No. A23-1544, slip op., at 2 (Minn. Ct. App. July 29, 2024).

³⁰ *Id.* at 4-10.

³¹ *Id.* at 7-10.

This matter now comes before the Minnesota Supreme Court. The only issue before the Court is whether Minnesota’s misrepresentation overpayment penalty violates the state and federal constitutional prohibitions against excessive fines.

Unemployment benefits are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, and not by an employer or from employer funds.³² PEUC benefits are paid from federal funds.³³ “The programs and provisions in the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program[.]”³⁴

³² Minn. Stat. § 268.069, subd. 2 (2022); *see also* *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 456, n. 4 (Minn. 2016) (recognizing that “unemployment benefits are paid from state funds, which the agency administers, and not by an employer”).

³³ 15 U.S.C. § 9025(c) (2022).

³⁴ Unemployment Insurance Program Letter (“UIPL”) 16-20, p. 2 (April 5, 2020), available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_16-20.pdf. As the programs in the CARES Act were rolled out, USDOL issued UIPLs to provide guidance on how to administer them. DEED signed a contract with USDOL, agreeing to administer the programs in accordance with USDOL operating instructions.

III. STANDARD OF REVIEW

Whether the application of a statute violates the excessive fines clause is a legal question that the Minnesota Supreme Court reviews de novo.³⁵ The Court “exercise[s] [its] power to declare a statute unconstitutional with extreme caution and only when absolutely necessary.”³⁶ “The party challenging the constitutionality of a Minnesota statute bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional provision.”³⁷

The ULJ issued three sets of decisions in this matter. The only decisions before the Minnesota Supreme Court are the ULJ’s decisions on reconsideration issued on September 21 and 22, 2023 and marked as R-6A (earnings), R-6B (misrepresentation/fraud), R-6C (FPUC 1) and R-6D (FPUC 2). The decisions on reconsideration are the final decisions in this matter.

³⁵ *State v. Rewitzer*, 617 N.W.2d 407, 412 (Minn. 2000).

³⁶ *Wendell v. Comm’r of Revenue*, 7 N.W.3d 405, 414 (Minn. 2024)(quotation omitted).

³⁷ *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

IV. ARGUMENT

A. The Minnesota unemployment insurance program is an eligibility program.

Program background

The unemployment insurance program, created as part of the Social Security Act of 1935, is a federal-state collaboration.³⁸ Under the Federal Unemployment Tax Act (FUTA), the U.S. Secretary of Labor must, each year, certify to the secretary of the treasury that Minnesota law meets all of the federal requirements.³⁹ Certification ensures that Minnesota employers receive the FUTA tax credit and that Minnesota receives grants from the Department of Labor to administer the unemployment insurance program.⁴⁰ The U.S. Secretary of Labor has certified that Minnesota's unemployment insurance statute, including the misrepresentation penalty, conforms to all federal requirements.

The public purpose of Minnesota's unemployment insurance program is to provide "workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed."⁴¹ Eligible applicants are paid unemployment benefits from the Trust

³⁸ *Wimberly v. Labor and Indus. Relations Com'n of Missouri*, 479 U.S. 511, 514 (1987).

³⁹ See 26 U.S.C. § 3302(a)(1) (2022), § 3303(b) (2022) and § 3304(a) (2022).

⁴⁰ 26 U.S.C. § 3302(a)(1); 42 U.S.C. § 502(a) (2022).

⁴¹ Minn. Stat. § 268.03, subd. 1 (2022).

Fund.⁴² An applicant's weekly benefit amount and maximum benefit amount are calculated based on the amount of wages the applicant earned in "covered employment" during the four-quarter period, or "base period," preceding their account date.⁴³ The weekly benefit amount is equal to about half of what the applicant earned on average each week during their base period, and the maximum benefit amount is 26 weeks of the weekly benefit amount.⁴⁴

The Trust Fund is funded by quarterly taxes paid by Minnesota employers.⁴⁵ Employers are taxed on wages paid to employees in "covered employment."⁴⁶ An employer's specific tax rate is determined according to a formula that includes benefits paid to employees in previous years.⁴⁷ In this way, the payment of unemployment benefits to employees and former employees may increase an

⁴² Minn. Stat. § 268.069, subds. 1, 2 (2022).

⁴³ Minn. Stat. § 268.07, subd. 2a (2022); Minn. Stat. § 268.035, subd. 15 (defining "employment"), subd. 12 (defining "covered employment"), subd. 20 (defining "noncovered employment") and subd. 4 (defining "base period")(2022).

⁴⁴ Minn. Stat. § 268.07, subd. 2a(a)(1), (c)(2) (2022).

⁴⁵ Minn. Stat. § 268.051, subd. 1(2) (2022).

⁴⁶ Minn. Stat. § 268.051, subd. 1 (2022). *See* Minn. Stat. § 268.035, subd. 15 (defining "employment"), subd. 12 (defining "covered employment"), and subd. 20 (defining "noncovered employment").

⁴⁷ Minn. Stat. § 268.047 (2022)(setting forth the effect on employer of unemployment benefits paid to applicants); Minn. Stat. § 268.051, subd. 2 (2022) (setting forth calculations for tax rates). Some employers, such as nonprofit and government employers, are "reimbursing employers." Minn. Stat. § 268.047, subd. 1 (2022). Here, Best Home Care was a taxpaying employer.

employer's tax obligation. Therefore, employers are interested parties in unemployment insurance proceedings, raising eligibility issues to DEED, providing information used in initial determinations, and participating as witnesses in unemployment benefits hearings.⁴⁸

Minnesota's eligibility criteria

Though every person has the right to apply for unemployment benefits, the right to receive unemployment benefits is contingent on meeting statutory eligibility criteria. An applicant is not presumed to be eligible for unemployment benefits simply because he or she is unemployed.⁴⁹ First, an applicant must have sufficient wages in covered employment during their base period to establish a benefit account under Minnesota Statutes, section 268.07.⁵⁰ Next, the applicant must not be ineligible for unemployment benefits based on a separation from employment under section 268.095. In addition, the applicant must meet the ongoing weekly eligibility requirements in section 268.085. This includes requirements that the applicant is available for suitable employment,⁵¹ actively

⁴⁸ See Minn. Stat. § 268.101, subd. 1(b), (c), subd. 2(a)-(c) (2022); Minn. Stat. § 268.105, subd. 1(a)(2022).

⁴⁹ Minn. Stat. § 268.069, subd. 2 (2022).

⁵⁰ Minn. Stat. § 268.07, subd. 2(a) (2022).

⁵¹ Minn. Stat. § 268.085, subds. 1(4), 15 (2022).

seeking suitable employment⁵², and not ineligible due to the receipt of certain income.⁵³ If an applicant is paid unemployment benefits but later determined ineligible for any week paid, the applicant is “overpaid the benefits, and must promptly repay the benefits to the Trust Fund.”⁵⁴

An applicant who is working while requesting unemployment benefits may be eligible for unemployment benefits for any week if they meet the definition of “unemployed.”⁵⁵ “An applicant is ‘unemployed’ in any week that: (1) the applicant performs less than 32 hours of service in employment, covered employment, noncovered employment, self-employment, or volunteer work; and (2) any earnings with respect to that week are less than the applicant’s weekly unemployment benefit amount.”⁵⁶ Section 268.085, subdivision 5 provides, “If the applicant has earnings, including holiday pay, with respect to any week, that is less than the applicant’s weekly unemployment benefit amount, from employment, covered employment, noncovered employment, self-employment,

⁵² Minn. Stat. § 268.085, subds. 1(4), 16 (2022).

⁵³ Minn. Stat. § 268.085, subds. 3, 3a, 3b, 3c (2022) and Minn. Stat. § 268.085, subds. 4a, 5, and 6 (2022).

⁵⁴ Minn. Stat. § 268.18, subd. 1 (2022).

⁵⁵ Minn. Stat. § 268.085, subd. 1(3) (2022).

⁵⁶ Minn. Stat. § 268.035, subd. 26 (2022). *See also* Minn. Stat. § 268.085, subd. 5(a) (2022).

or volunteer work, 50 percent of the earnings are deducted from the weekly unemployment benefit amount.”

To determine whether an applicant is “unemployed” / not ineligible based on the receipt of earnings, and whether to deduct any earnings from the applicant’s benefits, DEED requires applicants to answer certain questions each week when requesting benefits.⁵⁷ Applicants who report that they did not work during a week when they did in fact work may be subject to the misrepresentation penalty.

Misrepresentation/fraud penalty

The Social Security Act requires states to enact a minimum fraud penalty amount of “not less than 15 percent of the amount of the erroneous payment,” with states able to enact penalties higher than that amount.⁵⁸ FUTA allows states to enact disqualification provisions for fraud: “[C]ompensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with

⁵⁷ See R-2A, E. 4, p. 13.

⁵⁸ 42 U.S.C. § 503(a)(11)(A) (2022). See Unemployment Insurance Program Letter 20-21, p. 4 (“When a state determines an overpayment was made to an individual due to fraud committed by such individual, the state must assess a penalty of at least 15 percent of the amount of the erroneous payment”).

his work, fraud in connection with a claim for compensation, or receipt of disqualifying income[.]”⁵⁹

Minnesota Statutes, section 268.18, subd. 2, sets forth the misrepresentation penalty:

An applicant has committed misrepresentation if the applicant is overpaid unemployment benefits by making a false statement or representation without a good faith belief as to the correctness of the statement or representation.

