STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN and TEDDY BROE, individually and on behalf of similarly situated persons,

Plaintiffs-Appellees,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant-Appellant.
_____/

Supreme Court No. 160813

Court of Appeals No. 333181

Court of Claims No. 15-202-MM

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Unemployment Insurance Agency seeks leave to appeal the December 5, 2019 decision of the Michigan Court of Appeals. In that decision, the Court held that plaintiffs have sufficiently pled a constitutional tort claim against the Agency for violation of plaintiffs' constitutional rights under article 1, § 17 of Michigan's 1963 Constitution, and that plaintiffs could pursue a claim for money damages for a violation of their procedural due process rights.

On November 25, 2020, this Court issued an order scheduling oral argument on the Agency's application for leave to appeal and directing the parties to file supplemental briefing on whether plaintiffs have alleged cognizable constitutional tort claims that would allow them to recover a judicially inferred money damages remedy. The Agency now files this supplemental brief pursuant to the deadline established in this Court's December 8, 2020 order.

STATEMENT OF QUESTIONS PRESENTED

1. Over 30 years ago, two justices of this Court theorized that a claim for money damages for an alleged violation of the Michigan Constitution could be possible in appropriate circumstances. The decades between then and now have failed to produce a majority opinion of this Court that clearly addresses what those appropriate circumstances might be. Should this Court grant leave to appeal to consider whether such a judicially inferred remedy is an appropriate exercise of judicial power?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Court of Claims' answer: Did not directly answer.

   Court of Appeals' answer: Did not directly answer.

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

   Appellant's answer: Yes.

   Appellee's answer: No.

   Court of Claims' answer: No.

   Court of Appeals' answer: No.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 1, § 17 of Michigan's 1963 Constitution

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MCL 421.32a(1)

> Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. After review, the unemployment agency shall in its discretion issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination, or may transfer the matter to an administrative law judge for a hearing. If the unemployment agency issues a redetermination, it shall promptly notify the interested parties of the redetermination. The redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge pursuant to section 33.

MCL 421.33

> (1) An appeal from a redetermination issued by the agency in accordance with section 32a or a matter transferred for hearing and decision in accordance with section 32a shall be referred to the Michigan administrative hearing system for assignment to an administrative law judge. If the agency transfers a matter, or an interested party requests a hearing before an administrative law judge on a redetermination, all matters pertinent to the claimant's benefit rights or to the liability of the employing unit under this act shall be referred to the administrative law judge. The administrative law judge shall afford all interested parties a reasonable opportunity for a fair hearing and, unless the appeal is withdrawn, the administrative law judge shall decide the rights of the interested parties and shall

notify the interested parties of the decision, setting forth the findings of fact upon which the decision is based, together with the reasons for the decision. With respect to an appeal from a denial of redetermination, if the administrative law judge finds that there was good cause for the issuance of a redetermination, the denial shall be a redetermination affirming the determination and the appeal from the denial shall be an appeal from that affirmance. Unless an interested party would be unduly prejudiced, an administrative law judge may consolidate cases involving the same or substantially similar evidence or issues, hear the consolidated cases at the same date and time, create a single record of proceedings, and consider evidence introduced in 1 of those cases in the other cases. If the appellant fails to appear or prosecute the appeal, the administrative law judge may dismiss the proceedings or take other action considered advisable. An administrative law judge may, either upon application for rehearing by an interested party or on his or her own motion, proceed to rehear, affirm, modify, set aside, or reverse a prior decision on the basis of the evidence previously submitted in the case, or on the basis of additional evidence. The application or motion shall be made within 30 days after the date of mailing of the decision. The administrative law judge may, for good cause, reopen and review a prior decision and issue a new decision after the 30-day appeal period has expired. A request for review shall be made within 1 year after the date of mailing of the prior decision. An administrative law judge shall not participate in a case in which he or she has a direct or indirect interest.

(2) Within 30 days after the mailing of a copy of a decision of the administrative law judge or of a denial of a motion for rehearing, an interested party may file an appeal to the Michigan compensation appellate commission, and unless such an appeal is filed, the decision or denial by the administrative law judge is final.

MCL 421.34(2), (7)

(2) An appeal to the Michigan compensation appellate commission from the findings of fact and decision of the administrative law judge or from a denial by the administrative law judge of a motion for a rehearing or reopening shall be a matter of right by an interested party. The Michigan compensation appellate commission, on the basis of evidence previously submitted and additional evidence as it requires, shall affirm, modify, set aside, or reverse the findings of fact and decision of the administrative law judge or a denial by the administrative law judge of a motion for rehearing or reopening.

(7) The Michigan compensation appellate commission may, either upon application by an interested party for rehearing or on its own motion, proceed to rehear, affirm, modify, set aside, or reverse a prior decision on the basis of the evidence previously submitted in that case, or on the basis of additional evidence if the application or motion is made within 30 days after the date of mailing of the prior decision. The Michigan compensation appellate commission may, for good cause, reopen and review a prior decision of the Michigan compensation appellate commission and issue a new decision after the 30-day appeal period has expired, but a review shall not be made unless the request is filed with the Michigan compensation appellate commission, or review is initiated by the Michigan compensation appellate commission with notice to the interested parties, within 1 year after the date of mailing of the prior decision. Unless an interested party, within 30 days after mailing of a copy of a decision of the Michigan compensation appellate commission or of a denial of a motion for a rehearing, files an appeal from the decision or denial, or seeks judicial review as provided in section 38, the decision shall be final.

MCL 421.38(1)

The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

MCL 421.62(a), (c)

(a) If the unemployment agency determines that an individual has obtained benefits to which the individual is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest pursuant to section 15(a) by 1 or more of the following methods: deduction from benefits or wages payable to the individual, payment by the individual in cash, or deduction from a tax refund payable to the individual as provided under section 30a of 1941 PA 122, MCL 205.30a. [. . .]

(c) Any determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a.

INTRODUCTION

In 1987, two justices of this Court laid out a case for making it the public policy of this State to allow for money damages in actions against the State for alleged violations of the Michigan Constitution. As with other questions of public policy, however, this question is best left to the Legislature. And in the 30-plus years that have followed, our Legislature has declined to make this the public policy in our State. Since then, the courts have not given us much clarity or guidance on how or when a court could judicially infer a money damages remedy; or, more fundamentally, whether it is ever appropriate for a court to infer a damages remedy. This Court addressed these issues last year, but it resulted in five separate opinions, with the Court equally divided on judicially inferred constitutional tort actions for money damages. Thus, this case presents the opportunity to address these important issues and to review whether a court can do judicially what the Legislature has declined to do.

Since 1987, the federal caselaw underpinning the theory of a judicially inferred money damages remedy for a constitutional violation of the procedural kind raised here has essentially been abandoned in favor of leaving the establishment of such a remedy to legislative bodies. This Court should follow suit. Any other action would not be faithful to the principles of separation of powers.

