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**STATE OF MINNESOTA
IN SUPREME COURT**

Christopher Thigpen

Appellant,

vs.

Best Home Care, LLC,

and

Department of Employment
and Economic Development,

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondent's brief relies on many factual and legal misstatements that necessitate a wide-ranging reply. While the issues raised by DEED are addressed in turn, there is a risk in doing so that the forest will be missed for the trees. It is important to remember that Thigpen argues that Minnesota's unique and severe combination of unemployment misrepresentation penalties — which include a 40 percent penalty, 12 percent annual interest, and a total bar on eligibility for ten years as long as any part of the penalty and interest remain outstanding — are collectively unconstitutional when weighed against the severity of the conduct, penalties imposed for similar administrative violations, and penalties imposed in other states. The entire package of penalties must be considered together. Further, Minnesota's misrepresentation penalty system not only violates the excessive fines clause as applied to Thigpen, but is facially unconstitutional because it violates the excessive fines clause in all applications.

Part I of this brief explains why the eligibility bar falls squarely within the excessive fines clause protections and must be considered along with the financial penalty and interest in the Court's analysis. Part

II analyzes the proportionality factors and refutes the many factual and legal misstatements made by DEED in weighing these factors. Part III provides the context missing from DEED's selective legislative history discussion, which shows that legislative support for the current penalties is not as robust as DEED contends.

I. DEED'S ABSOLUTE BAR ON UNEMPLOYMENT ELIGIBILITY FOR INDIVIDUALS OWING ANY AMOUNT OF MISREPRESENTATION OVERPAYMENT, PENALTY, OR INTEREST IMPLICATES THE EXCESSIVE FINES CLAUSE.

DEED argues that the excessive fines clause only applies to “cash or in-kind payment imposed by and payable to the government,” and that benefit eligibility bars are outside the clause’s protections. DEED Brief, p. 54. DEED’s argument is not supported by any legal precedent. It also ignores the reality that an eligibility bar for individuals who cannot repay a debt impacts individuals based solely on their financial circumstances.

DEED relies on a dicta footnote from a non-excessive fines case, *Dep't of Hous. & Urban Dev. v. Rucker*, which suggested that evictions from subsidized housing do not implicate the excessive fines clause. 535 U.S. 125, 136 n.6 (2002). The issue in *Rucker* was whether regulations of the U.S. Department of Housing and Urban Development permitting housing authorities to evict tenants in certain situations were consistent

with the underlying statutes. *Id.* at 130-31. Although the Court stated in a footnote that it agreed with the 9th Circuit’s finding that the excessive fines clause was not implicated, that issue was not before the Court. This dicta is not legal authority that prohibits any penalty that is not a literal payment to the government from being implicated by the excessive fines clause.

DEED also relies on cases which have found that forfeiting public pensions for public officials convicted of bribery does not implicate the excessive fines clause. DEED Brief, p. 55. This analogy is inapposite. The pension cases do not rely on whether the withholding of a benefit constitutes a fine, as DEED implies. Instead, pension disqualifications following bribery convictions are treated as a quasi-contractual issue, where the right to the pension is in the first instance contingent upon honorable service in office. “New Jersey’s approach to treat public pensions as quasi-contractual rights rooted in statute and not as property rights, is consistent with the majority of courts to have addressed this issue.” *State v. Anderson*, 248 N.J. 53, 75, 256 A.3d 981, 993 (2021). “Hopkins had no ‘property’ right in his pension benefits — even though he had already begun to receive the pension benefits — because Hopkins’

right to his pension always was contingent on maintaining honorable service during his tenure in office.” *Hopkins v. Oklahoma Pub. Employees Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998). The pension issue turns on the official failing to meet a condition precedent to vesting their pension, meaning they have no property interest in the pension whatsoever. Unlike these pensions, unemployment benefits are a protected property interest. *Berg v. Shearer*, 755 F.2d 1343, 1345 (8th Cir. 1985); *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019).

DEED claims that the eligibility bar exists to prevent a fraudster from “us[ing] the system again to help pay off what you stole.” DEED Brief, p. 21. However, this is a mischaracterization of unemployment benefits, which are not contractual, but an earned benefit. The benefit amount is based entirely on the amount of employment income earned during the year prior to applying for unemployment. Minn. Stat. § 268.07. If an individual commits misrepresentation, works for two years, and then is laid off from their job, it is not correct to say they are using the “system” to pay off what they stole if they are able to use unemployment benefits to pay off their debt. They are using their own unemployment benefits, which they earned by working, to repay the debt.