After discovery of facts indicating misrepresentation, the commissioner must issue a determination of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid. This penalty is in addition to penalties under section 268.183.⁶⁰

Of the penalty amounts paid by applicants, 62.5 percent is credited to the contingent account and 37.5 is credited to the Trust Fund.⁶¹

Section 268.18, subdivision 2b provides for interest:

On any unemployment benefits obtained by misrepresentation, and any penalty amounts assessed under subdivision 2, the commissioner must assess interest on any amount that remains unpaid beginning 30 calendar days after the date of a determination of

⁵⁹ 26 U.S.C. § 3304(a)(10) (2022).

⁶⁰ Minn. Stat. § 268.18, subd. 2(a) (2022)(hereafter the “misrepresentation penalty”).

⁶¹ *Id.* See Minn. Stat. § 268.199(a) (2022)(“ All money in this account is appropriated and available for administration of the Minnesota unemployment insurance program unless otherwise appropriated by session law.”).

overpayment penalty. Interest is assessed at the rate of one percent per month or any part of a month.⁶²

Section 268.085, subdivision 2, part of the ongoing eligibility requirements, provides, “An applicant is ineligible for unemployment benefits for any week. . . that the applicant, at any time during the week, has an outstanding misrepresentation overpayment balance under section 268.18, subdivision 2, including any penalties and interest.”⁶³ DEED does not offset from future unemployment benefits payments to satisfy the misrepresentation overpayment, like it does for non-misrepresentation overpayments, because an applicant with a misrepresentation overpayment balance is ineligible for unemployment benefits.⁶⁴ Unpaid misrepresentation overpayment balances, penalties, and interest are cancelled after ten years.⁶⁵

Section 9025(e) of the CARES Act addresses fraud in the PEUC program.⁶⁶ An applicant obtained PEUC by fraud if they “knowingly. . . made . . . a false

⁶² Minn. Stat. § 268.18, subd. 2b (2022).

⁶³ Minn. Stat. § 268.085, subd. 2(2) (2022)(hereafter the “eligibility provision”).

⁶⁴ See Minn. Stat. § 268.18, subd. 3a (2022)(providing that DEED may offset from future unemployment benefits the amount of a non-misrepresentation overpayment).

⁶⁵ Minn. Stat. § 268.18, subd. 4(b) (2022). Under Minn. Stat. § 268.183 (2022), DEED may assess, “in addition to any other penalties, an administrative penalty of being ineligible for unemployment benefits for 13 to 104 weeks.” The ULJ did not assess an ineligibility penalty under this section.

⁶⁶ 15 U.S.C. § 9025(e)(1) (2022).

statement or representation of a material fact” and received PEUC as a result.⁶⁷ Unemployment Insurance Program Letter 20-21 Change 1 states, “States must apply the same monetary penalty to CARES Act UC programs as it does to the regular UC program.”⁶⁸ As such, DEED imposed a 40-percent penalty, consistent with Minn. Stat. § 268.18, subd. 2(a).

B. The misrepresentation and fraud penalties do not violate the excessive fines clause.

The Minnesota and United States Constitutions have prohibitions against excessive fines. The excessive fines clauses of the state and federal constitutions are identical: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁹ The purpose of the excessive fines clause is “to prevent the government from abusing its power to punish.”⁷⁰ Because the misrepresentation penalty “cannot fairly be said to serve a solely remedial

⁶⁷ *Id.*

⁶⁸ Unemployment Insurance Program Letter (UIPL) 20-21 Change 1, p. 7 (Feb. 7, 2022), available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2022/UIPL_20-21_Change_1.pdf.

⁶⁹ Minn. Const. art. I § 5; U.S. Const. amend. VIII.

⁷⁰ *Wilson v. Commissioner of Revenue*, 656 N.W.2d 547, 553 (Minn. 2003)(citing *Austin v. United States*, 509 U.S. 602, 606-07 (1993)).

purpose,” but also has “either retribution or deterrent purposes” as well, it is “punishment” that is subject to the excessive fines analysis.⁷¹

To determine whether the misrepresentation penalty violates the excessive fines clause, the Minnesota Supreme Court must keep in mind that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,” and “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”⁷²

The Minnesota Supreme Court “presume[s] statutes are constitutional” and will use its power to declare a statute unconstitutional “with extreme caution and only when absolutely necessary.”⁷³ “A large discretion is necessarily vested in the legislature to impose penalties sufficient to prevent the commission of an offense, and it would have to be an extreme case to warrant the courts in holding that the constitutional limit has been transcended.”⁷⁴ In *State v. Hassan*, quoted by the Court of Appeals in *Thigpen*, Hassan argued that the statutorily required sentence

⁷¹ See *Wilson v. Comm’r of Revenue*, 656 N.W.2d 547, 553 (Minn. 2003)(quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)).

⁷² *Bajakajian*, 524 U.S. at 336.

⁷³ *Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461*, 924 N.W.2d 594, 601 (Minn. 2019)(quotation omitted).

⁷⁴ *Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 895 (Minn. 2003). See *Grashoff v. Adams*, 65 F. 4th 910, 917 (7th Cir. 2023)(“[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature[.]”) (quoting *Bajakajian*, 524 U.S. at 336).

of life without the possibility of release violated the excessive fines clause of the Minnesota Constitution given his age.⁷⁵ The Minnesota Supreme Court rejected this argument, emphasizing that it is the legislature's job to determine appropriate punishments:

Statutory punishments are presumed constitutional, and defendants challenging a punishment under Article 1, Section 5, bear a heavy burden of showing that our culture and laws emphatically and well nigh universally reject a challenged sentence. The Legislature is the best arbiter of Minnesota's culture because it is constituted to respond to the will and consequently the moral values of the people. Here, rather than embracing judicial discretion in sentencing, the Minnesota Legislature deliberately rejected a scheme of indeterminate sentencing in favor of mandatory sentences.⁷⁶

1. Legislative history of misrepresentation penalty

Legislative intent is relevant in considering whether a penalty violates the excessive fines clause.⁷⁷ The current versions of the misrepresentation penalty and eligibility provision were enacted in 2007, when the legislature passed it with a vote of 62-0.⁷⁸ At a Business, Industry and Jobs Committee meeting, a

⁷⁵ *State v. Hassan*, 977 N.W.2d 633, 641 (Minn. 2022)(cited by *Thigpen*, No. A23-1544, slip. op. at 9).

⁷⁶ *Id.* at 641-42 (quotations omitted) .

⁷⁷ *United States ex rel. Fesenmaier v. Cameron-Ehlen Group, Inc.*, 715 F.Supp.3d 1133, 1158 (D. Minn. 2024).

⁷⁸ Laws of Minnesota 2007, chapter 128, S.F.No. 167, sec. 19. Before 2007, the penalty was 25 percent of the overpayment, and if the applicant had a prior

representative from DEED testified regarding the policy of the eligibility provision: “The theory behind it is, if you cheated the system, you committed fraud, this is felony level, and you shouldn’t be able to come back right in and use the system again to help pay off what you stole. . . . You should pay it back and then come in and use the system again.”⁷⁹

In 2017, the Minnesota legislature changed the word “fraud” to “misrepresentation.”⁸⁰ In 2019, the legislature changed the interest provision from compound interest to simple interest.⁸¹

In 2023, the Minnesota legislature considered various proposed changes, including reducing the misrepresentation penalty to 15 percent, eliminating interest, eliminating the eligibility provision, and requiring offset.⁸² In a committee

fraud overpayment, it was 50 percent. Minn. Stat. § 268.18, subd. 2 (2006). Subdivision 2b provided that DEED “may assess interest at the rate of 1-1/2 percent per month on any amount that remains unpaid 30 days after the date of the determination.” Minn. Stat. § 268.18, subd. 2b (2006). Subdivision 2(c) required DEED to offset from future unemployment benefits. Minn. Stat. § 268.18, subd. 2(c) (2006).

⁷⁹ Minn. Sen., Hearing on S.F. 167, before the Comm. on Business, Industry and Jobs, 85th Minn. Leg., Reg. Sess. (Feb. 7, 2007) available at https://www.lrl.mn.gov/media/file?mtgid=850129#ct100_Main_panel_minutes (audio web media, 9:25 mark).

⁸⁰ Laws of Minnesota 2017, chapter 35, art. 3, sec. 16.

⁸¹ Laws of Minnesota 2019, 1st Spec. Sess. chapter 7, article 5, sec. 2.

⁸² H.F. 784, S.F. 1498, 93rd Minn. Leg., Reg. Sess.

meeting, a state senator questioned the DEED representative about eliminating the eligibility provision:

Senator: If somebody commits fraud on the unemployment insurance system, that they are still allowed to collect benefits. . . . We're saying, even if you commit fraud, you can still collect unemployment benefits, so that's the net impact of the change, is that correct?

DEED representative: Yes, that is correct. We do have a concern that this would eliminate some of the prohibitions that would be in place if an individual did indeed commit fraud.⁸³

The senator further stated, "I think it's wrong for us to be making it easier and more profitable to commit unemployment fraud. We saw a lot of it come through during the pandemic and the governor['s] shut downs. I think this is the wrong time to take this on."⁸⁴ The Minnesota legislature ultimately declined to make any changes to the long-standing misrepresentation penalty, interest, and eligibility provisions but changed the appeal period deadline from 20 days to 45 days.⁸⁵

⁸³ Minn. Senate, Hearing on S.F. 1498, before the Comm. on Jobs and Economic Development, 93rd Minn. Leg., Reg. Sess. (March 1, 2023), available at https://mnsenate.granicus.com/player/clip/10564?view_id=1&redirect=true (video web media, mark 1:53:47).

⁸⁴ *Id.* at 2:01:49.

⁸⁵ Laws of Minnesota 2023, chapter 33, sec. 7 through sec. 24.