But even if this Court were to overlook this jurisprudential retreat and instead get firmly on board with allowing judicially inferred money damages remedies, it should hold that the constitutional right at issue here—procedural due process—is an inappropriate one to allow for a money-damages remedy.

STATEMENT OF FACTS AND PROCEEDINGS

Plaintiffs allege the Agency's fraud-detection and adjudication system violated their due process rights, resulting in economic harm.

Plaintiffs allege they were deprived of their property—specifically, their wages and tax refunds—without due process of law. (Am Compl, p 32, App Vol I, p 039a.) In any procedural due process case, it is crucial to examine the facts underlying the alleged due process violation. Thus, the relevant portion of each named plaintiff's factual scenario is presented below.

Grant Bauserman

After separating from his employment, Bauserman collected unemployment benefits from September 2013 until early March 2014. (Am Compl, p 17, App Vol I, p 024a.) During a later investigation, the Agency learned that Bauserman received two sizeable payments from his employer that he failed to report to the Agency: a $256,299.16 payment for the quarter ending December 31, 2013, and a $36,963.00 payment for the quarter ending March 31, 2014. (Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 8.) While he asserted his former employer had mistakenly reported earnings, Bauserman never fully explained the earnings. (Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 19.) On December 3, 2014, the Agency issued a redetermination finding Bauserman ineligible for benefits, seeking repayment of all improperly received benefits, and assessing a penalty for intentionally misleading or concealing information from the Agency to obtain benefits. (*Id.*, Ex 14; see also

Bauserman, et al v Michigan Unemployment Ins Agency, 503 Mich 169, 174 (2019).) Bauserman timely protested that redetermination within the time period provided in the redetermination. (Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 17.) On March 17, 2015, after the December 3, 2014 determination became final and after Agency began collection activity on it, Bauserman fully explained the two large payments. (Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 20.)

Bauserman's protest of the December 3, 2014 redetermination was forwarded to the Michigan Administrative Hearing System (MAHS) for a hearing. MAHS returned the matter to the Agency and asked for more information. *Bauserman*, 503 Mich at 175. Bauserman's tax refund was intercepted on June 16, 2015.

The Agency then reviewed the information submitted by Bauserman and concluded that the payment from his former employer was a bonus earned in 2013 and was not remuneration. Thus, the Agency issued a redetermination on September 30, 2015, finding the December 3, 2014 redeterminations "null and void." (Agency Br in Supp of Mot to Dismiss, Ex 25.) The Agency has returned all monies collected from Bauserman. *Bauserman*, 503 Mich at 175.

Teddy Broe

Broe collected benefits in 2013, and after his employer disputed his eligibility, the Agency requested information from Broe, but he did not respond. (Am Compl, pp 24–25, App Vol I, pp 031a–032a.) Based upon information available to it, the Agency issued redeterminations on July 15, 2014, finding Broe ineligible for

benefits and assessing penalties. (*Id*. Vol I, p 032a; see also *Bauserman*, 503 Mich at 175.) Broe did not protest or appeal the redeterminations within the time period provided in the redeterminations. (*Id*.) In 2015, the Agency sent a notice that Broe owed the Agency over $8,000.00 in restitution for the improperly paid benefits, interest, and fraud penalties. (*Id*.; see also *Bauserman*, 503 Mich at 176.) The Agency then collected on that debt by intercepting Broe's state and federal income tax refunds in May of 2015. (*Id*. Vol I, p 033a; see also *Bauserman*, 503 Mich at 176.)

Broe filed a late appeal of the 2014 redeterminations, but an ALJ denied the request on September 24, 2015, because Broe failed to establish good cause for the late appeal. (Am Compl, p 26, App Vol I, p 033a.) Broe appealed the ALJ's decision and on October 8, 2015, the matter was returned to the Agency. The Agency reconsidered its previous redeterminations and additional information submitted by Broe, and on November 4, 2015, issued a new determination in Broe's favor. (Agency Supplemental Br in Supp of Mot to Dismiss, filed in the Court of Claims on November 9, 2015, Ex 18.) All intercepted monies have been returned to Broe. *Bauserman*, 503 Mich at 176.

The complaints

On September 9, 2015, Bauserman (as the sole named class representative) filed a complaint with the Court of Claims. The complaint alleged that the Agency's use of the Michigan Data Automated System (MiDAS) to "detect and adjudicate suspected instances of unemployment benefit fraud . . . deprives UIA claimants of

due process and fair and just treatment because it determines guilt without providing notice, without proving guilt and without affording claimants an opportunity to be heard before penalties are imposed." (Compl, pp 1–2.) The "result of the violations of the Michigan Constitution" to Bauserman and the putative class were "economic damages." (*Id.* p 21.)

After the Agency filed a dispositive motion based, in part, on Bauserman's failure to comply with the notice requirement of the Court of Claims Act, Bauserman filed an amended complaint on October 19, 2015, adding Karl Williams and Broe as additional class representatives. The allegations and thrust of the amended complaint were nearly identical to the original complaint, but the amended complaint included allegations that the Agency's means of collecting debts owed to it violated the Michigan Employment Security Act, MCL 421.1, *et seq*. (Am Compl, pp 2–3 and 14–17, App Vol I, pp 009a–010a, 021a–024a.) The Agency sought dismissal of the amended complaint.

The Court of Claims denies the Agency's dispositive motion.

The Court of Claims denied the Agency's dispositive motion, holding, in relevant part, that plaintiffs could not "fully allege the elements" of their constitutional tort claim (false accusation of fraud and wrongly deprived of property) until the Agency issued the redeterminations on September 30, 2015 and November 4, 2015, respectively, which rendered the previous fraud determinations null and void. (Opinion and Order, p 7, App Vol II, p 037a.) Thus, the court concluded, the filing of the amended complaint on October 19, 2015 was filed within

six months of the redetermination dates, and plaintiffs therefore complied with the requirements of MCL 600.6431. (*Id.* p 8, App Vol II, p 038a.)

The Court of Claims also declined to dismiss plaintiffs' constitutional tort claims. (*Id.* pp 8–9, App Vol II, pp 038a–039a.) The court held that such claims are not barred by governmental immunity, and that there were no other remedies available to plaintiffs to challenge "an entire statutory policy and scheme." (*Id.* p 9, App Vol II, p 039a.)

The Court of Appeals reverses the Court of Claims and dismisses plaintiffs' claims because they failed to timely file the claims or a notice of intent.

The Agency appealed the Court of Claims' decision and argued the court erred in holding that plaintiffs' claims accrued *after* they filed their complaints. The Court of Appeals agreed and held that the Court of Claims' conclusion of when plaintiffs' claims accrued was incorrect and warranted reversal. *Bauserman v Unemployment Ins Agency*, unpublished opinion per curium of the Court of Appeals, issued July 18, 2017 (Docket No. 333181), p 9, App Vol II, p 050a. Instead, the Court concluded that since the nature of plaintiffs' claim was a violation of the Due Process Clause of the Michigan Constitution, and because the fundamental requirement of due process is reasonable notice of proceedings and a meaningful opportunity to object and be heard, the wrong on which plaintiffs' claim was therefore based was the Agency's adjudication that they fraudulently obtained unemployment benefits without giving plaintiffs notice and a chance to be heard. *Id.* pp 9–10, App Vol II, pp 050a–051a (citations and quotations omitted).