The core of the 8th amendment is concerned with the creation of fines which become unpayable or so large as to deprive the individual of their livelihood. *See Timbs v. Indiana*, 586 U.S. 146, 152 (2019) (discussing the historical background of the 8th Amendment). Even the government action of temporarily impounding a vehicle for 72 hours, when considered along with the associated fines, has been found to be “partially punitive” and implicates the excessive fines clause. *City of Seattle v. Long*, 198 Wash. 2d 136, 164, 493 P.3d 94, 109 (2021). Similarly, the eligibility bar is not separable from the penalty and interest fine because it specifically acts to make the fine more punishing, more difficult to pay back, and more burdensome on the poor. This implicates the core concerns of the excessive fines clause. The eligibility bar is a particular burden on those who are precariously employed or low-wage earners. Because the eligibility bar acts to greatly increase the difficulty of paying the attendant penalty, it falls within the excessive fines clause and must be considered, along with the other penalties, when analyzing whether the misrepresentation penalty is unconstitutional in its entirety.

II. MINNESOTA'S MISREPRESENTATION PENALTY IS GROSSLY DISPROPORTIONATE TO A MISREPRESENTATION FINDING AND VIOLATES THE EXCESSIVE FINES CLAUSE.

Applying the three *Solem* factors demonstrates that Minnesota's packages of misrepresentation penalties – the 40 percent penalty, 12 percent annual interest, *and* ineligibility for future benefits until the debt is repaid – are disproportionate to a misrepresentation finding. These sanctions are facially unconstitutional because they violate the excessive fines clause in all applications and are also unconstitutional as applied to Thigpen. First, the gravity of a misrepresentation offense is low. Second, Minnesota punishes other similar conduct less harshly than unemployment misrepresentation. Third, most other states punish their equivalent of unemployment misrepresentation less harshly. Additionally, the difficulty Thigpen and other low-income individuals have in repaying misrepresentation debts further demonstrates Minnesota's misrepresentation penalties are grossly disproportionate. DEED's attempt to undermine these arguments relies on incorrect facts, selectively cited law, or are counter to basic common sense and logic.

A. MINNESOTA’S MISREPRESENTATION PENALTY SYSTEM IS FACIALLY UNCONSTITUTIONAL.

Minnesota’s unemployment insurance misrepresentation penalty system is facially unconstitutional because it violates the excessive fines clause in all applications. *See Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461*, 924 N.W.2d 594, 607 (Minn. 2019). DEED asserts that the misrepresentation penalty could not be unconstitutional all applications because “an applicant can incur a penalty as low as \$1” and pay the penalty back before incurring interest or being impacted by an eligibility bar. DEED Brief, FN 88. DEED’s hypothetical ignores the reality that most misrepresentation overpayments are thousands of dollars.¹ It simply is not realistic to imagine hypothetical \$1 penalties being levied. This is not what happens.

¹ With the lowest currently possible benefit account of \$1850, *see* Minn. Stat. §§ 268.07, subd. 2a(a) and 268.095, subd. 10, spread over 26 weeks, the minimum weekly benefit amount possible is \$71. If an individual incurs a misrepresentation overpayment for just one week of benefits, on an account with the lowest possible benefit, a 40% penalty would be \$28. It is theoretically possible, but unlikely, that an individual could have a lower overpayment amount. That would occur if the applicant was eligible for some of the payment that week, for example, if they had earned income of less than \$71. *See* Minn. Stat. § 268.085, subd. 5(b).

Additionally, DEED forgets the legal standard for determining whether a punishment violates the excessive fines clause: whether the punishment is proportional to the offense. It does not matter if there is a scenario in which an individual receives a misrepresentation overpayment small enough to quickly repay the debt – what matters is whether the punishment applied is proportional to the offense committed. *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 556-56 (Minn. 2003). An individual's ability to pay the debt is only one of several factors the Court considers in determining proportionality. The Court must also consider whether the gravity of the offense outweighs the harshness of the penalty; whether the misrepresentation penalty is comparable to penalties for similar offenses in Minnesota; and whether the penalty is comparable to penalties levied for the same conduct in other states. As argued in Thigpen's principal brief and below, these factors all demonstrate that Minnesota's misrepresentation penalty is disproportionate to a misrepresentation finding in all applications.

B. MENS REA, STANDARD OF PROOF, AND PROCEDURES FOLLOWED ARE RELEVANT TO THE GRAVITY OF THE OFFENSE ANALYSIS, AND SHOW THAT THE GRAVITY OF A MISREPRESENTATION FINDING IS LOW.

DEED attempts to deny the low gravity of a misrepresentation finding by arguing that the *mens rea*, standard of proof, and procedures required to establish misrepresentation are irrelevant to this analysis. DEED Brief, pp. 37-38. DEED also tries to enhance the gravity of the offense by claiming that Thigpen committed a criminal offense and lied during DEED's investigation. *Id.* 31. However, these arguments all fail. Of course, *mens rea*, standard of proof, and the procedures followed to establish an offense reflect the gravity of an offense. Thigpen has not been charged or convicted of a felony, much less any criminal offense. DEED is simply incorrect in its assertion that Thigpen lied during its "investigation."