The Minnesota legislature's recent decision to keep the misrepresentation penalty, interest, and eligibility provision is important. "Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy."⁸⁶ The Minnesota legislature is the "best arbiter of Minnesota's culture because it is constituted to respond to the will and consequently the moral values of the people."⁸⁷ The misrepresentation penalty, interest, and eligibility provision are not outdated laws that have gone unexamined over the years. The legislature has revisited section 268.18 multiple times since 2007. The misrepresentation penalty, interest, and eligibility provision are products of an engaged legislature, and as such represent the will of the Minnesota people.

2. Summary of Argument

Thigpen argues that the misrepresentation penalty, interest, and eligibility provision constitute an excessive fine under the state and federal constitutions. Because Thigpen is not arguing that the misrepresentation penalty is

⁸⁶ *Gore v. United States*, 357 U.S. 386, 393 (1958)(quoted by *Bajakajian*, 524 U.S. at 336).

⁸⁷ *See Hassan*, 977 N.W.2d at 641-42.

unconstitutional in all applications, DEED interprets his argument to be that it is unconstitutional as applied to Thigpen.⁸⁸

Thigpen argues that the misrepresentation penalty, interest, and eligibility provision are grossly disproportionate to Thigpen's conduct. Specifically, Thigpen argues that the misrepresentation standard (*mens rea*), the standard of proof, and DEED's procedure for issuing misrepresentation determinations and decisions make the penalty constitutionally excessive. Significantly, neither Minnesota courts, nor any other courts, consider these things when determining whether a penalty for an offense is a constitutionally excessive fine. The excessive fines analysis applies to civil penalties, imposed in administrative decisions, just as it does to criminal penalties.⁸⁹ Thigpen argued to the Minnesota Court of Appeals that the ULJ misapplied the misrepresentation standard, used the wrong standard of proof, and violated Thigpen's right to procedural due process. The Court of Appeals rejected these arguments. Thigpen sought review of those questions, and the Minnesota Supreme Court declined to take them. Thigpen's attempts to attack

⁸⁸ See *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 607 (Minn. Ct. App. 2019) . If the Court reviews whether the misrepresentation penalty is unconstitutional on its face, it is not. An applicant can incur a penalty as low as \$1 (40 percent of an overpayment). The applicant could pay back that penalty before incurring any interest. If they are back at work, and no longer requesting benefits, the eligibility provision would have no impact.

⁸⁹ *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 553 (Minn. 2003).

the misrepresentation standard and DEED's procedures here are misplaced. The ULJ determined that Thigpen obtained benefits through misrepresentation. The Minnesota Court of Appeals affirmed the decision, and this Court denied review of it. The only issue before this Court is whether the penalty for misrepresentation is excessive.

Thigpen does not meet the "heavy burden" of showing that Minnesota's culture and laws reject the penalty.⁹⁰Applying the three *Solem* factors, the misrepresentation penalty, interest provision, and eligibility provision are not an excessive fine. Thigpen's conduct in knowingly lying for 104 weeks in a row, to obtain benefits he was not entitled to, was serious. His conduct not only put the Trust Fund at risk but put strain on the unemployment insurance system during a time when access to unemployment benefits for Minnesotans who needed them was critical. Minnesota's penalty is comparable to other state penalties for fraud as well as other states' unemployment insurance fraud penalties. Some states have significantly higher penalties, compound interest, and forfeiture-of-all-benefits provisions. Minnesota's penalty does not violate the excessive fines clause of the federal or state constitutions.

⁹⁰ See *State v. Hassan*, 977 N.W.2d 633, 641 (Minn. 2022)(quoted by *Thigpen*, p. 9).

3. The three Solem factors show that the misrepresentation penalty is not grossly disproportional to the gravity of Thigpen's conduct.

A fine is excessive “if it is grossly disproportional to the gravity of the offense.”⁹¹ The Minnesota Supreme Court adopted the three-factor test from the United States Supreme Court’s decision in *Solem v. Helm* to determine proportionality.⁹² The three factors are: “(1) the gravity of the offense and the harshness of the penalty, (2) comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction, and (3) comparison of the contested fines with fines imposed for commission of the same crime in other jurisdictions.”⁹³

In *Wendell v. Comm’r of Revenue*, the nonresident appellants filed joint tax returns in 2019 and 2020 but failed to report Minnesota taxable income.⁹⁴ The Commissioner of Revenue imposed a statutory penalty under Minnesota Statutes section 289A.60, subdivision 7, in the amount of 25 percent of the tax amount for filing a frivolous return.⁹⁵ The appellants argued to the Minnesota Supreme Court

⁹¹ *Miller*, 669 N.W.2d at 895 (citing *Bajakajian*, 524 U.S. at 334).

⁹² *Id.*

⁹³ *State v. Rewitzer*, 617 N.W.2d 407, 413 (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983)).

⁹⁴ *Wendell v. Comm’r of Revenue*, 7 N.W.3d 405, 409 (Minn. 2024).

⁹⁵ *Id.* at 410.

that the frivolous-return penalty violated the excessive fines clause.⁹⁶ Applying the three-factor *Solem* test, the Court rejected this argument.⁹⁷ For the first factor, the *Wendell* Court reasoned:

The filing of frivolous tax returns creates unnecessary delay and waste of government resources due to the investigation necessary to correct and adjust tax assessments. A penalty of up to 25 percent of the tax amount actually owed is proportionate to the harm caused by the delayed administration of tax laws.⁹⁸

For the second factor, the Court examined the other subdivisions of section 289A.60 that impose comparable fines.⁹⁹ Among these was the 50 percent penalty for filing a fraudulent return cited by the court of appeals in *Thigpen*.¹⁰⁰ For the third factor, the Court looked at other states' penalties for filing frivolous returns, concluding that Minnesota's penalty "falls somewhere in the middle."¹⁰¹

Notably, courts in other jurisdictions have addressed whether a state's unemployment insurance misrepresentation penalty (more commonly called fraud penalty) violated the excessive fines clause. Last year, the Seventh Circuit Court of Appeals held in *Grashoff v. Adams* that Indiana's unemployment-

⁹⁶ *Id.* at 416.

⁹⁷ *Id.* at 417.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

insurance civil penalty for failing to report income while requesting unemployment benefits did not violate the excessive fines clause.¹⁰² In *Grashoff*, the applicant was working part time but answered “no” when asked if she had worked on each of 24 continued requests for benefits.¹⁰³ Grashoff was paid a total of \$8,952 in unemployment benefits; she would have been eligible for \$6,123.25 had she correctly reported her earnings.¹⁰⁴ The Indiana statute provided that a “knowing failure” to disclose income in continued requests resulted in forfeiture of all benefits otherwise payable as well as a civil penalty.¹⁰⁵ The civil penalty was 25 percent of the overpayment for first-time violations, 50 percent for the second violation, and up to 100 percent for subsequent violations.¹⁰⁶

Following an investigation, the Indiana Department of Workforce Development determined that Grashoff forfeited the full amount of \$6,123 in benefits and owed an additional \$2,238 penalty.¹⁰⁷ The Seventh Circuit applied four *Bajakajian* factors to determine whether the forfeiture and penalty violated the Eighth Amendment and concluded that the sanction of \$8,361 was “not grossly

¹⁰² *Grashoff*, 65 F.4th 910, 920-21 (7th Cir. 2023).

¹⁰³ *Id.* at 915.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 914.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 915.

disproportionate to the gravity of the offense that triggered it.”¹⁰⁸ First, the Court reasoned that the violation of law was “significant,” as Grashoff knowingly failed to disclose her income on 24 separate applications for public benefits.¹⁰⁹ The Court rejected Grashoff’s attempt to “lump her 24 violations into one.”¹¹⁰ Second, the Seventh Circuit found that Grashoff “clearly” fits within the “class of persons for whom the statute was principally designed.”¹¹¹ Third, the Seventh Circuit looked at Indiana’s criminal penalties for similar conduct, as well as other states’ civil and criminal penalties, reasoning that, “[l]ike other states, Indiana has deemed unemployment fraud to be a serious offense.”¹¹² Fourth, the Seventh Circuit considered the “harm caused by Grashoff’s conduct.”¹¹³ The Court reasoned that, not only did Grashoff’s conduct cause monetary harm to the unemployment fund, but it complicated administration of the fund and undermined “the public’s faith in the state’s ability to administer it efficiently and fairly.”¹¹⁴

¹⁰⁸ *Id.* at 921.

¹⁰⁹ *Id.* at 918.

¹¹⁰ *Id.*

¹¹¹ *Id.* (quotation omitted).

¹¹² *Id.* at 919-20.

¹¹³ *Id.* at 920.

¹¹⁴ *Id.* See also *Zynda v. Arwood*, 175 F.Supp.3d 791, 810-11 (E.D. Mich. 2016)(determining that Michigan’s fraud penalty in the amount of four times the benefit received did not violate the excessive fines clause); *Blount v. Smith*, 440

Applying the three *Solem* factors here, the misrepresentation penalty is not grossly disproportional to the gravity of Thigpen’s offense.

a. The gravity of the offense is serious.

Thigpen, on 104 separate occasions--that is, once every week for two years—reported that he was not working or earning any wages when he was in fact working up to 40 hours per week as a PCA. Thigpen intentionally chose to not report income. While the penalty is substantial, it is directly proportional to the amount of state and federal benefits Thigpen wrongfully received.¹¹⁵ Notably, Thigpen was paid significantly more benefits than he would typically be able to receive in a benefit year due to the federal extensions and supplemental payments provided in the CARES Act. As such, his penalty is significantly higher than a typical misrepresentation penalty.¹¹⁶

Thigpen attempts to characterize his conduct as a “mistake” or misunderstanding. But the ULJ found that Thigpen “knowingly lied” to obtain

F.Supp. 528, 533 (M.D. Pa. 1977)(determining that Pennsylvania’s one-year disqualification period did not violate the excessive fines clause).