The Court of Appeals expressly rejected plaintiffs' argument that their claim did not accrue until they suffered economic harm. *Bauserman*, unpub op at 9–10, App Vol II, pp 050a–051a. Citing this Court's decision in *Frank v Linkner*, 500 Mich 133 (2017), the Court of Appeals noted the difference between the occurrence of a wrong on which a claim is based—the accrual of that claim—and the resulting monetary damages or financial injury from the harm. *Id.*, citing *Frank*, 500 Mich at 149–156 (internal quotations and citations omitted). The Court concluded that plaintiffs here, like those in *Frank*, "erroneously focus on the potential consequence of a due process violation, the taking of their property, rather than the hallmark of a due process claim, the right to notice and an opportunity to he heard." *Id.* at 10, App Vol II, p 051a.

Thus, because each plaintiff failed to file a notice of intent to file their claim, or the claim itself, within six months of the happening of the event giving rise to their claim—the issuance of their fraud adjudications—the Court of Appeals concluded plaintiffs failed to comply with MCL 600.6431(3). *Bauserman*, unpub op at 10–11, App Vol II, pp 051a–052a.) The Court remanded the matter to the Court of Claims to grant the Agency's motion to dismiss. *Id.* at 11, App Vol II, p 052a.

This Court reverses the Court of Appeals, holding that a person cannot bring a due process claim unless and until they are deprived of property.

The plaintiffs sought leave to appeal the Court of Appeals' decision to this Court. In lieu of granting leave to appeal, the Court affirmed the Court of Appeals' decision in part, reversed it in part, and remanded the case for consideration of the

propriety of plaintiffs' constitutional tort claims. *Bauserman, et al v Michigan Unemployment Ins Agency*, 503 Mich 169 (2019).

The Court held that a procedural due process claim that seeks money damages accrues when the claimant is deprived of their life, liberty, or property. *Bauserman*, 503 Mich at 173. Stated another way, "a plaintiff incurs no harm under the Due Process Clause until and unless he or she incurs a deprivation of property." *Id*. at 186. And here, the Court held, that happened when the plaintiffs' tax refunds were first seized or when their wages were first garnished. *Id*. For Bauserman, that occurred on June 6, 2015; for Broe, that occurred in May 2015; and for Williams, that occurred on May 16, 2014. *Id*. at 192–193. Thus, the Court held that Bauserman and Broe complied with the requirements of MCL 600.6431(3) in bringing their claims. *Id*. at 193. Williams, however, failed to comply with MCL 600.6431(3), and the Court dismissed his claims. *Id*.

Further, this Court remanded the case to the Court of Appeals to consider whether "plaintiffs failed to raise cognizable constitutional tort claims." *Bauserman*, 503 Mich at 193 n 20.

The Court of Appeals concludes that plaintiffs have sufficiently pled a constitutional tort claim.

On remand, the Court of Appeals issued a decision on December 5, 2019, without any further briefing or argument from the parties. The Court of Appeals concluded that plaintiffs have sufficiently alleged a viable constitutional tort claim

against the Agency. *Bauserman, et al v Unemployment Ins Agency (On Remand)*, 330 Mich App 545 (2019).

The Court of Appeals noted that it had to accept plaintiffs' factual allegations as true and to construe them in plaintiffs' favor. *Bauserman (On Remand)*, 330 Mich App at 559 (citation omitted).) Thus, the Court held that the plaintiffs sufficiently alleged that the Agency, pursuant to a policy or custom, violated their due process rights as established in article 1, § 17 of Michigan's 1963 Constitution. *Id*. at 563–567. The Court of Appeals also held that, taking plaintiffs' allegations as true, it would be appropriate for a court to infer a money damages remedy for the alleged constitutional violation. *Id*. at 576. In reaching this conclusion, the Court of Appeals analyzed a series of factors first stated in a concurring opinion in *Smith v Department of Public Health*, 428 Mich 540 (1987), and more recently applied in *Mays v Governor*, 323 Mich App 1 (2019). *Id*. at 567–576. Judge Gadola issued a concurring opinion questioning the utility of judicially created money damages remedies and urging this Court to "address the continued vitality of *Smith*. . . ." *Bauserman, (On Remand)*, 330 Mich App at 583 (GADOLA, J., concurring).

STANDARD OF REVIEW

This Court reviews de novo a lower court's decision on a motion for summary disposition. *Winkler v Marist Fathers of Detroit, Inc.,* 500 Mich 327, 333 (2017). Courts deciding motions under MCR 2.116(C)(8) examine the legal sufficiency of the facts in the complaint and accept the well-pled allegations as true and grant such motions when the asserted claims are clearly unenforceable. *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159–160 (2019) (citations omitted).

ARGUMENT

I. This Court should address the continued vitality of judicially inferred claims for money damages under the Michigan Constitution.

An important question at issue in this case is whether it is ever appropriate for a court to unilaterally create a potentially sizeable damage remedy. This issue warrants serious consideration by this Court. See *Bauserman (On Remand)*, 330 Mich App at 577 (GADOLA, J., concurring) ("the Supreme Court should address more clearly under what circumstances, *if any*, a judicially-inferred damages remedy is appropriate for violations of the Due Process Clause of the Michigan Constitution.") (emphasis added).) Even the majority decision below recognized that this Court has not yet determined "whether a judicially inferred remedy for monetary damages is 'ever appropriate' under the Due Process Clause of the state constitution." *Bauserman (On Remand)*, 330 Mich App at 568 n 5 (citation omitted).

Last year, this Court addressed the issue of a judicially inferred money-damages remedy for alleged violations of Michigan's Due Process Clause in a

different context—whether plaintiffs pled a cognizable claim for the right to bodily integrity under the Due Process Clause. *Mays, et al v Governor, et al*, 506 Mich 157 (2020). There, three Justices of this Court opined that it could be proper for this Court to infer a damages remedy for a violation of the Constitution. Thus, this issue remains unsettled after the deadlock in *Mays*.

The Agency contends that this Court should decline to judicially create or infer a money-damages remedy for an alleged violation of plaintiffs' procedural due process rights under the Michigan Constitution. The federal caselaw underpinning Michigan's jurisprudence in this area is trending away (if not fully retreating) from judicially created remedies; opting instead to have legislative bodies address the issue. This Court should conclude that separation-of-powers principles require our Legislature to determine whether it is appropriate to impose damage remedies for an alleged violation of our Constitution by the State.