DEED incorrectly argues that *mens rea* and standard of proof of an offense are irrelevant to determining the gravity of the offense under the first *Solem* factor. DEED Brief, pp. 37-38. This argument defies Minnesota Supreme Court precedent. This Court considered culpability an important aspect of the gravity-of-the-offense-analysis in *Wilson*, 656 N.W.2d at 556. The issue was that the provision Wilson had been fined

under had subsequently been amended, and both the fine and culpability requirements were reduced. *Id.* The Supreme Court found that even though the statute Wilson had been fined under required “willful behavior,” as opposed to the new statute which required only that the employer act “without reasonable cause,” the disparity between the old 100% penalty and the new 25% penalty was too great to be justified by the differing levels of culpability. *Id.* Similarly, the low degree of moral culpability for unemployment misrepresentation should be considered here.

DEED also attempts to evade the impact of the minimal *mens rea* and standard of proof requirements for misrepresentation on the excessive fines analysis by asserting that Thigpen “meets the criminal fraud standard,” thus demonstrating his offense was grave. DEED. Brief, p. 42. This statement is disingenuous. Thigpen has never been charged with a crime related to this overpayment and has never been found guilty of theft by fraud in a criminal proceeding. Additionally, a criminal conviction for fraud requires more culpability than what was found here. It requires that the false statement or representation be intentional. Minn. Stat. § 268.182. This is a higher degree of intent than even

“knowingly making a false statement,” and it is certainly a higher degree of intent than the more reduced culpability requirement required here — making a false statement without a good faith belief to its correctness. It is inaccurate to equate the intent element required for criminal fraud with the much lower intent and its corresponding lesser degree or moral culpability that was found here, in this civil administrative proceeding.

Additionally, crimes are required to be proven beyond a reasonable doubt while civil liability is not, because criminal offenses are more grave than civil ones. Establishing a criminal conviction also requires that the state follow heightened procedures and provide numerous procedural protections to a defendant, whereas establishing civil administrative liability has fewer protections. It makes sense that before holding someone liable for something as serious as a criminal offense, versus an administrative offense, stricter procedures should be followed.

Moreover, in this administrative proceeding, DEED only needed to determine that Thigpen committed misrepresentation by a preponderance of the evidence and, in stark contrast with a criminal proceeding, DEED had no burden of proof. Minn. Stat. §§ 268.18, subd. 2(a); § 268.069, subd. 2. The ULJ only had to find that the Thigpen

reported “without a good faith belief” that he was reporting correctly, not that he intended to deceive DEED. Minn Stat. § 268.031. Despite the ULJ’s cursory finding that Thigpen “knowingly lied,” it is not reasonable to claim that a preponderance finding in a simple administrative proceeding equates to a criminal conviction beyond a reasonable doubt.

Similarly, it is not reasonable to assert that Thigpen committed fraud on 104 separate occasions. DEED Brief, p. 30. For 104 weeks, Thigpen received no feedback from DEED and there was no indication that there was a problem. Given the lack of any indication by DEED that his reporting or understanding of the question was incorrect, most people in this situation would naturally assume that they were reporting correctly and keep reporting the same way. Moreover, this was the first time Thigpen ever received unemployment benefits and the record shows that he did not understand the process well given his relative youth and cognitive limitations., T. 104-105.

DEED attempts to find additional bad behavior by incorrectly claiming that Thigpen “lied” during the investigation. *Id.* at 38. But such a finding is nowhere in the ULJ’s decision, and this is seemingly a new factual claim by DEED. This claim is particularly puzzling given that the

only “investigation” DEED engaged in that involved Thigpen was to mail him a single audit form. The audit form listed all of Thigpen’s earnings from Best Home Care. Thigpen agreed that he had earned this money. Thigpen called customer service after he received the audit form and the representative told him “if you believe everything was correct you should just check the no corrections column.” Tr. 85-86. Because Thigpen agreed that he had earned the income listed on the form, he checked no corrections and returned it to DEED. Tr. 86. And during the hearing, Thigpen was clear with the ULJ that he had worked for Best Home Care during the time at issue. Tr. 23. Thus, DEED’s assertion that Thigpen “lied” during their investigation is simply not true. Instead, the record shows that Thigpen readily admitted his income from Best Home Care at every juncture when asked about it directly — he had simply not understood that this was income from a “new job” on the weekly reporting form.

C. MINNESOTA’S PENALTIES FOR MISREPRESENTATION ARE MORE SEVERE THAN THOSE IMPOSED FOR SIMILAR CONDUCT IN MINNESOTA.

Beyond falsely equating the different culpability required for a criminal theft by fraud conviction and an administrative unemployment

misrepresentation finding, DEED also unfairly compares the penalties of these two actions to assert that the penalty and conduct are not disproportionate. DEED Brief, pp. 41-43. DEED's argument that this Court must consider the maximum fine for criminal theft by fraud (despite data demonstrating courts rarely impose maximum fines in Minnesota), distracts from one of the most important comparisons between penalties from criminal theft by fraud and unemployment misrepresentation. Criminal courts have the *discretion* to impose lower penalties on individuals convicted of criminal theft by fraud, Minn. Stat. § 609.101, whereas no there is *no discretion* at all to impose a lower penalty on an individual with a misrepresentation overpayment, Minn. Stat. 268.18, subd. 6(a). Minnesota recognizes that there are circumstances when an individual criminally convicted of theft by fraud may need a reduced penalty, yet an individual with a simple administrative finding of unemployment misrepresentation is never provided such flexibility. Nothing justifies this disparity.