¹¹⁵ See *Grashoff*, 65 F. 4th at 921.

¹¹⁶ While his penalty is higher, the amount of benefits Thigpen was able to keep was also higher than is typical. Thigpen was able to keep \$18,454 in state and federal benefits. R-2A, E. 22, pp. 3-10; R-2A E. 23; R-2A E. 4, pp. 114-19 and 128-50; R-6A (Add. A1-A7); R-6C (Add. A20-A31); R-6D (Add. A32-A43).

unemployment benefits.¹¹⁷ Whether an applicant committed misrepresentation while requesting unemployment benefits “involves an assessment of credibility of the [applicant’s] testimony which lies within the province of the [ULJ].”¹¹⁸ Thigpen, who was represented by an individual from SMRLS, testified in detail over the course of multiple hearings regarding his reasons for reporting to DEED that he did not work or receive income.¹¹⁹ The ULJ found, “Thigpen knowingly made false statements of material fact. He knew he was working for Best Care. Yet, he chose to tell the Department he was not working. He knowingly lied.”¹²⁰ The ULJ made a detailed credibility determination, specifically rejecting Thigpen’s claims that he believed the question was asking if he worked for Target, and that he spoke with DEED customer service representatives about his work and earnings.¹²¹ The Court of Appeals determined that the ULJ’s findings and credibility determination were supported by substantial evidence in the record.¹²²

¹¹⁷ R-6B, p. 9 (Add. < >).

¹¹⁸ *Burnevik v. Dep’t of Econ. Sec.*, 367 N.W.2d 681, 683 (Minn. Ct. App. 1985)(reviewing a decision under previous version of the misrepresentation statute).

¹¹⁹ T. 47-60, 82-94, 97-102, 109-111.

¹²⁰ R-6B, p. 9 (Add. A16)

¹²¹ R-6B, pp. 5-6 (Add. A12-A13).

¹²² *Thigpen*, No. A23-1544, slip op.at 4-5. The facts here mirror those of most misrepresentation cases reviewed by the Court of Appeals. *See, e.g., Cash v. Comm’r of Econ. Sec.*, 352 N.W.2d 535, 536 (Minn. Ct. App. 1984); *Vasko v.*

The Court here must determine the constitutionality of the statute as applied to the facts that are before the Court.¹²³

Like the *Grashoff* Court reasoned, Thigpen misrepresented his work and earnings on 104 separate requests for benefits. “Put another way, on [104] occasions [Thigpen] knowingly withheld information about [his] income to obtain a higher benefit from a limited fund meant to support economically vulnerable people in [Minnesota.]”¹²⁴ Citing a Fourth Circuit case, the *Grashoff* Court reasoned that just because the repeated offense was the same offense, it did not diminish the gravity of having repeated the offense so many times.¹²⁵

Dominion Cares, No. A19-0637, 2019 WL 6284260, at *3 (Minn. Ct. App. Nov. 25, 2019); *Harmon v. Dep’t of Emp’t and Econ. Dev.*, No. A16-1841, 2017 WL 2417074 (Minn. Ct. App. June 5, 2017); *Weiczorek v. CSK Auto Inc.*, No. A09-1318, 2010 WL 2485134 (Minn. Ct. App. June 22, 2010); *Ellis v. Dep’t of Emp’t and Econ. Dev.*, Nos. A14-1774, A14-1775, 2015 WL 4393417 (Minn. Ct. App. July 20, 2015); *Langevin v. RELS, LLC*, No. A10-116, 2010 WL 3307069 (Minn. Ct. App. Aug. 24, 2010); *Parvez v. Dep’t of Emp’t and Econ. Dev.*, No. A08-1964, 2009 WL 2852464, at *2 (Minn. Ct. App. Sept. 8, 2009).

¹²³ See *Rew v. Bergstrom*, 845 N.W.2d 764, 780 (Minn. 2014)(stating that the Court must evaluate the as-applied challenge to the “specific circumstances presented by this case,” including “the findings made by the district court.”); *United States ex rel. Fesemaier*, 715 F.Supp.3d at 1158 (declining to adopt appellant’s characterization of his conduct, reasoning the depiction was not “accepted by the jury”).

¹²⁴ *Grashoff*, 65 F. 4th at 918.

¹²⁵ *Id.* at 918 (citing *Korangy v. U.S. F.D.A.*, 498 F.3d 272, 278 (4th Cir. 2007). In *Korangy*, the petitioner was fined for 193 violations of the Mammography Quality Standards Act, resulting in a combined penalty of more than \$1,000,000. *Korangy*, 498 F.3d at 278. In applying the gross-proportionality analysis, the Fourth Circuit

Significantly, Thigpen’s conduct resulted in harm not only to the Trust Fund, but to the unemployment insurance system and its participants.¹²⁶ Thigpen’s repeated false reports resulted in Thigpen receiving \$24,005 in state and federal unemployment benefits that he was not legally entitled to receive. The state portion of those benefits was paid from “a special state trust fund, separate and apart from all other public money or funds of this state, . . . that is administered by [DEED] exclusively for the payment of unemployment benefits.”¹²⁷ The Trust Fund is funded primarily by employer taxes.¹²⁸ Thigpen’s conduct, if not caught and corrected, results in employer’s unemployment insurance taxes being higher than they should be. This is because “[u]nemployment benefits paid to an

reasoned, “While we recognize that this is a substantial penalty, the amount of the penalty is the direct result of the number of individual offenses committed by Korangy and KRA.” *Id.* The Fourth Circuit further reasoned, “Contrary to the suggestion of the petitioners, the gravity of their offenses does not diminish because they repeatedly committed the same offense.” *Id.*

¹²⁶ See *Bajakajian*, 524 U.S. at 339 (reasoning that harm caused was minimal, as there was “no fraud on the United States” and “no loss to the public fisc.”).

¹²⁷ Minn. Stat. § 268.194, subd. 1 (2022). The federal portion of the overpayment (PEUC funds) were paid from federal funds. 15 U.S.C. § 9025(c) (2022). In UIPL 20-21, USDOL stated, “Addressing improper payments and fraud is a top priority for the Department and the entire UI system.” UIPL 20-21, p. 3.

¹²⁸ See Minn. Stat. § 268.194, subd. 1 (2022).

applicant . . . will be used in computing the future tax rate of a taxpaying base period employer[.].”¹²⁹

In addition, when individuals like Thigpen wrongfully obtain unemployment benefits through misrepresentation, this depletes the Trust Fund, which in turn triggers additional tax assessments for employers. If the amount in the Trust Fund dips to less than .55 percent of total wages paid in covered employment, additional assessments are added to employers’ tax bills.¹³⁰ If the Trust Fund becomes insolvent, the governor is authorized to borrow funds from the federal unemployment trust fund under 42 U.S.C. § 1321(a)(1) (2022). In the event of such a loan, DEED assesses a special assessment on taxpaying employers to cover interest on the loan.¹³¹ The risk of additional assessments and insolvency is even greater when, like here, the misrepresentation occurs during a time when there is high demand on the unemployment insurance system.

The impact of misrepresentation is not limited to employer taxes. Like the Court of Appeals reasoned, “Misrepresentation when filing for unemployment

¹²⁹ Minn. Stat. § 268.047, subd. 1 (2022). Even when misrepresentation is caught, as it was here, there is the chance that the applicant will never pay back the overpayment. Though DEED has some tools to aid in the collection of overpayments, many overpayment balances are never paid and written off after ten years. *See* Minn. Stat. § 268.18, subd. 4(b) (2022).

¹³⁰ Minn. Stat. § 268.051, subd. 2(c) (2022).

¹³¹ Minn. Stat. § 268.051, subd. 8(a) (2022).

benefits creates unnecessary delay and waste of government resources associated with the investigation to identify and correct the overpayment of benefits to applicants who are not entitled to receive those benefits.”¹³² The resources devoted to detecting, investigating, and making determinations regarding misrepresentation are resources that could otherwise be used to make the unemployment insurance system more efficient for applicants.

Like the *Grashoff* Court reasons, Thigpen’s conduct “undermines the integrity of the fund and public’s faith in the state’s ability to administer it efficiently and fairly.”¹³³ “While many COVID-19 relief programs were vulnerable to fraud, unemployment insurance has proven to be particularly susceptible.”¹³⁴ This potentially wide-ranging fraud may negatively impact Minnesotans’ perceptions of the unemployment insurance program.

¹³² *Thigpen*, slip opinion, p. 9. See also *Wendell*, 7 N.W.3d at 417 (“The filing of frivolous tax returns creates unnecessary delay and waste of government resources due to the investigation necessary to correct and adjust tax assessments.”); *Grashoff*, 65 F. 4th at 920 (“[W]hen some claimants don’t comply with the baseline requirement to honestly report their income, it becomes harder to administer the fund and complicates the distribution of benefits to all claimants.”)

¹³³ *Grashoff*, 65 F. 4th at 920.

¹³⁴ U.S. Government Accountability Office, *More Fraud Has Been Found in Federal COVID Funding – How Much Was Lost Under Unemployment Insurance Programs* (Sept. 13, 2023), available at <https://www.gao.gov/blog/more-fraud-has-been-found-federal-covid-funding-how-much-was-lost-under-unemployment-insurance-programs>.