A. The U.S. Supreme Court has significantly undercut the authority relied on by two justices of this Court in *Smith*.

The starting point in this area in Michigan began with *Smith v Department of Public Health*, 428 Mich 540 (1987). A majority of the justices there agreed that claims for money damages could be appropriate in certain cases alleging violations of the state Constitution. *Id*. at 544. In separate opinions, the justices cited extensively to *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388 (1971), as the beginning point for analyzing potential claims for money damages for constitutional violations. *Bivens* was the starting point in this analysis because it

"broke new ground in inferring causes of action for damages for constitutional violations." *Mays*, 506 Mich at 253 n 72 (VIVIANO, J., concurring in part and dissenting in part). The Court of Appeals below also noted that "[c]onsitutional-tort claims originated in *Bivens*." *Bauserman (On Remand)*, 330 Mich App at 560.

Bivens recognized a right to bring claims for money damages against individual federal officials in federal court for violations of the federal constitution. 403 US at 395–396. But because *Bivens* actions can proceed only against *individuals*, *Bivens* is an odd case to rely on for support in inferring money damages against *state agencies*. Indeed, the U.S. Supreme Court has explained why *Bivens* actions are not appropriate against governmental entities, as opposed to government officials.

In *FDIC v Meyer*, 510 US 471 (1994), the U.S. Supreme Court declined to recognize a *Bivens* action against a federal agency for a deprivation of property without due process for two reasons. First, the Court held that such an expansion was not supported by the purpose of *Bivens*, which was "to deter *the officer*." 510 US at 485 (emphasis in original) (citation omitted). Thus, relying on *Bivens* to infer a remedy against the *State* would defeat the deterrence *Bivens* sought to achieve. As Justice Brickley noted in *Smith*, the logic of *Bivens* had never been extended to "allow the recovery of damages from *state agencies* for violations of a plaintiff's constitutional rights." *Smith*, 428 Mich at 628 (opinion by BRICKLEY, J., joined by RILEY, C.J.). And second, the U.S. Supreme Court held that such an expansion would improperly usurp Congressional power. *Id*. at 486.

Further, the U.S. Supreme Court has "never considered [a *Bivens* action] a proper vehicle for altering an entity's policy." *Correctional Servs Corp v Malesko*, 534 US 61, 74 (2001). That is why *Bivens* actions are generally not available against high-ranking officials, let alone the agency itself. See *Ziglar v Abbasi*, 137 S Ct 1843, 1854–1855 (2017).

Since *Bivens*, the U.S. Supreme Court has significantly slowed the pace in recognizing or creating causes of action for money damages for constitutional violations. In his concurring opinion below, Judge Gadola recognized that the Court "has steadily retreated" from *Bivens*. *Bauserman (On Remand)*, 330 Mich App at 581 (GADOLA, J., concurring). In fact, the Supreme Court has "adopted a far more cautious course before finding implied causes of action." *Ziglar*, 137 S Ct at 1855. Only three times has the Court recognized an implied money damages remedy arising under the Constitution: *Bivens*, *Davis v Passman*, 442 US 228 (1979), and *Carlson v Green*, 446 US 14 (1980). All three were decided before *Smith*. And since then, that Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Ziglar*, 137 S Ct at 1857, quoting *Malesko*, 534 US at 68. In fact, two current U.S. Supreme Court Justices have "called for *Bivens* to be overturned." *Mays*, 506 Mich at 258 n 84 (VIVIANO, J., concurring in part and dissenting in part), citing *Hernandez v Mesa*, 140 S Ct 735, 750 (2020) (THOMAS, J., concurring, joined by GORSUCH, J.).

In *Mays*, two Justices of this Court pushed-back on the contention that *Bivens* stands on shaky ground, stating that the Supreme Court reaffirmed it in

2017. *Mays*, 506 Mich at 215–217 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.), citing *Ziglar* 137 S Ct at 1856–1857. But the passage quoted by the Justices shows that any "continued force" of *Bivens* is applicable only in the "search-and-seizure context in which it arose," and that it should be retained in *that* "common and recurrent sphere of law enforcement." See *id*. at 4, quoting *Ziglar*, 137 S Ct at 1856–1857.

Plaintiffs have asserted that it is "irrelevant" how the Supreme Court has applied *Bivens*. (Resp to App for Lv, pp 38–41.) In that vein, some Justices of this Court have said the Court is not bound by the Supreme Court's post-*Bivens* jurisprudence. *Mays*, 506 Mich at 221 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.) ("the United States Supreme Court's *Bivens* jurisprudence [is of] limited value as we determine how to approach state constitutional torts."). The Agency respectfully disagrees.

As noted above, *Bivens* was the basis for this Court's opening of the door in *Smith* to the possibility of recognizing a constitutional tort action. And it must be remembered that Justice Boyle's concurrence in *Smith* was not based on an interpretation of our Constitution. Rather, it was based on federal (specifically, U.S. Supreme Court) caselaw. See *Smith*, 428 Mich at 642–652 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). Thus, the U.S. Supreme Court's analysis and limitation of *Bivens* over the last four decades should play a central role in this Court's analysis of the continued vitality of *Smith*.

While this Court does not necessarily "take [its] cue" from the Supreme Court when interpreting the Michigan Constitution, *Mays*, 506 Mich at 217 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.), this Court has nevertheless already noted "the textual similarities between the state and federal Due Process Clauses," and has applied U.S. Supreme Court caselaw in analyzing the accrual of plaintiffs' due process claim under the Michigan Constitution. See *Bauserman*, 503 Mich at 184–185 n 12. Thus, the Agency respectfully contends that this Court should recognize the applicability of U.S. Supreme Court caselaw limiting the judicial creation of causes of action for money damages for constitutional violations.

Plaintiffs have asserted that our courts have recognized or permitted *Bivens*-style "actions against the State of Michigan under the due process clause of the Michigan Constitution. . . ." (Resp to App for Lv, p 34.) But the cases plaintiffs cite do not support their assertion:

- *Neal v Department of Corrections*, 230 Mich App 202 (1998) and *Carlton v Department of Corrections*, 215 Mich App 490 (1996) did not involve constitutional tort claims seeking money damages.
- *Jones v Powell*, 462 Mich 329 (2000) and *Mays, et al v Governor, et al*, 323 Mich App 1 (2018) did not involve an alleged violation of procedural due process.
- *Reid v State of Michigan*, 239 Mich App 621 (2000) held that there was *not* a viable due process constitutional tort claim.
- And *Burdette v State of Michigan*, 166 Mich App 406 (1988) remanded a case for further consideration of a due process claim.

In short, this Court should no longer leave open the possibility of recognizing constitutional tort claims against state agencies seeking money damages for claims

of violations of procedural due process. The justices in *Smith* relied heavily on *Bivens* to open the door to such claims, but the U.S. Supreme Court has engaged in a multi-decade retreat from *Bivens*. Indeed, the outcome in *Bivens* "might have been different if [it] were decided today." *Ziglar*, 137 S Ct at 1856. The same should be said for *Smith*.