DEED also argues that Minnesota imposes comparable penalties for making false statements in other contexts, but none of the comparisons are as on point as those provided in Thigpen's principal

brief. DEED references Minn. Stat. § 176.178, which is the statute defining criminal worker's compensation theft by fraud and is punished under Minn. Stat. § 609.52. This is the same criminal statute that applies to criminal unemployment insurance theft by fraud. While this would be an apt comparison if the Court was considering the penalties imposed for criminal unemployment insurance theft by fraud, this is not an apt comparison for unemployment misrepresentation.

DEED also cites Minnesota Statutes Chapter 15C, the Minnesota False Claims Act (FCA), which is not at all comparable to unemployment insurance misrepresentation. The FCA applies to sophisticated government contractors, not workers with widely varying ages, levels of education, and levels of English proficiency, as is the case with unemployment insurance misrepresentation. Additionally, liability under the FCA is imposed after a finding of civil liability in district court, not after a simple administrative hearing. Minn. Stat. §§ 15C.04, 15C.05.

DEED's attempts to diminish the comparison between unemployment insurance misrepresentation and intentional program violations for cash, food, and childcare benefits are not persuasive. Thigpen acknowledges that cash, food, and childcare benefits are strictly

need-based welfare benefits, but unemployment insurance also takes need into account by reducing or eliminating benefits based on earned income. Minn. Stat. § 268.085 Subd. 5. The types of individuals who rely on both programs certainly overlap, and the conduct resulting in a fraud finding is similar in both contexts, so they are comparable.

Liability for individuals who are found to have committed an intentional program violation can be pursued through an administrative hearing *or* criminal prosecution, not both. 7 CFR § 273.16(a)(1). Intentional program violation penalties imposed after an administrative hearing are more comparable to penalties imposed for unemployment misrepresentation, since both are determined after administrative proceedings. Individuals determined to have committed an intentional program violation through the administrative process are *not* subject to the penalties or fines imposed under Minn. Stat. 609.52, as implied by DEED. DEED Brief, p. 48-49. There are *no* penalties or fines imposed in this instance.

DEED's contention that the eligibility disqualification imposed for an intentional program violation is in fact harsher than the eligibility ban imposed for unemployment misrepresentation is facially incorrect

and misstates the law. The benefit disqualification for cash, food, and childcare programs is time-limited: one year for a first offense; two years for a second; and permanently only for a third.² 7 CFR § 273.16(b)(1). While it is possible that some individuals may be able to repay an unemployment insurance misrepresentation debt and be eligible for benefits again within less than a year, this is simply not the reality for most low-wage workers.

Finally, where nonreporting occurs over a period of months or years, it is treated as a single incident for intentional program violation purposes. 7 C.F.R. § 253.8(h)(4) (“The same act of intentional program violation continued over a period of time will not be separated so that more than one penalty can be imposed.”). This means that if, on the same set of facts, Thigpen were found to have committed an intentional program violation as opposed to unemployment misrepresentation, it would be considered a single violation. Thigpen would be subject to a one-year disqualification from benefits. He would not be considered to have

² Additionally, the disqualification only applies to the individual household member determined to have committed an IPV. Other household members, such as minor children, can continue to receive benefits. 7 CFR § 273.16(b)(11)

committed 104 violations and be subject to a permanent bar, as DEED claims. DEED Brief, p. 58.

D. DEED EXAGGERATES THE NUMBER OF OTHER STATES THAT BAR APPLICANTS WITH OUTSTANDING MISREPRESENTATION DEBTS FROM BENEFITS.

DEED claims that “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.” DEED Brief, p. 58. DEED references or cites to nine other states that allegedly have such eligibility bars: Arizona, Maryland, Arkansas, Tennessee, Delaware, Alabama, Idaho, Florida, and Utah.³ *Id.* p. 58-60. DEED misstates or oversimplifies the law from these other states.

First, four of these states do not actually disqualify individuals with outstanding misrepresentation overpayment debts from future eligibility

³ DEED also notes that many states provide mandatory time-limited disqualification periods for individuals determined to have committed fraud. DEED Brief, pp. 58-59. Thigpen’s argument does not pertain to time-limited disqualifications from benefits for fraud, so this argument is irrelevant.

for benefits. Maryland,⁴ Florida,⁵ and Idaho⁶ only disqualify individuals who have been found guilty of *criminal* unemployment benefits fraud from eligibility for future benefits until their debt is repaid. Arkansas

⁴ Md. Code Ann. Lab. & Empl. § 8-1305(b)(2) states “In addition to the penalty under subsection (a) of the section, a person who violates § 8-1301 of this subtitle shall be disqualified from receiving benefits” until the overpaid benefits, 15 percent penalty, and interest have been paid in full. Md. Code Ann. Lab. & Empl. § 8-1301 is Maryland’s criminal unemployment benefits fraud statute. Maryland’s fraud overpayment statute does not include any bar on future eligibility for benefits. *See* Md. Code Ann., Lab. & Empl. § 8-809(b).