Finally, unlike in *Bajakajian*, Thigpen was “squarely within the class of persons for whom this statute was principally designed.”¹³⁵ The purpose of the misrepresentation statute is to protect the integrity of the Trust Fund by deterring individuals from engaging in misrepresentation and punishing them when they do. “Program integrity involves both ensuring that entitled workers are not underpaid nor overpaid, and preventing payments to those who are not entitled to benefits.”¹³⁶ DEED must protect the Trust Fund so that it can pay unemployment benefits to Minnesotans who are unemployed through no fault of their own. Thigpen knowingly lied about his employment and earnings for each of 104 weeks to receive a significant amount of benefits he was not legally entitled to receive.

The gravity of Thigpen’s offense is serious, with various impacts. Unlike in *Bajakajian*, this was not “solely a reporting offense” that resulted in “no loss to the public fisc.”¹³⁷ Unlike in *Wilson v. Comm’r of Revenue*, where the corporate officer was not responsible for creating the underlying tax liability, Thigpen was solely

¹³⁵ See *Grashoff*, 65 F. 4th at 918-19 (discussing *Bajakajian* analysis).

¹³⁶ UIPL 20-21, Change 1, p. 3 (addressing federal CARES Act fraud).

¹³⁷ See *Bajakajian*, 524 U.S. at 337 (concluding that appellant’s conduct in trying to leave the United States without reporting money did not violate the excessive fines clause, reasoning it “was solely a reporting offense,” and the harm caused was “minimal”).

responsible for creating the significant overpayment.¹³⁸ The penalty is directly proportional to the amount of benefits Thigpen wrongfully obtained. This factor weighs in favor of finding the misrepresentation penalty constitutional.

Thigpen's arguments fail.

Thigpen argues that his conduct was not serious because under section 268.18, subdivision 2(a), an individual commits misrepresentation if they make “a false statement or representation without a good faith belief as to the correctness of the statement or representation.”¹³⁹ Thigpen does not point to any authority that supports his contention that this standard makes the misrepresentation penalty excessive.

Thigpen goes on to compare the misrepresentation standard to the frivolous-tax-return statute in *Wendell*. But the *Wendell* Court did not consider the *mens rea* requirement of the frivolous-return penalty in its excessive fines analysis.¹⁴⁰ The appellants made a similar argument that the frivolous-return penalty violated due process because it “fails to provide adequate notice for what

¹³⁸ *Wilson v. Comm’r of Revenue*, 656 N.W.2d at 555 (reasoning that the gravity of appellant’s conduct in failing to respond to a wage levy was limited because he did not “participate[] in the creation of the underlying tax liability”).

¹³⁹ Thigpen Brief, pp. 23-27.

¹⁴⁰ 7 N.W.3d at 416-18.

constitutes a ‘substantially incorrect’ or ‘frivolous’ return.”¹⁴¹ The *Wendell* Court rejected this argument, reasoning that section 289A.60, subd. 7 “provided a robust description of what categories of conduct would qualify,” and “[u]nder-reporting, misreporting, or otherwise failing to report taxable Minnesota income, based on an unsupported assertion that the income is not taxable, would unquestionably qualify as a ‘substantially incorrect’ or ‘frivolous’ return.”¹⁴² “Misreporting. . . based on an unsupported assertion that the income is not taxable” is quite close to “making a false statement. . . without a good faith belief as to the correctness of the statement.” Thigpen’s argument that the misrepresentation standard makes the conduct unserious fails.

Thigpen further asserts that DEED was partially to blame because it did not catch Thigpen’s misrepresentation for two years. Notably, Thigpen lied during the investigation. In a request-for-information questionnaire dated April 7, 2022, DEED stated that Best Home Care had reported wages for Thigpen during the period in question and asked if Thigpen had any corrections to his weekly reports.¹⁴³ Thigpen checked the box for “No Correction” for each one of the 104

¹⁴¹ *Id.* at 415.

¹⁴² *Id.*

¹⁴³ R-2A, E. 3, pp. 1-5.

weeks.¹⁴⁴ The time it took DEED to perform an employer cross-match, investigate Thigpen's misrepresentation, and issue determinations was admittedly longer than usual due to the unprecedented increase in workload caused by the COVID-19 pandemic. Minnesota statute provides that DEED is authorized to issue a determination of ineligibility for misrepresentation within 48 months of the establishment of the benefit account.¹⁴⁵ DEED was well within this time frame when it issued the determinations here.¹⁴⁶ Moreover, in addition to the clear instructions in the handbook, DEED warned Thigpen of potential consequences in the continued-request form that Thigpen filled out each week: "The information you provided will be verified through electronic matching with information provided by your employers. Failure to provide accurate information may result in a delay or overpayment of benefits."¹⁴⁷ The misrepresentation penalty is meant to deter improper reporting, thereby preventing overpayments, before DEED can perform the cross-checks with employer information.

¹⁴⁴ R-2A, E. 3, pp. 2-5.

¹⁴⁵ Minn. Stat. § 268.101, subd. 2(e) (2022). DEED must issue all other determinations within 24 months. *Id.*

¹⁴⁶ Thigpen's first benefit account was dated March 22, 2020. The determination of ineligibility for misrepresentation was issued on July 15, 2022. R-2B, E. 1.

¹⁴⁷ R-2A, E. 4, p. 13.

Finally, Thigpen asserts that DEED should consider an applicant's ability to repay the overpayment and penalty. While the Minnesota Supreme Court in *Miller v. One 2001 Pontiac Aztek* reasoned that the first *Solem* factor "does not expressly preclude consideration of a defendant's financial condition," Minnesota courts have never held that a decision maker is required to consider an individual's ability to pay for a penalty to be constitutional.¹⁴⁸ "There is no equitable or common law denial or allowance of unemployment benefits."¹⁴⁹

Moreover, an applicant's ability to repay benefits is, to an extent, a function of how their benefit amount is calculated. An applicant's benefit amount is calculated based on the applicant's gross earnings in covered employment during the year before their account date. Because an applicant's weekly benefit amount is a function of their regular earnings, the amount an applicant can potentially obtain by misrepresentation is also a function of their regular earnings. The penalty applied is directly related to how much an applicant earns through the same function. In addition, Thigpen was paid \$18,454 in benefits, over the course of two years, while working up to full-time hours, that he was legally entitled to

¹⁴⁸ See *Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 897 (Minn. 2003). The *Miller* Court concluded, "[w]ithout specifically deciding the extent that harshness can be measured by a defendant's unique financial situation," that the district court abused its discretion by finding the forfeiture an excessive fine. *Id.*

¹⁴⁹ Minn. Stat. § 268.069, subd. 3 (2022).

keep.¹⁵⁰ The Court should decline to hold that the misrepresentation penalty is unconstitutional as applied to Thigpen because the ULJ did not consider his ability to repay the penalty.

b. The misrepresentation penalty is comparable to other fines imposed for similar conduct in Minnesota.

Minnesota's criminal penalties for unemployment insurance fraud, as well as its civil and criminal penalties for similar conduct, show that the misrepresentation penalty is not excessive. First, Minnesota's criminal penalties for unemployment insurance fraud provide higher fines than the misrepresentation penalty. Minnesota Statutes, section 268.182 states:

An individual has committed fraud and is guilty of theft and must be sentenced under section 609.52 if the individual obtains, or attempts to obtain, or aids or abets any other individual to obtain, by an intentional false statement or representation, by intentional concealment of a material fact, or by impersonation or other fraudulent means, unemployment benefits that the individual is not entitled to under this chapter, or under federal law.

Section 609.52 provides, in turn, that if the value of the property stolen exceeds \$5,000, the individual may be sentenced "to imprisonment for not more than ten

¹⁵⁰ R-6A (Add. A1-A7); R-6C (Add. A20-A31); R-6D (Add. A32-A43).

years or to payment of a fine of not more than \$20,000.”¹⁵¹ A fine of \$20,000 is more than twice the misrepresentation penalty here.

Thigpen asserts that a criminal conviction requires a showing of “intent to defraud.”¹⁵² This is incorrect. As stated above, an individual is guilty of theft if the individual obtains unemployment benefits by “an intentional false statement or representation.” This is close to the requirement of the misrepresentation penalty that an individual obtains unemployment benefits “by making a false statement or representation without a good faith belief as to the correctness of the statement or representation.”¹⁵³ Notably, under the facts here, Thigpen meets the criminal fraud standard. Again, the ULJ found that Thigpen “knowingly lied” when he reported he was not working each week.

Thigpen further asserts that district courts are unlikely to order the maximum fine in practice. While a district court may have discretion to order a lower fine, it is appropriate to compare the penalty at issue to other maximum fines when determining whether a penalty is constitutionally excessive.¹⁵⁴ While

¹⁵¹ Minn. Stat. § 609.52, subd. 3(2) (2022).

¹⁵² Thigpen Brief, p. 40.

¹⁵³ Minn. Stat. § 268.18, subd. 2(a) (2022).

¹⁵⁴ See, e.g., *City of New Brighton v. 2000 Ford Excursion VIN #1FMNU43S2YEA74156*, 622 N.W.2d 364, 371 (Minn. Ct. App. 2001)(applying the second *Solem* factor and comparing the forfeiture statute with maximum fines for aggravated robbery, felony burglary, and criminal vehicular homicide, among

a district court is required to order a fine of at least 30 percent of the maximum fine allowed, its power to order the highest fine is unfettered.¹⁵⁵ The Minnesota legislature has determined that a district court may impose a fine in the amount of \$20,000 for theft of unemployment benefits in the amount of \$24,005. Minnesota’s criminal penalties for unemployment-insurance fraud show that Minnesota “takes this kind of public-benefits fraud seriously.”¹⁵⁶

Minnesota statutes provide comparable penalties for making false statements to the government in other contexts.¹⁵⁷ Minnesota Statutes, section 176.178 provides, “Any person who, with intent to defraud, receives workers’ compensation benefits to which the person is not entitled by knowingly representing, misstating, or failing to disclose any material fact is guilty of theft and shall be sentenced to section 609.52, subdivision 3.”¹⁵⁸ As discussed above, under that section, an individual may be fined up to \$20,000 for stolen property

others); *Rewitzer*, 617 N.W.2d at 414 (comparing fines to statutory maximum fines for other crimes).