But even if the U.S. Supreme Court's refusal to expand *Bivens* in the way the Court of Appeals did in this case is not enough reason for this Court to reverse the Court of Appeals, respect for separation-of-powers principles also warrants reversing the Court of Appeals.

B. A court cannot unilaterally create a damages remedy against a state agency without violating the separation of powers.

Our Constitution provides that the "powers of government are divided into three branches," and no "person exercising powers of one branch shall exercise powers properly belonging to another branch." Const 1963, art 3, § 2. So, which branch should establish the limitations on the liability to be imposed on the State: the judicial branch or the legislative branch?

The general rule, of course, is that governmental agencies engaged in governmental functions are immune from tort liability. *Kline v Dep't of Transp*, 291 Mich App 651, 653 (2011). But the Legislature has the authority to decide whether the state can be sued, and if so, what the limitations on the state's liability should be. *McCahan v Brennan*, 492 Mich 730, 736 (2012). And this Court has limited (if not eliminated) the judiciary's ability to alter those conditions. *Id.* at 732. The

answer should not be any different for claims alleging constitutional torts. If such a cause of action should exist under Michigan's Constitution, it is the Legislature that should create it and waive the government's immunity.

This issue was contested in *Bivens* and *Smith*. In *Bivens*, three dissenting justices said that Congress should create a damages remedy. 403 US at 411–412, 427–430, 430 (BURGER, C.J., BLACK, J., and BLACKMUN, J.). And in *Smith*, even though a majority of the justices agreed that claims for money damages could be appropriate in certain cases alleging violations of the state constitution, they disagreed on whether courts or the legislature should create that remedy. Justice Brickley and Chief Justice Riley thought it best to "defer to the Legislature's unique capacity to weigh the competing policy considerations implicated in creating such a damages remedy." *Smith*, 428 Mich at 632 (opinion by BRICKLEY, J., joined by RILEY, C.J.). But Justices Boyle and Cavanaugh took on that task as one for the judiciary. Their opinion laid out a case for why it was good policy for the State of Michigan to recognize claims for money damages against the state for alleged violations of constitutional rights. 428 Mich at 642–644 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). Indeed, Justice Boyle's concurrence in *Smith* noted the public policy concerns and issues at the center of inferring damage remedies. *Id.* at 643, 647–648. But respectfully, and as recently reiterated by the U.S. Supreme Court, those policy determinations are best left to legislative bodies.

In *Ziglar*, the U.S. Supreme Court said that whether "to create and enforce a cause of action for damages . . . to remedy a constitutional violation" requires the consideration of "a number of economic and governmental concerns." 137 S Ct at 1856. This Court has noted that determining if, when, and how to open the public coffers to tort claimants present "problems . . . of immense difficulty." *Ross v Consumers Power Co*, 420 Mich 567, 618 (1984) (citation omitted). And therefore, "separation-of-powers principles are or should be central to the analysis." *Ziglar*, 137 S Ct at 1857. And in most cases, the U.S. Supreme Court has held that Congress should decide whether to create damages remedies. *Id.*; see also *Carlson*, 446 US at 36 (REHNQUIST J, dissenting) ("Because the judgments that must be made here involve many 'competing policies, goals, and priorities' that are not well suited for evaluation by the Judicial Branch, in my view '[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States.'" (citation omitted)).

Recall, too, that in *Meyer*, the U.S. Supreme Court declined to extend *Bivens* to encompass a procedural due process claim because, in part, extending *Bivens* to allow actions for money damages against federal agencies would "create[e] a potentially enormous financial burden for the Federal Government." 510 US at 486. The Court concluded it was best to "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.* This is powerful support for the claim that such an action—a procedural due process claim—should not lie against the state agency defendant here.

It also helps to consider the context in which this Court decided *Smith*. At that time, this Court took an expansive approach that vaguely allowed courts to "imply" rights of action from statutes where the existing remedy was "plainly inadequate." *Myers v City of Portage*, 304 Mich App 637, 643 n 12 (2014) (describing the approach as "freewheeling"), discussing *Pompey v Gen Motors Corp*, 385 Mich 537, 553 (1971), and *Gardner v Wood*, 429 Mich 290, 302 (1987). Likewise, the U.S. Supreme Court noted that it decided *Bivens* during a time in which that Court followed a "different approach," when the Court thought it proper to imply causes of action not explicitly found in the text of the statute in order to effectuate what the Court believed the statute's purpose to be. *Ziglar*, 137 S Ct at 1855 ("In the mid–20th century, the Court followed a *different approach* to recognizing implied causes of action than it follows now.") (emphasis added; citations omitted).

Roughly a year ago, the U.S. Supreme Court again demonstrated its retreat from *Bivens*. The Court noted the "tension" between courts implying a cause of action for money damages for an alleged constitutional violation and separation-of-powers principles. *Hernandez v Mesa*, 140 S Ct 735, 741 (2020). In such cases, and in recognition of Congress's role, the U.S. Supreme Court has shown reluctance "to create new causes of action." *Id.* at 742. The U.S. Supreme Court has identified separation-of-powers principles are "central to [the] analysis" of whether to extend *Bivens*. *Id.* at 743, quoting *Ziglar*, 137 S Ct at 1857. Indeed, "respect for the

separation of powers" appears to be the paramount concern for the U.S. Supreme Court in its unwillingness to extend *Bivens*. *Id.* at 749–750.

In *Mays*, three Justices of this Court reiterated that it is this Court's responsibility to interpret and enforce our Constitution, and that the Court enforces the Constitution by fashioning remedies. See *Mays*, 506 Mich at 215, 222–224 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.); 506 Mich at 211 (BERNSTEIN, J., concurring). Thus, they ask why establishing a money-damages remedy against the State for a constitutional tort should fall to our Legislature. *Mays*, 506 Mich at 222–224 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.); 506 Mich at 211 (BERNSTEIN, J., concurring). In response, the Agency does not dispute that a fundamental function of this Court is to interpret our Constitution.

But inferring or creating a money-damages remedy for an alleged constitutional violation that does not appear in the Constitution has the danger both of removing the Court from its important role of interpreting existing law and of placing it in the role of policymaker in creating new remedies. Again, as Justice Boyle noted, there are significant public policy concerns surrounding the establishment of a money-damages remedy against the state. *Smith*, 428 Mich at 641–643 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). Courts inferring causes of action and remedies from the Constitution poses a significant separation-of -powers problem because the Legislature cannot respond to those new claims or remedies and opine on the public-policy utility of them. And, judicial inference or judicial creation is not the *only* way a remedy for a

constitutional violation can be fashioned. The people themselves have done that (see Const 1963, art 11, § 5, ¶ 12), and they have directed the Legislature to do so (see Const 1963, art 1, § 2).