⁵ Florida disqualifies from benefit eligibility any individual who makes “any false or fraudulent representation for the purpose of obtaining benefits contrary to this chapter, constitution a violation under s. 443.071” until “any overpayment of benefits resulting from such representation has been repaid in full.” Fla. Stat. Ann. § 443.101(b). Fla. Stat. Ann. § 443.071 is Florida’s criminal unemployment benefits fraud statute. Florida’s fraud overpayment statute allows any person determined to have committed fraud “to have those benefits deducted from future benefits payable.” Fla. Stat. Ann. § 443.151(6)(a).

⁶ Idaho disqualifies from benefit eligibility anyone who has “willfully made a false statement or willfully failed to report a material fact in order to obtain benefits” and still owes an overpayment, penalty, or interest resulting from the determination. Idaho Code Ann. § 72-1366(12). Idaho’s definition for criminal unemployment benefits fraud includes a requirement that the false statement was made willfully. Idaho Code Ann. § 72-1371. Idaho’s misrepresentation overpayment statute only requires a finding that the claimant “made a false statement, misrepresentation, or failed to report a material fact to the department,” and does not require the statement be made willfully. *See* Idaho Code Ann. § 72-1369. As such, the benefit bar only applies to those found to have committed criminal unemployment fraud.

imposes a time-limited disqualification from benefits but does not explicitly impose an eligibility bar based on outstanding debt.⁷

While there are five other states that also disqualify individuals owing outstanding fraud or misrepresentation overpayment debts from future benefit eligibility, Minnesota's bar is still harsher than each of these states. Importantly, each of these states require a showing that an individual *intentionally* or *knowingly* lied to the agency before a fraud finding can be imposed.⁸ For example, Utah's law includes a detailed

⁷ See Ark. Code Ann. § 11-10-532(a)(3)(B) (requires repayment of the overpayment, penalty, and interest "before the person receives benefits" again); Ark. Code Ann. § 11-10-519(a)(1) (must "forfeit any right to receive benefits" until the debts are repaid.). Arkansas' law does not appear to disqualify an individual who still owes a fraud overpayment debt from benefit eligibility, it just prevents them from receiving the benefits. Presumably, Arkansas can recoup 100 percent of the individual's benefits to repay their debt until the debt is paid off.

⁸ Ariz. Rev. Stat. Ann. § 23-778 (defining fraud as someone who "has made a false statement or representation of a material fact knowing it to be false, or knowingly failed to disclose a material fact with intent to obtain benefits"); Tenn. Code Ann. § 50-7-303(a)(7) (defining fraud as someone who "made any false or fraudulent representation or intentionally withheld material information for the purpose of obtaining benefits contrary to this chapter"); Del. Code Ann. tit. 19, § 3314(6) (defining fraud as someone who "made a false statement or representation knowing it to be false or knowingly has failed to disclose a material fact to obtain benefits to which the individual was not lawfully entitled"); Ala. Code § 25-4-145 (3) (defining fraud as "any fraudulent misrepresentation made by a claimant with the object of obtaining benefits").

definition of each element the agency has the burden of proving to establish an intentional misrepresentation sufficient to constitute fraud,⁹ and the agency must establish each element by clear and convincing evidence.¹⁰ Minnesota only requires that a preponderance of the evidence demonstrates an individual's lack of good faith belief as to the correctness of a statement, and DEED has no burden of proof. In other words, the bar DEED must clear to prove misrepresentation is far lower in Minnesota than the five other states that include an eligibility bar for individuals with outstanding debts.

There are other differences that diminish the harshness of other states' eligibility bars when compared with Minnesota. All states but Utah impose lower financial penalties than Minnesota's 40 percent.¹¹ Alabama only requires the individual to repay the underlying

⁹ Utah Admin. Code r. R994-406-401(1) ("Each of the following elements of fraud must be proved to establish an intentional misrepresentation sufficient to constitute fraud under Subsection 35A-4-405(5). The elements of fraud are materiality, knowledge, and willfulness.").

¹⁰ Utah Admin. Code r. R994-406-402 ("The Department has the burden of proving each element of fraud. The elements of fraud must be established by clear and convincing evidence.").