¹⁵⁵ See Minn. Stat. § 609.101, subd. 4 (2022).

¹⁵⁶ See *Grashoff*, 65 F. 4th at 919.

¹⁵⁷ See *Id.* (providing that “penalties for similar conduct are relevant evidence of legislative judgments about the seriousness of the offense”); *Blount v. Smith*, 440 F.Supp. at 533 (comparing the one-year disqualification provision to the punishment for theft by deception under the general penal statute).

¹⁵⁸ Minn. Stat. § 176.178, subd. 1 (2022).

exceeding \$5,000 in value, significantly higher than the misrepresentation penalty.

Minnesota Statute, section 289A.60, discussed in *Wendell* and cited by the Court of Appeals in *Thigpen*, provides a penalty of 50 percent of the tax, less amounts paid, for failing a false or fraudulent return “with intent to evade or defeat a tax or payment of tax.”¹⁵⁹ Section 289A.60 further provides a penalty of 50 percent of any refund received “that is attributable to fraud” in addition to the penalty imposed for filing a false or fraudulent return.¹⁶⁰ The penalties “are in addition to the criminal penalties [in section 289A.63],”¹⁶¹ and bear interest at a rate “equal to the prime rate charged by banks during the six-month period ending on September 30 of that year.”¹⁶² This is a total penalty of 50 percent of what a taxpayer owes to the government in taxes plus 50 percent of any refund wrongfully received, with interest at the prime rate; here, *Thigpen* was assessed

¹⁵⁹ Minn. Stat. § 289A.60, subd. 6(a) (2022).

¹⁶⁰ Minn. Stat. § 289A.60, subd. 6(b) (2022). Minn. Stat. § 289A.63 provides criminal penalties. “A person who files with the commissioner a return, report, or other document, known by the person to be fraudulent or false concerning a material matter, is guilty of a felony.” Minn. Stat. § 289A.63, subd. 2(a) (2022).

¹⁶¹ Minn. Stat. § 289A.60, subd. 19 (2022).

¹⁶² Minn. Stat. § 289A.55, subs. 1, 9 (2022); Minn. Stat. § 270C.40, subs. 1, 3, 5 (2022).

a penalty of 40 percent of what he wrongfully received from government funds, with interest of one percent per month.

The Minnesota False Claims Act (FCA), used “to combat fraud against the government and protect taxpayer dollars,” provides higher penalties.¹⁶³ The Minnesota Attorney General’s Office has used the FCA to recover public funds fraudulently obtained by medical professionals overbilling state health insurance programs, colleges falsely certifying compliance with various laws, and contractors failing to pay workers prevailing wages to work on government-funded projects, among other things.¹⁶⁴ Under the FCA, a person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” is liable to the state for a civil penalty as set forth in the federal False Claims Act, “plus three times the amount of damages that the state or the political subdivision sustains because of the act of that person.”¹⁶⁵

Thigpen asserts that the misrepresentation penalty is excessive compared to the penalty in the Paid Family and Medical Benefits program (“PFMB”).¹⁶⁶ The

¹⁶³ The Office of Minnesota Attorney General Keith Ellison, *The Minnesota False Claims Act*, <https://ag.state.mn.us/Consumer/Publications/MNFalseClaimsAct.asp> (last visited January 9, 2025).

¹⁶⁴ *Id.*

¹⁶⁵ Minn. Stat. § 15C.02(a)(1) (2022); *see* 31 U.S.C. § 3729(a)(1) (2022).

¹⁶⁶ Thigpen Brief, pp. 32-35.

Paid Leave Law provides a 15-percent penalty and six percent interest rate.¹⁶⁷ As an initial matter, PFMB has not yet started, and the statutes cited by Thigpen are not yet in effect.¹⁶⁸ Rulemaking is in progress.¹⁶⁹ A proposed rule provides that the commissioner “must suspend paid leave benefit payments to a covered individual if the commissioner finds by a preponderance of the evidence that the covered individual intentionally gave the commissioner materially false information to obtain paid leave benefits. The commissioner must suspend the covered individual’s payments for a period of time not to exceed three months beyond the time the commissioner determines that the condition has been corrected.”¹⁷⁰ This is more punitive than the eligibility provision because it extends beyond repayment.

Thigpen asserts that the legislature’s recent enactment of a lower penalty for PFMB “suggests that penalties imposed by the older statute may be excessive.”¹⁷¹ Significantly, in the same session that the legislature enacted the Paid Leave Law,

¹⁶⁷ Minn. Stat. § 268B.001 (2022)(referring to Chapter 268B as the “Minnesota Paid Leave Law”); Minn. Stat. § 268B.185, subds. 2, 4 (eff. Jan. 1, 2026).

¹⁶⁸ See Minn. Stat. § 268B.185 (providing the section is effective January 1, 2026).

¹⁶⁹ See Minn. Stat. § 268B.02, subd. 3 (2022).

¹⁷⁰ Department of Employment and Economic Development, Proposed Expedited Permanent Rules Regulating Paid Leave, Rule Draft 4846, Rule 3317.4310, available at <https://mn.gov/deed/assets/paid-leave-proposed-rules-certified-tcm1045-653495.pdf>.

¹⁷¹ Thigpen Brief, p. 35.

the legislature considered and rejected a bill that reduced the misrepresentation penalty to 15 percent, eliminated interest on misrepresentation overpayments and penalties, and eliminated the eligibility provision.¹⁷² While it is true that the legislature enacted a lower penalty and interest rate for the PFMB program, it is also true that the legislature decided at the same time to keep the misrepresentation penalty, interest rate, and eligibility provision for the unemployment insurance program. The fact that the legislature chose a lower penalty for PFMB does not mean that the misrepresentation penalty is excessive.

Thigpen further asserts that the misrepresentation penalty is excessive compared to penalties imposed for fraud in the cash, food, and childcare assistance programs administered by the Minnesota Department of Human Services and Department of Children, Youth and Families.¹⁷³ First, these programs are fundamentally different from the unemployment insurance program. These programs are need-based programs, where receipt of benefits is determined based on an individual's financial resources and need.¹⁷⁴ The unemployment insurance program, on the other hand, is an eligibility program,

¹⁷² H.F. 784, S.F. 1498, 93rd Minn. Leg., Reg. Sess.

¹⁷³ Thigpen Brief, p. 36.

¹⁷⁴ See 7 C.F.R. § 273.8(b) (2022)(establishing maximum allowable financial resources of all members of a household to be eligible for SNAP benefits); Minn. Stat. § 142G.10, subd. 1 (providing that, to be eligible for MFIP, applicants must meet property limitations and income limitations).

where an applicant must meet certain eligibility criteria to be paid unemployment benefits for any week. Financial need is not implicated in any of the eligibility criteria for unemployment benefits.

Second, while there is no administrative penalty that attaches to public-assistance overpayments, like the misrepresentation penalty, individuals who wrongfully obtain public assistance are subject to criminal prosecution and mandatory program disqualification. Minnesota Statutes, section 256.98, subd. 1 prohibits wrongfully obtaining public assistance for programs including MFIP (cash assistance for families) and childcare assistance.¹⁷⁵ Specifically, section 256.98, subd. 1 states that a person who “obtains or attempts to obtain. . . by means of a willfully false statement or representation, by intentional concealment of any material fact, or by impersonation or other fraudulent device, assistance or the

¹⁷⁵ Minn. Stat. § 256.98, subd. 1(a) (2022). Minn. Stat. § 256D.14 (2022), concerning general assistance (cash assistance for individuals without children), states, “Whoever obtains or attempts to obtain. . . by means of a willfully false statement or representation, or by the intentional withholding or concealment of a material fact, or by impersonation or other fraudulent device. . . assistance to which the person is not entitled. . . shall be considered to have violated section 256.98, and shall be subject to both the criminal and civil penalties provided therein.” Minn. Stat. § 393.07, concerning SNAP benefits, provides, “A person who . . . obtains or attempts to obtain. . . by means of a willful statement or misrepresentation, or intentional concealment of a material fact, SNAP benefits or vouchers. . . to which the person is not entitled” “has violated section 256.98 or 609.821, or both, and is subject to both the criminal and civil penalties provided under those sections.” Minn. Stat. § 393.07, subd. 10(c)(1) (2022).

continued receipt of assistance. . . to which the person is not entitled” is “guilty of theft and shall be sentenced under section 609.52[.]”¹⁷⁶ Again, under that section, an individual may be fined up to \$20,000 for stolen property exceeding \$5,000 in value.¹⁷⁷ In addition, as discussed in section d below, the disqualification (or ineligibility) provisions for fraud in these programs are harsher than the eligibility provision and cannot be eliminated by repayment.¹⁷⁸ In sum, applying the second *Solem* factor, Minnesota’s criminal penalties for unemployment insurance fraud, and its civil and criminal penalties for other government-benefits fraud, shows that the misrepresentation penalty is not an excessive fine.

c. The misrepresentation penalty is comparable to penalties imposed in other jurisdictions.

“The third and final *Solem* factor compares the contested fine with fines imposed for the same crimes in other jurisdictions.”¹⁷⁹ Minnesota’s misrepresentation penalty is comparable to most penalties nationwide. It is true that Minnesota’s 40-percent penalty is higher than some states’ penalties. But it is not the highest. In addition, some states provide forfeiture of all benefits received for weeks the applicant committed fraud. Some states have compound interest

¹⁷⁶ Minn. Stat. § 256.98, subd. 1(a)(1) (2022).