Also in *Mays*, two Justices said that this Court had to chart its own path in this constitutional tort jurisprudence because states must be free to "function as laboratories of experiments." *Mays*, 506 Mich at 219 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.), quoting *New State Ice Co v Liebmann*, 285 US 262, 310–311 (1932) (BRANDEIS, J., dissenting, joined by STONE, J.).) But *Liebmann* supports the Agency's contention that the legislative branch should determine, as a matter of public policy, whether to recognize a constitutional tort action against the State for money damages. In *Liebmann*, the Court was analyzing a state statue enacted by Oklahoma's legislative branch. Thus, Justice Brandeis spoke of allowing *citizens* to choose to "serve as a laboratory" through the policy choices of the elected representatives; not of allowing courts to engage in that experimentation. *Liebmann*, 285 US at 311.

If left to stand, the Court of Appeals' decision would allow for the violation of the separation-of-powers doctrine by permitting courts to authorize sizeable awards of money damages without legislative authorization. This Court should therefore grant leave to appeal, reverse the Court of Appeals, and dismiss plaintiffs' constitutional tort claim.

II. Assuming *Smith's* continued vitality, the Court of Appeals clearly erred in applying it in this case.

Plaintiffs sued the Agency for money damages for allegedly violating their due process rights under the Michigan Constitution. But the Agency is immune from tort liability under MCL 691.1407(1). This immunity is a "characteristic of government," so plaintiffs must plead in avoidance of that immunity for their case to proceed. *Mack v City of Detroit*, 467 Mich 186, 198 (2002).

Plaintiffs rely on an exception to that immunity based on the Michigan Constitution. They allege that they can bring a property damage claim against the Agency for the violation of their procedural due process rights established in Article 1, §17 of Michigan's 1963 Constitution. This Court recognized the possibility of this type of claim against state institutions under certain circumstances. *Smith*, 428 Mich at 544 (memorandum opinion of the Court). But those circumstances do not exist here. It is the policy of the Agency to provide notice and an opportunity to be heard. Any failure to provide that opportunity would not be in furtherance of the Agency's policy, but instead in violation of it. And the Agency contends that it did provide such an opportunity to the plaintiffs in this case. Thus, because plaintiffs failed to plead a claim in avoidance of the Agency's immunity, the Court of Appeals erred by allowing plaintiffs' suit to continue.

A. Plaintiffs cannot identify a policy or custom that directly led to a violation of their procedural due process rights.

In *Smith*, this Court indicated that "governmental immunity is not available in a state court action" where "it is alleged that the state, by virtue of custom or

policy, has violated a right conferred by the Michigan Constitution." *Smith*, 428 Mich at 544 (memorandum opinion of the Court). Last year, three Justices of this Court agreed. *Mays*, 506 Mich at 188 (opinion by BERNSTEIN, J, joined by MCCORMACK, C.J. and CAVANAGH, J.). Following *Smith*, our Court of Appeals said that "[t]he policy or custom must be the moving force behind the constitutional violation in order to establish liability." *Carlton v Dep't of Corrections*, 215 Mich App 490, 505 (1996), citing *Monell v New York City Dep't of Social Servs*, 436 US 658, 694 (1978). This Court has held that a plaintiff is required to do two things: (1) "identify and connect a policy or custom" to the governmental entity; and (2) show facts "demonstrating that implementation or execution of that policy or custom caused the alleged constitutional violation." *Johnson v Vanderkooi*, 502 Mich 751, 763 (2018). Plaintiffs cannot satisfy either requirement.

1. A policy or custom did not mandate the alleged violation of plaintiffs' procedural due process rights.

The standard articulated in *Monell*, which is used to determine when individuals can sue municipalities under 42 USC 1983, has also been used to determine whether the State's policy or custom caused the deprivation of the constitutional right at issue. *Bauserman (On Remand)*, 330 Mich App at 563, citing *Mays*, 323 Mich App at 62, and *Johnson*, 502 Mich at 762. The Court of Appeals below did not follow the *Monell* standard.

Under *Monell*, a plaintiff must "show that the [institutional] action was *taken with the requisite degree of culpability* and must demonstrate *a direct causal link*

between the [institutional] action and the deprivation of federal rights." *Bd of Co Comm'rs of Bryan Co, Ok v Brown*, 520 US 397, 404 (1997) (emphasis added). The U.S. Supreme Court has limited liability to cases where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v Cincinnati*, 475 US 469, 483 (1986).

A majority of this Court interpreted *Monell* and *Pembaur* to mean that "a policy or custom that authorizes employees to perform their duties in a particular manner represents a deliberate decision of the [State] and an employee's performance of his or her duties in the manner authorized may be considered acts of the [State]." *Johnson*, 502 Mich at 767. But the concurring justices in *Johnson* recognized that identifying conduct that is properly attributable to a governmental entity (as opposed to conduct attributable to an employee) is "a hard conceptual problem" because governmental entities act only through people. *Johnson*, 502 Mich at 784 (WILDER, J., concurring, joined by MARKMAN, C.J. and ZAHRA, J.).

The Court of Appeals cited *Pembaur* to support its conclusion that plaintiffs had sufficiently alleged that an official policy or custom led to a violation of their procedural due process rights. *Bauserman (On Remand)*, 330 Mich App at 564–565. But it did not perform the required analysis. That is, the Court of Appeals did not identify any range of options of various alternatives that the Agency considered. Rather, the Court of Appeals focused on plaintiffs' allegations and concluded that

they must have occurred pursuant to a policy or custom. *Id*. at 565–567. That was clear error.

Plaintiffs do not identify a "policy or custom" that "mandated" that their taxes be intercepted, or wages garnished without adequate notice and an opportunity for a hearing. There is no written policy or official directive from the Agency directing as much. In fact, the MES Act expressly allows unemployment claimants the opportunity to contest Agency adjudications, including the right to an evidentiary hearing. MCL 421.32a, 421.33. Plaintiffs even acknowledge this. (Am Compl, pp 8–9, App Vol I, pp 015a–016a.) Nor do plaintiffs allege that the official policy of the Agency is that notice and an opportunity to be heard are unnecessary before it can garnish wages or intercept tax refunds. The Court of Appeals even noted that the Agency acknowledged that it could not deprive plaintiffs of their property without due process of law. *Bauserman (On Remand)*, 330 Mich App at 563 n 4.

Plaintiffs also fail to allege when the policy and custom forming the basis of their constitutional tort claim was adopted, who adopted it, whether and how it was communicated to Agency employees, etc. They allege that MiDAS exists and that deprived them of their due process rights. But a "bald allegation" that a plaintiff was injured "pursuant" to a custom or policy falls far short of satisfying the *Monell* standard. *Polk Co v Dodson*, 454 US 312, 326 (1981). This is especially true when a plaintiff, like those here, has the burden of pleading "*facts* in avoidance of immunity." *Mack*, 467 Mich at 199 (citation omitted, emphasis added).