¹¹ Ala. Code § 25-4-145(a)(3) (capped at \$500); Ariz. Rev. Stat. Ann. § 23-778 (15 percent); Del. Code Ann. tit. 19, § 3314(6) (15 percent); Tenn. Code Ann. § 50-7-303(a)(7) (none).

overpayment to reestablish eligibility.¹² Delaware has the option of writing off any remaining debt after three years,¹³ and in Tennessee it can be forgiven after six years (as opposed to Minnesota’s ten years).¹⁴ In Arizona the interest accrued on a fraud overpayment debt can be waived at any time (which is never an option in Minnesota).¹⁵

Most states do not impose any penalty making individuals who owe misrepresentation debts ineligible for benefits, and instead allow these individuals to use their benefits to pay off their debt. *See* United States Department of Labor, Office of Unemployment Insurance Division of Legislation, Comparison of State Unemployment Insurance Laws Ch. 6.

¹² Ala. Code § 25-4-145(3) (“Additionally, a disqualification shall be applied for the 52-week period which immediately follows the final date of the fraud determination and until the fraud overpayment has been repaid in cash.”).

¹³ Del. Code Ann. tit. 19, § 3325(f)(1) and (c)(1) (the Department may “[w]rite off, in whole or in part, an overpayment debt after a period of 3 years, when it has ascertained after investigation and after reasonable attempts at collection that the overpayment debt is wholly or partly uncollectible.”)

¹⁴ Tenn. Code Ann. § 50-7-303(d)(3)(A) (“The administrator may waive the collection of any overpayment that is due to fraud, misrepresentation or willful nondisclosure on the part of the person who was overpaid and that is outstanding after the expiration of six (6) years from the date of determination of the overpayment.”).

¹⁵ Ariz. Rev. Stat. Ann. § 23-787(G) (“The department may waive a portion of any accrued interest on a benefit overpayment debt for good cause shown.”).

Overpayments, 6-10 (2023) available at <https://oui.doleta.gov/unemploy/statelaws.asp> (last accessed February 10, 2025). And among the small number of states that make individuals owing misrepresentation debts ineligible for benefits, those states' penalties are significantly less severe than Minnesota. This is particularly true when considering all the penalty components and the level of *mens rea* required to establish misrepresentation.

E. THIGPEN'S INABILITY TO PAY HIS MISREPRESENTATION DEBT FURTHER DEMONSTRATES THAT MINNESOTA'S PENALTY IS DISPROPORTIONATE.

The Excessive Fines Clause is “fundamental to our scheme of ordered liberty, with deep roots in our history and tradition.” *Timbs*, 586 U.S. at 150. “This right to be free from excessive governmental fines is not a relic relegated to the period of parchments and parliaments, but rather it remains a crucial bulwark against government abuse. The government cannot overstep its authority and impose fines on its citizens without paying heed to the limits posed by the Eighth Amendment.” *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020). For the excessive fines clause to serve as a bulwark against governmental abuse, it must consider the fined individual's ability to pay the fine when

determining if the fine is proportional. Courts around the country have increasingly embraced this view. Minnesota should as well.

Several courts have found that the excessive fines clause requires assessing an individual's ability to pay a fine. *E.g.*, *Oregon v. Goodenow*, 251 Or. App. 139, 153, 282 P.3d 8 (2012) (“When assessing the severity of a defendant's forfeiture, courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant.” (citing *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67 (1989)); *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. Cmwlth. 2014). While there is a circuit split on the issue, the 8th circuit has found that ability to pay is a factor to consider in an excessive fines analysis. *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) (“[I]n the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause.”). *But see United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (deeming a “defendant's inability to satisfy a forfeiture at the time of conviction” is not relevant to constitutional analysis (quoting *Levesque*, 546 F.3d 78, 85 (1st. Cir.

2008)); accord *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009).

Colorado and Washington have both decided that ability to repay is a required element. The Colorado Supreme Court noted that the 8th amendment's history, as cited in *Timbs*, is "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment." *Colorado Dep't of Labor & Employment v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019). The court also found that the "concept of 'proportionality' itself" supported considering ability to pay. *Id.* A fine that would bankrupt one person would be a substantially more burdensome fine than one that did not. *Id.* The Washington Supreme Court similarly held that "[t]he central tenet of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood." *City of Seattle v. Long*, 198 Wash. 2d 136, 171, 493 P.3d 94, 113 (2021).

DEED disputes that Thigpen cannot repay the misrepresentation overpayment, penalty, and interest accrued. DEED alleges that because Thigpen had wages during the time he was collecting unemployment he must have the ability to pay. This ignores how meager his wages were.

Between 2/27/2020 and 6/1/2022, Thigpen earned \$44,218.15 gross from working as his mother's personal care attendant (PCA), a period of over two years. I.L. Exhibit 6 at 13. This works out to \$1,637.70 a month.

The reason that, despite not reporting his PCA income, Thigpen remained eligible for some unemployment benefits, is because his income was so low. And his earnings from years ago have little bearing on his current ability to pay. DEED's argument that Thigpen's poverty-level wages from four years ago proves that he can pay the fines imposed by DEED, after the buildup of thousands of dollars in interest, ignores the hard realities faced by low-income individuals who live month-to-month and struggle to make ends meet.