¹⁷⁷ Minn. Stat. § 609.52, subd. 3(2) (2022).

¹⁷⁸ Minn. Stat. § 256.98, subd. 8 (2022).

¹⁷⁹ *Rewitzer*, 617 N.W.2d at 415.

rates, at rates higher than Minnesota’s simple interest rate, which result in unpaid overpayment balances growing exponentially higher over time. Finally, most states allow criminal prosecution, which can lead to additional fines as well as prison sentences.

Alaska,¹⁸⁰ Arkansas,¹⁸¹ and Montana¹⁸² penalize at 50 percent of the overpayment for fraud. Colorado imposes a 65-percent penalty.¹⁸³ Other states have a graduated penalty, whereby the penalty increases with each offense. For example, South Dakota imposes a penalty “equal to fifty percent of the amount of benefits obtained by willful or fraudulent misrepresentation for the first offense and a penalty equal to one hundred percent of the amount of benefits for each subsequent offense.”¹⁸⁴ Michigan penalizes at 100 percent for the first violation, and 150 percent “[f]or a second or subsequent violation.”¹⁸⁵

¹⁸⁰ Alaska Stat. § 23.20.390(f) (2022).

¹⁸¹ Ark. Code Ann. § 11-10-532(a)(3)(A) (2022)(providing a penalty of 50 percent of the overpayment amount unless paid within 30 days, in which case it is 15 percent).

¹⁸² Mont. Code Ann. § 39-51-3201(1)(a) (2022).

¹⁸³ Colo. Rev. Stat. § 8-81-101(4)(a)(II) (2022).

¹⁸⁴ S.D. Codified Laws § 61-6-39 (2022).

¹⁸⁵ Mich. Comp. Laws § 421.54(b)(i) (2022). *See also* Me. Rev. Stat. Ann. T. 26 § 1193(6) (2022)(penalizing at 50 percent of the overpayment for the first occurrence, 75 percent for the second occurrence, and 100 percent for the third occurrence).

Some states require forfeiture of benefits an applicant is otherwise entitled to. In New Hampshire, an applicant is “disqualified for benefits for each week directly affected by the false statement,” with “[a]ll benefits received for each week of such disqualification. . . deemed overpaid,” and is assessed “a penalty equal to 20 percent” of the overpayment.¹⁸⁶ In addition, the applicant is “deemed ineligible” for benefits for 4 to 52 weeks, and for each week of ineligibility, “an amount equal to the individual’s maximum weekly benefit rate during such week shall be deducted from the maximum benefits available to the individual during the benefit year[.]”¹⁸⁷ Similarly, Indiana’s statute, as discussed in *Grashoff*, provides that an individual must “forfeit[] any wage credits earned, regardless of whether benefits were paid, and any benefits or extended benefits that might otherwise be payable to the individual for any week in which the failure to disclose or falsification occurred.”¹⁸⁸ The statute goes on to provide that, in addition to forfeiture, the individual is subject to a 25-percent penalty for the first instance, a 50-percent penalty for the second instance, and a 100-percent penalty for the third and each subsequent instance.¹⁸⁹ Under these statutes, if an applicant obtains

¹⁸⁶ N.H. Rev. Stat. Ann. § 282-A:164 (2022).

¹⁸⁷ *Id.*

¹⁸⁸ Ind. Code Ann. § 22-4-13-1.1(a) (2022).

¹⁸⁹ Ind. Code Ann. § 22-4-13-1.1(b) (2022). *See also* Ohio Rev. Code Ann. § 4141.35(A)(1) (2022)(providing for cancellation of an applicant’s “entire weekly

benefits through misrepresentation but is still eligible for some amount of unemployment benefits for that week (because their earnings are less than their weekly benefit amount), the applicant would lose the amount they were otherwise legally entitled to receive.

Unlike in these states, Thigpen was not required to forfeit any benefits. Thigpen was able to keep the unemployment benefits that he was legally entitled to under section 268.085, subdivision 5 (as well as the FPUC supplemental payments).¹⁹⁰ In total, Thigpen was able to keep \$18,454 in state and federal unemployment benefits that were paid between March 2020, and March 2022.¹⁹¹

Thigpen asserts that the interest rate in Minnesota is higher than other states' interest rates.¹⁹² Minnesota Statutes, section 268.18, subdivision 2b provides

claim for benefits that was fraudulently claimed” and for “each weekly claim canceled” ineligibility “for two otherwise valid weekly claims for benefits.”); Ala. Code § 25-4-145(a)(3) (2022)(providing that when an applicant makes a fraudulent misrepresentation there “shall be deducted from any benefits to which such claimant might become entitled during his or her present benefit year and/or next subsequent benefit year, an amount not less than four times his or her weekly benefit amount and not more than the maximum benefit amount payable in a benefit year”).

¹⁹⁰ Thigpen was entitled to partial benefits under Minn. Stat. § 268.085, subd. 5(b) when he had earnings that were less than his weekly benefit amount.

¹⁹¹ R-2A, E. 22, pp. 3-10; E. 23; E. 4, pp. 114-19 and 128-50; R-6A (Add. A1-A7); R-6C (Add. A20-A31); R-6D (Add. A32-A43).

¹⁹² Thigpen Brief, p. 42. DEED did not assess interest to the PEUC and FPUC overpayments and penalties. R-6B, p. 10 (Add. A17).

that interest is assessed at “one percent per month or any part of a month” on the overpayment and penalty amounts but “not assessed on unpaid interest.” This is known as “simple interest.”¹⁹³ Some states not only have higher interest rates, but also provide for compound interest, where interest accrues on the overpayment and penalty, as well as the unpaid interest. North Dakota has a 15-percent overpayment penalty with interest rate of one and a half percent per month, compound interest.¹⁹⁴ Alabama provides, in addition to criminal penalties and disqualification, a 15-percent overpayment penalty with “interest at the rate of two percent per month on unpaid balances.”¹⁹⁵ Ohio provides, in addition to forfeiture and ineligibility, a penalty of 25 percent of benefits forfeited, with interest accruing “at the annual rate of fourteen per cent compounded monthly on the aggregate receivable balance due.”¹⁹⁶ Finally, Idaho provides a graduated penalty, culminating in 100 percent of an overpayment for the third and any subsequent determination,¹⁹⁷ with interest accruing at one and a half times the rate computed

¹⁹³ Black’s Law Dictionary, 3rd pocket edition, p. 372 (1996).

¹⁹⁴ N.D. Cent. Code § 52-06-33 (2022).

¹⁹⁵ Ala. Code § 25-4-145(a)(1)(criminal penalties), (a)(3)(disqualification), (c)(4)(interest), (c)(5)(15-percent penalty) (2022).

¹⁹⁶ Ohio Rev. Code Ann. § 4141.35(A)(1)-(2)(forfeiture and ineligibility), (4)(penalty) (2022); Ohio Rev. Code Ann. § 4141.23 (B)(2) (2022) (interest).

¹⁹⁷ Idaho Code Ann. § 72-1369(2) (2022).

for judgments¹⁹⁸, which as of July 1, 2024 was 10.125 percent.¹⁹⁹ While these states may provide a lower penalty up front, the compound interest results in an unpaid balance growing exponentially over time.

Finally, most states provide criminal penalties in addition to civil penalties.²⁰⁰ In sum, Minnesota’s misrepresentation penalty and interest provision are comparable to other states’ penalties. The third *Solem* factor weights in favor of constitutionality.

d. The eligibility provision is not a fine; if the Court finds that it is, it is not excessive.

The excessive fines clause applies only to “cash or in-kind payment imposed by and payable to the government.”²⁰¹ The United States Supreme Court and

¹⁹⁸ Idaho Code Ann. § 72-1369(3) (2022); Idaho Code Ann. § 72-1360(2) (2022); Idaho Code Ann. § 28-22-104(2) (2022).

¹⁹⁹ Julie A. Ellsworth Idaho State Treasurer, Legal Rate of Interest, <https://sto.idaho.gov/Banking/Legal-Rate-of-Interest>.

²⁰⁰ See, e.g., Fla. Stat. § 443.071(1) (2022) (“Any person who makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase any benefits . . . commits a felony of the third degree. . . . Each false statement or representation or failure to disclose a material fact constitutes a separate offense.”); Kan. Stat. Ann. § 44-719(a)(1) (2022) (“[A]ny person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act. . . shall be guilty of theft and shall be punished in accordance with the provisions of K.S.A. 21-5801[.]”).

²⁰¹ *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 n. 6 (2002)(quotation omitted).

courts in other jurisdictions have determined that an individual's disqualification to participate in a government program is not a "fine" for purposes of the excessive fines clause.²⁰² In *Wright v. Uniforms for Industry*, the District Court of Appeal of Florida held that the Florida statute disqualifying an employee for workers' compensation benefits if the employee obtained benefits by fraud did not violate the excessive fines clause because it "does not contemplate any payment to a sovereign."²⁰³

In *Hopkins v. Oklahoma Public Employees Retirement System*, the claimant forfeited his pension benefits when he was convicted of a felony involving a violation of his oath of office.²⁰⁴ The claimant argued that the forfeiture was an excessive fine in violation of the Eighth Amendment.²⁰⁵ The Tenth Circuit rejected

²⁰² See *Id.* (determining that provision allowing eviction of a public housing tenant who did not know of drug-related criminal activity in the household did not implicate the excessive fines clause because it "is neither a cash nor an in-kind payment imposed by and payable to the government"); *Kim v. United States*, 121 F.3d 1269, (9th Cir. 1997) ("Permanent disqualification [from Food Stamp program] is not an excessive fine prohibited by the Eighth Amendment because it is not cash or in kind payment directly imposed by, and payable to, the government.")