The Agency therefore retains its immunity because plaintiffs do not plead *facts* showing that the *Agency* "mandated" that plaintiffs receive no notice of Agency adjudications or an opportunity to protest them before their wages were ultimately garnished or their tax refunds ultimately intercepted. *Smith*, 428 Mich at 642 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.).

But even if the plaintiffs had satisfied their burden under *Monell* and *Pembaur* of showing a policy or custom, they *still* must plead facts showing that the policy or custom "caus[ed]" their constitutional injury. See *Johnson*, 502 Mich at 780, citing *Brown*, 520 US at 404–405. Plaintiffs failed to do so.

2. Even if plaintiffs did identify a policy or custom, they fail to show that the policy or custom deprived them of their procedural due process rights.

As noted above, a plaintiff "must show that the [institutional] action was *taken with the requisite degree of culpability* and must demonstrate *a direct causal link* between the [institutional] action and the deprivation of federal rights." *Brown*, 520 US at 404 (emphasis added). "Obviously, if one retreats far enough from a constitutional violation some [institutional] 'policy' can be identified behind almost any . . . harm inflicted by [an institution's] official." *City of Canton, Ohio v Harris*, 489 US 378, 390, n 9 (1989) (citation omitted). But as this Court put it, "the policy or custom must be the 'moving force' behind the alleged constitutional violation. *Johnson*, 502 Mich at 763 (citation omitted). Plaintiffs do not make this showing.

Plaintiffs allege that the Agency used MiDAS to detect and adjudicate possible instances of the fraudulent receipt of unemployment benefits, which they say violates their due process rights because it determines a claimant's guilt without first giving them notice of why or an opportunity to be heard in advance of the Agency assessing fraud penalties. (Am Compl, pp 2, 12–13, 32–33, App Vol I, pp 009a, 019a–020a, 039a–040a.) For its part, the Court of Appeals held that plaintiffs demonstrated that an Agency policy or custom caused a violation of their procedural due process rights through the following allegations:

- Using MiDAS to disqualify plaintiffs from receiving unemployment benefits;
- Using MiDAS to accuse plaintiffs of fraudulently receiving unemployment benefits; and
- Using MiDAS to unlawfully impose fraud penalties and interest.

Bauserman (On Remand), 330 Mich App at 565–566, 575–576.

But this analysis focuses on events other than the alleged constitutional violation previously identified by this Court. This Court held that plaintiffs' claim is for a violation of procedural due process, *Bauserman*, 503 Mich at 173—that is, a deprivation of their property without any reasonable notice and an opportunity for a hearing, *id*. at 185. The Court also held that "a plaintiff incurs no harm under the Due Process Clause until or unless he or she incurs a deprivation of property." *Bauserman*, 503 Mich at 186. Thus, for these plaintiffs, the "actionable harm" was the deprivation of their property, and their claim did not accrue until they were deprived of their property by a tax intercept or wage garnishment. *Id*. at 185–186. For procedural due process purposes then, plaintiffs "incurred no harm before [the]

deprivation." *Id.* at 190. Therefore, to satisfy the thresholds of *Monell* and *Johnson*, plaintiffs must show a direct causal link between the execution of their identified custom or policy and a deprivation of their property without notice and an opportunity to be heard. As explained below, the gulf between this alleged constitutional violation and the policy or custom identified by plaintiffs is too wide to satisfy the requirements of *Monell* and *Johnson*.

The alleged policy or custom of identifying possible instances of fraud or initially adjudicating fraud and assessing penalties, and sending plaintiffs notices to that effect, did not cause the deprivation of plaintiffs' property. That is, even accepting plaintiffs' allegations about MiDAS as true—that it issued notices stating plaintiffs were disqualified from receiving benefits and had engaged in fraud, and that it issued notices stating that the plaintiffs owed the Agency money (see Am Compl, pp 12–13, App Vol I, pp 019a–020a)—that would not *cause* the harm giving rise to their procedural due process claim. This Court likened these "initial redetermination notices" to "an erroneously high bill from the government," because they "merely apprised plaintiffs of the amount owed to the Agency." *Bauserman*, 503 Mich at 190–191 (citation omitted). And as this Court recognized, the Sixth Circuit has held that a person "does not have a property interest in not being billed," and that an improper bill does not in and of itself deprive a person of a protected property interest. *Id.* at 191, quoting *Jones v Clark Co*, 666 F Appx 483, 486 (CA 6, 20160). Thus, the policy and custom identified by plaintiffs that resulted in the issuance of initial notices stating that they were disqualified from benefits,

that they had fraudulently obtained those benefits, and that they had to repay those benefits and pay fraud penalties, is not sufficiently linked to the actionable harm of a procedural due process violation.

There are simply too many variables and possible intervening events between the initial notices and the potential deprivation of plaintiffs' property much later in the process. After all, plaintiffs do not allege that those initial notices cut off any benefits or deprived them of any other property interest. Rather, these notices show that plaintiffs already received the benefits at issue and they explain that the Agency is seeking to recover the benefits that were already paid to the plaintiffs. (Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 16, App Vol I, pp 064a–066a; Agency Supplemental Br in Supp of Mot to Dismiss, filed in the Court of Claims on November 9, 2015, Ex 9, App Vol II, pp 010a–012a.) And a review of the contested notices shows that they are not self-executing. Rather, they indicate that future collection action *could* take place if the claimant took no further action. (See Am Compl, pp 13 (¶ 52), 20 (¶ 94), App Vol I, pp 020a, 027a; Agency Br in Supp of Mot to Dismiss, filed in Court of Claims on October 5, 2015, Ex 14, App Vol I, pp 055a–059a; Ex 15, App Vol I, pp 060a–063a; Ex 16, App Vol I, p 064a–066a; Ex 21, App Vol I, p 067a–068a; Ex 22, App Vol I, pp 069a–070a; Ex 24, App Vol I, pp 071a–080a; and Agency Supplemental Br in Supp of Mot to Dismiss, filed in the Court of Claims on November 9, 2015, Ex 7, App Vol II, pp 002a–005a; Ex 8, App Vol II, pp 006a–009a; Ex 9, App Vol II, p 010a–012a; Ex 15, App Vol II, 013a–028a; Ex 16, App Vol II, pp 029a–030a.)

Thus, there is an insufficient link between the initial notices issued to plaintiffs and the actionable harm of property deprivation that could happen later, if at all. As this Court previously noted in this case, "the state could provide additional process before the actual deprivation or elect not to deprive that person of property at all, in which case no harm would occur." *Bauserman*, 503 Mich at 190. Indeed, claimants do receive several levels of additional process before a property deprivation occurs. The Agency cannot collect money from a person until and unless an Agency adjudication becomes final. See MCL 421.62(a). An Agency adjudication does not become final until a claimant's protest deadline has passed without the claimant filing a protest. See MCL 421.32a(1), 421.62(c). If the claimant does timely protest, the Agency can review the matter and issue a redetermination or transfer the matter to an independent administrative law judge for a de novo evidentiary hearing. MCL 421.32a(1), 421.33. If still aggrieved, the claimant can appeal the ALJ's decision to an independent appellate commission and then into the Michigan courts for appellate review. MCL 421.34, 421.38.