III. DEED OVERSTATES THE LEGISLATIVE HISTORY OF MINNESOTA'S UNEMPLOYMENT INSURANCE MISREPRESENTATION PUNISHMENT SCHEME.

DEED argues that because the Minnesota legislature has examined the unemployment insurance misrepresentation statute in recent years, and has not made any changes, the current penalty scheme represents the will of the Minnesota people and thus is not excessive. DEED Brief, p. 23. DEED far overstates the recent legislative history of the

misrepresentation overpayment statute and cherry-picks committee hearing quotes that are most generous to their position.

DEED notes that in 2007 the Minnesota legislature enacted the current version of the misrepresentation overpayment punishment statute, which increased the misrepresentation overpayment penalty from 25% to 40%, and added the eligibility ban for individuals still owing any misrepresentation debt. *Id.* at 20. The bill passed in 2007 was drafted by DEED and approved by its own Unemployment Insurance Advisory Council.¹⁶ DEED only cites testimony provided by its own representative at a Business, Industry, and Jobs Committee hearing.

During that committee hearing, there were only two questions by one Senator regarding the proposed changes: one confirming how the eligibility bar works, and one asking about safeguards for someone who makes a legitimate mistake.¹⁷ In response to the Senator's questions,

¹⁶ 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, 2:27 mark). The Committee Chair noted, "This came out of the recommendation of the Unemployment Advisory Council and I believe it is pretty close to the bill we passed last year." *Id.*

¹⁷ *Id.* at 9:00 and 9:50 mark.

DEED incorrectly told legislators that misrepresentation overpayments are “felony level” fraud, and therefore warrant a higher penalty amount and bar to eligibility for benefits.¹⁸ It is undisputed that a DEED decision holding that an individual committed a misrepresentation overpayment under Minn. Stat. § 268.18 does not equate to felony-level fraud, neither in 2025 nor in 2007. Felony-level fraud is found only after an individual is criminally charged and convicted under Minn. Stat. § 268.182 for an overpayment greater than \$500. If anything, DEED’s testimony during the 2007 committee hearing suggests that the Minnesota legislature passed a bill increasing the penalty for misrepresentation overpayment and creating the eligibility bar based on incomplete information provided by DEED.

DEED also notes that the 2023 Minnesota legislature considered various proposed changes to the unemployment insurance misrepresentation penalty scheme, but did not adopt the changes.¹⁹ The

¹⁸ *Id.* at 9:30 mark.

¹⁹ DEED also notes that in 2017 and 2019 the Minnesota legislature reviewed passed bills that made small changes to the misrepresentation overpayment statute, suggesting that the legislature implicitly approved of the misrepresentation penalties during these sessions. DEED Brief, p. 21. These changes were introduced as part of DEED’s technical bill, drafted by DEED and its Unemployment Insurance

proposed changes included (1) changing the definition of misrepresentation to be “an intentional false statement of representation in an effort to fraudulently collect benefits” and not an “unintentional mistake”; (2) reducing the penalty to 15%; (3) eliminating interest; and (4) eliminating the eligibility provision to allow repayment via offset. H.F. 784, S.F. 1498, 93rd Minn. Leg., Reg. Sess. DEED is correct that neither the House nor Senate ultimately adopted any of these changes, but fails to provide the full context of committee hearing testimony and discussion regarding the proposed changes.

DEED cites testimony from a Senate Committee on Jobs and Economic Development hearing, in which a Senator expressed concerns about lowering penalties for individuals who commit fraud and making it easier for individuals to commit fraud. DEED Brief, pp. 21-22. It should be noted that DEED publicly opposed the proposed changes to misrepresentation overpayment penalties and submitted a memo laying

Advisory Council. Laws of Minnesota 2017, chapter 35, art. 3 (titled “Unemployment Insurance Advisory Council Technical”); Laws of Minnesota 2019, 1st Spec. Sess. chapter 7, article 5 (titled “Unemployment Insurance Advisory Counsel; Interest”). Adoption of technical bills by the legislature is routine, and sheds little light on the legislature’s policy views regarding the misrepresentation penalties.

out its concerns prior to the committee hearing.²⁰ The concerns expressed by this Senator were lifted from DEED’s memo.²¹ Additionally, the Senator references “fraud” under the new definition of misrepresentation proposed in the bill, which would have required a finding of intent (and is much more in line with the definition used by other states), not the current definition, which simply requires a lack of good faith belief.²² There was no opportunity for clarification of this point, or questions/comments by other Senators, as the Committee was running behind and needed to move on to other business.²³ Ultimately, the on-the-record discussion by the Senate of these proposed changes was very limited. All we know is that the proposed changes did not end up in the

²⁰ 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, 1:34:50 and 1:41:40 mark) (referencing the DEED memo).

²¹ *Id.* at 1:46:40 (referencing concerns noted in the DEED memo).