²⁰³ *Wright v. Uniforms for Industry*, 772 So.2d 560, 561 (Fla. 1st DCA 2000). See also *Medina v. Gulf Coast Linen Servs.*, 825 So.2d 1018, 1020 (Fla. Dist. Ct. App. 2002)(citing *Wright* and reasoning, "a claimant's right to receive workers' compensation benefits is qualified; there is no right to receive benefits once a claimant commits fraud in obtaining benefits.").

²⁰⁴ *Hopkins v. Okla. Pub. Emp. Ret. Sys.*, 150 F.3d 1155, 1158 (10th Cir. 1998).

²⁰⁵ *Id.* at 1162.

this argument, reasoning that the claimant “had no property right in his pension benefits,” and therefore, “the forfeiture of those benefits does not constitute a ‘payment’ to the state of Oklahoma.”²⁰⁶ The Tenth Circuit noted that the claimant’s “right to his pension always was contingent on maintaining honorable service during his tenure in office.”²⁰⁷

Here, Minnesota Statutes, section 268.085, subdivision 2, provides that an applicant is ineligible for unemployment benefits any week that the applicant has an outstanding misrepresentation overpayment balance.²⁰⁸ Notably, the Minnesota Court of Appeals did not analyze whether the eligibility provision was an excessive fine, despite Thigpen’s assertion that it is. Because the eligibility provision is not a payment or payment in kind to the government, it does not implicate the excessive fines clauses of the state or federal constitutions.

²⁰⁶ *Id.*

²⁰⁷ *Id.* See also *Dailey v. City of Philadelphia*, 819 F.App’x. 71, 73 (3d Cir. 2020)(determining that forfeited pension was “not property that ever belonged” to the claimant and “the disqualification flowed from Dailey’s failure to satisfy all conditions necessary to qualify for her pension”); *Childers v. State, Dept. of Mgmt. Servs., Div. of Ret.*, 989 So.2d 716, 719 (Fla. Dist. Ct. App. 2008)(“Forfeiture of the employee’s retirement benefits is not a fine because the employee has not been ordered to pay anything to the government.”). Cf. *Blount*, 440 F.Supp. at 533 (“Assuming, without deciding, that the [one-year] ineligibility is penal in nature and subject to the Eighth Amendment, we do not find it is so excessive as to amount to a constitutional violation.”).

²⁰⁸ Minn. Stat. § 268.085, subd. 2(2) (2022).

Like in *Hopkins* and *Dailey*, Thigpen does not have a vested property right to receive future unemployment benefits.²⁰⁹ There is no guarantee that Thigpen would meet all eligibility criteria for future benefits. Thigpen's right to receive unemployment benefits under Chapter 268 is distinguishable from an individual's property right in a forfeited car or money paid to the government as a fine. Thigpen's argument, that section 268.085, subdivision 2(2) is an excessive fine, fails.

If the Court considers the eligibility provision to be a fine, it is not constitutionally excessive. The gravity of the offense warrants the harshness of the penalty. Unlike in many states, which have mandatory periods of disqualification, Thigpen can become eligible for unemployment benefits by paying back the money he owes the Trust Fund plus the penalty. The eligibility provision serves an important remedial purpose by protecting the Trust Fund from further depletion by those not legally entitled to unemployment benefits. Without the

²⁰⁹"Unemployment benefits are an entitlement protected by the procedural due process requirements of the fourteenth amendment." *Schulte v. Transportation Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984). This does not mean that Thigpen had a vested property right in unemployment benefits for purposes of the excessive fines analysis. See *Medina*, 825 So.2d at 1020 (noting the right to receive workers' compensation is protected by due process but stating the rule that "this statute does not offend the excessive fines clauses of the constitutions because no payment is made to a sovereign")(citation omitted).

eligibility provision, an applicant could continually receive unemployment benefits by misrepresentation without limitation. It is not too harsh a penalty to prevent an applicant who has abused the system to continue abusing the system until the Trust Fund is made whole.

For the DHS programs referenced by Thigpen, Minnesota Statutes, section 256.98, subdivision 8, provides that individuals found guilty of “wrongfully obtaining assistance” in MFIP, SNAP, and general assistance programs shall be disqualified for one year after the first offense, two years after the second offense, and permanently after the third offense.²¹⁰ Unlike Thigpen, a participant subject to such a disqualification is unable to end the disqualification by repaying the overpayment balance. Considering each of Thigpen’s knowing misstatements to be a violation, as the *Grashoff* Court did, Thigpen would be permanently disqualified.

In the unemployment insurance context, a number of other states provide that an applicant who received unemployment benefits by misrepresentation is ineligible until they have paid back the overpayment plus penalties.²¹¹ Many states

²¹⁰ Minn. Stat. § 256.98, subd. 8(a) (2022); 7 C.F.R. § 273.16 (2022)(SNAP regulation).

²¹¹ See Ariz. Rev. Stat. Ann. § 23-787(B) (2022)(“If benefits to which a person is not entitled are received by reason of fraud. . . , the department shall assess a penalty on the person equal to fifteen percent of the amount of the erroneous payment and the person is not eligible to receive any benefits under this chapter until the

provide mandatory disqualification periods.²¹² Some states provide both disqualification periods and ineligibility until repayment. For example, Tennessee statute provides that an applicant who obtained benefits by making a false representation is disqualified for four to 52 weeks, and “shall remain disqualified from future benefits so long as any portion of the overpayment or interest on the overpayment is still outstanding.”²¹³ Delaware’s statute provides that an individual who obtained benefits by making a false statement knowing it to be

total amount of the overpayment and all penalties and interest have been recovered or otherwise satisfied in compliance with a civil judgment.”); Md. Code Ann. Lab. & Empl. § 8-1305(b)(2)(i)(providing that a person who commits fraud is disqualified from receiving benefits until the “benefit unlawfully received” and “monetary penalty of 15% and interest at a rate of 1.5% a month” have been paid in full); Ark. Code Ann. § 11-10-532(a)(3)(B) (2022)(providing fraud overpayment, penalties, interest, and costs “shall be repaid before the person receives benefits under this chapter.”).

²¹² See Alaska Stat. § 23.20.387(a) (2022)(providing disqualification for week of false statement plus period of 6 to 52 weeks); Mont. Code Ann. § 39-51-3201(1)(a)(i) (2022)(providing disqualification for a period of not more than 52 weeks); S.D. Codified Laws § 61-6-39 (2022), S.D. ADC 47:06:04:28 (2022) (imposing denial of benefits for four weeks for each week an applicant fraudulently obtained benefits, up to 52 weeks); Co. Stat. § 8-81-101(II) (2022)(providing the applicant “may be denied benefits, when otherwise eligible, for a four-week period for each one-week period in which the person filed claims for or received benefits to which the person was not entitled”); Wash. Rev. Code § 50.20.070(2) (2022)(providing the applicant is disqualified any week he “knowingly made a false statement,” and for an additional 26 to 104 weeks after); R.I. Gen. Laws § 28-44-24(a) (2022)(imposing disqualification for a period of one year); Me. Rev. Stat. Ann. T. 26 § 1193(6) (2022)(imposing disqualification for week of false statement and period of six months to one year).

²¹³ Tenn. Code Ann. § 50-7-303(a)(7) (2022).

false is disqualified for one year, and in addition, is disqualified until the total overpayment and penalty including interest has been paid in full.²¹⁴

Minnesota's misrepresentation penalty is less harsh than these penalties. Thigpen was not totally disqualified from receiving benefits during the weeks at issue. Thigpen can become eligible for future benefits by paying back his overpayment, penalty, and interest.

The eligibility provision is not a fine that is subject to the excessive fines clause. Even if the Court determines that it is a fine, it is not constitutionally excessive.

²¹⁴ Del. Code Ann. Tit. 19 § 3314(6) (2022); Del. Code Ann. Tit. 19 § 3325(c)(2) (2022). *See also* Ala. Code § 25-4-145(a)(3) (2022)(providing for 52- to 104-week disqualification and "until the fraud overpayment has been repaid in cash"); Fla. Stat. § 443.101(6) (2022) ("The disqualification imposed under this subsection shall begin with the week for which the false or fraudulent representation was made and shall continue for a period not to exceed 1 year after the date the Department of Commerce discovers the false or fraudulent representation and until any overpayment of benefits resulting from such representation has been repaid in full."); Idaho Code Ann. § 72-1366(12) (2022)(providing for 52-week disqualification and ineligibility "for any week in which he owes the department an overpayment, civil penalty, or interest resulting from a determination that he willfully made a false statement or willfully failed to report a material fact"); Utah Admin. Code. R994-406-403(3), (4)(b) (2022) (providing for 13- to 49-week of ineligibility and "overpayment penalty would have to be repaid in its entirety before the claimant would be eligible for any further waiting week credit or unemployment benefits").

In sum, the misrepresentation penalty is not grossly disproportional to the gravity of the offense and does not violate the Eighth Amendment. The Minnesota Supreme Court should affirm the decision of the Minnesota Court of Appeals.

V. CONCLUSION

The misrepresentation penalty does not violate the excessive fines clauses of the state and federal constitutions. The Minnesota Supreme Court should affirm.

Dated this 27th day of January, 2025.



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STATE OF MINNESOTA
(IN COURT OF APPEALS)

APPELLATE COURT CASE NUMBER: A23-1544

CHRISTOPHER THIGPEN

vs.

BEST HOME CARE, LLC

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT

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