²² *Id.* at 2:00:20 (“I am looking at the language in your bill, and we are saying that a misrepresentation is an intentional false statement or misrepresentation in an effort to collect benefits.”).

²³ *Id.* at 2:00:11 at 2:02:56 (noting that the committee is out of time).

Senate omnibus bill, and we have no knowledge of what lobbying by DEED might have influenced that decision.

DEED makes no reference to discussion of the proposed changes in the House Workforce Development Committee, which included comments from multiple Representatives expressing support for changes to Minnesota's misrepresentation penalty scheme.²⁴ One Representative noted that they have helped several of their own employees deal with misrepresentation overpayment debts.²⁵ The Representative noted "They were overpaid \$2000-\$3000 with the unemployment fund, and with the penalty and interest, I tried to help them pay it off. And it was such a burden."²⁶ The Representative further noted that changes to the misrepresentation penalty scheme is long overdue, and that Minnesota needs to bring some "common sense" to the issue.²⁷ The Representative

²⁴ Minn. House, Hearing on H.F. 784, before the Workforce Development Committee, 93rd Minn. Leg., Reg. Sess. (March 1, 2023) available at <https://www.lrl.mn.gov/audio/house/2023/work030123.mp3> (audio web media, 18:40).

²⁵ *Id.* at 25:25.

²⁶ *Id.*

²⁷ *Id.*

further noted they had talked to DEED a number of years ago about the “horrific” penalties and hoped to see some changes.²⁸

There is no further on-the-record discussion regarding the bill, but the House Workforce Development Finance and Policy Committee ultimately did not include the proposed changes into the Workforce omnibus bill. The Committee did later add an amendment which would have required DEED to propose changes to reduce the fines and fees applied to misrepresentation overpayments. H.F. 2233, 1st Engrossment, 93rd Minn. Leg., Reg. Sess. The amendment’s sponsor noted that the hope was DEED could figure out a way to lessen the financial burden on low-income individuals and those who make mistakes.²⁹ Another Representative agreed this is an important issue, and that we need to understand why Minnesota has such high fines.³⁰ The amendment ultimately did not make it into the final Workforce omnibus bill that was

²⁸ *Id.*

²⁹ Minn. House, Hearing on H.F. 2233, before the Workforce Development Finance and Policy Committee, 93rd Minn. Leg., Reg. Sess. (March 29, 2023) available at <https://www.lrl.mn.gov/audio/house/2023/work030123.mp3> (audio web media, 20:25).

³⁰ *Id.*

passed by the House and Senate, but there is no additional on-the-record discussion available.

DEED is correct that “a large discretion is necessarily vested in the legislature to impose penalties sufficient to prevent the commission of the offense,” and therefore legislative history regarding Minnesota’s misrepresentation penalty statute could be relevant in determining whether the punishment scheme violates the Excessive Fines clause. *See Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 895 (Minn. 2003); *United States ex rel. Fesenmaier v. Cameron-Ehlen Group, Inc.*, 715 F. Supp. 3d 1133, 1158 (D. Minn. 2024) (noting that legislative intent is one among several factors court must consider in determining whether a penalty is grossly disproportionate). But the recent legislative history does not demonstrate that the legislature has closely examined Minnesota’s misrepresentation overpayment penalty scheme, and explicitly chose not to make any changes to the scheme, as DEED contends. All the recent history shows is that changes were proposed in 2023; those changes were openly opposed by DEED; there was limited discussion by both chambers regarding the changes, but the discussion included both support and opposition to the changes; and the changes

were not ultimately included in a final omnibus bill. The 2024 enactment of the significantly lower misrepresentation penalty for the Paid Family and Medical Leave Benefits, being fully considered by both chambers, is more instructive regarding the legislature's current view regarding civil penalties for misrepresentation overpayments imposed via DEED's administrative appeal process.

CONCLUSION

Minnesota's harsh combination of unemployment misrepresentation punishments, including a 40% penalty, a 12% annual interest rate, and total bar on eligibility as long as any portion of the debt remains outstanding, facially violates the Excessive Fines clauses of the federal and state constitutions. Analysis of the *Solem* proportionality factors shows that the harsh punishment is disproportionate to an administrative finding of lack of "good faith belief" by preponderance of the evidence with no burden of proof; to penalties for similar offenses in Minnesota; and to unemployment fraud penalties in other states. The penalties disproportionately hurt low-income individuals who are unable to repay their debt and regain eligibility for benefits.

Appellant requests that this Court declare that Minnesota's combination of punishments for unemployment misrepresentation violates the prohibitions on excessive fines in the United States and Minnesota Constitutions; that Appellant's penalty and interest be removed; and that Appellant be granted future eligibility for benefits if all other eligibility conditions are met, with the ability to repay his outstanding overpayment via offset of future benefits pursuant to Minn. Stat. 268.18, subd. 3a(a).

Dated: February 10, 2025

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CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional font, and the length of this document is 6,964 words. This document was prepared using Microsoft Word for Office 365.

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