Syllogistically speaking, if a claimant cannot be denied due process until the Agency collects money from them, and the Agency cannot collect money from a claimant until an adjudication becomes final (which can happen only if a claimant does not appeal the adjudication, or if one or more appellate bodies affirms the adjudication), then it cannot be said that using MiDAS to detect and preliminarily decide possible instances of fraud caused a violation of plaintiffs' procedural due

process rights. Thus, plaintiffs have failed to clearly connect the identified custom or policy to their alleged constitutional violation.

Plaintiffs also allege that the Agency violated their due process rights by sending notices to plaintiffs' online account even after those claimants are no longer receiving unemployment benefits and therefore have no reason to check those accounts. (Am Compl, pp 12, 18, 25; App Vol I, pp 019a, 025a, 032a.) But the Agency sends notifications to claimants through this online account only when a claimant elects to receive all communications through that account. (See Agency Br in Supp of Motion to Dismiss, Ex 2, filed in Court of Claims on October 5, 2015, App Vol I, p 049a; and Agency Supplemental Br in Supp of Motion to Dismiss, Ex 3, filed in Court of Claims on November 9, 2015, App Vol II, p 001a.) Thus, it was not an Agency policy or custom that caused plaintiffs not to receive the initial notices, as they allege; rather, it was the plaintiffs' personal choice to have the notices sent to their online account.

Finally, plaintiffs cite to two Michigan Auditor General reports from 2016 to support their argument that the Agency's use of MiDAS to detect and adjudicate fraud caused the alleged deprivation of their procedural due process rights. (See Resp to App for Lv, p 15, 17–18.) But these reports fall short of offering the support plaintiffs want them to.

In February 2016, the Auditor General issued a performance audit report on MiDAS. *Office of the Auditor General*, *Performance Audit Report*, Report No. 641-0593-15, issued February 2016 (Agency Application for Lv to Appeal, Attachment

A).[1] Plaintiffs state that this report identified "critical failures," which support their assertion that MiDAS resulted in the deprivation of their property without due process. (Resp to App for Lv, pp 17–18.) The report does not, however, identify any "critical" failure relating to MiDAS's role in processing unemployment claims. In fact, the report recommended that the Agency *expand* its use of MiDAS to, among other things: identify claimants who have not submitted evidence of their efforts to find work; identify potential improper benefit payments for further review; and improve the way the Agency transmitted case information to the Michigan Administrative Hearing System (MAHS) for the scheduling of administrative hearings. (Agency Application for Lv to Appeal, Attachment A, pp 17–26.)

In April 2016, the Auditor General issued a performance audit report on the Agency's claimant services. (Resp to App for Lv, Exhibit 2.) Plaintiffs assert that this report shows that the Agency's "policies and customs result[ed] in the deprivation of [plaintiffs'] property without due process. (Resp to App for Lv, pp 17–19.) Once again, however, the report does not make that conclusion. The report noted that the Agency's efforts to obtain information from claimants met state and federal requirements, but concluded that the Agency could improve its efforts to contact claimants, consider certain information it receives, and explain more of the

[1] Plaintiffs attach parts of this report to their response to the application for leave to appeal. The entire report is publicly available at https://audgen.michigan.gov/archive/archive-2016/. The Agency included the entire report as an attachment to its application for leave to appeal for ease of reference.

reasons for the Agency's decisions, so as to "better ensure[]" the claimants receive "adequate due process." (Resp to App for Lv, Exhibit 2, pp 10–11.)

Read together, these reports show how unemployment claimants receive due process during the processing and adjudication of their claims. They describe the many levels of decisions and protests or appeals that are available, including the right to an evidentiary hearing. Indeed, the February 2016 report describes an *increase* in the number of appeals that were requested and referred to MAHS for a hearing. (Agency Application for Lv to Appeal, Attachment A, pp 22–23.) Thus, plaintiffs are in the awkward position of pointing to *more* hearings as being reflective of *less* or *no* due process.

In sum, the Agency asks this Court to grant leave and dismiss plaintiffs' constitutional tort claim because they have failed to meet the threshold required showing that a policy or custom of the Agency caused their constitutional rights to be violated. But even if this Court concludes that plaintiffs made this threshold showing, the Court of Appeals still erred in applying the *Smith* factors.

B. The factors suggested by Justice Boyle in *Smith* do not support recognizing a judicially inferred money damages remedy in this case.

The Court of Appeals said that the multi-factor analysis suggested by Justice Boyle in *Smith* supported "recognizing a judicially inferred damage remedy in this case." *Bauserman (On Remand)*, 330 Mich App at 576. Indeed, Justice Boyle's opinion identified different "steps" and "factors" that two justices thought "may be helpful" in analyzing the issue. *Smith*, 428 Mich at 648 (BOYLE, J., concurring in

part and dissenting in part, joined by CAVANAGH, J.). The first step was to establish a violation of the Constitution, and the second step was to examine the text, history, and interpretations of the specific provision(s) at issue to determine whether judicially inferring a damages remedy was appropriate. *Id*. at 648–650. Justice Boyle also identified "various other factors" that could "militate *against* a judicially inferred damages remedy for violation of a specific constitutional provision: (1) the legislature's special authority or role in the issue; (2) the specificity of the constitutional protection at issue; and (3) the availability of other remedies. *Id*. at 648–652 (emphasis added).

In *Mays*, the Court of Appeals added a catchall factor: "'various other factors' militating *for or against* a judicially inferred damage remedy." *Mays*, 323 Mich App at 66, citing *Smith*, 428 Mich App at 648–652 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.) (emphasis added). But the *Mays* Court of Appeals' majority's reference to *Smith* to support its catchall factor is not supported by the text of *Smith*.

Either way, these steps and factors do not support inferring a damages remedy in this case.

1. The lack of specificity as to what constitutes due process in a given case weighs against inferring a money damages remedy.

In analyzing "the clarity of the constitutional violation" factor, the Court of Appeals simply quoted article 1, § 17 of Michigan's 1963 Constitution and this Court's summary of the "thrust of plaintiffs' allegations," and concluded that the

factor weighed "in favor of judicially inferring a remedy for monetary damages." *Bauserman (On Remand)*, 330 Mich App at 567–568. But the *general* requirements of the due process clause are not in dispute. *Id*. at 562 n 3 ("The parties do not dispute that Const 1963, art 1, § 17 protects plaintiffs' right to not be 'deprived of . . . property[ ] without due process of law.'") The *specific* requirements of what the due process clause requires in a given case are very fact dependent.

Procedural due process is a flexible concept. *In re Brock*, 442 Mich 101, 111 (1993), quoting *Matthews v Eldridge*, 424 US 319, 332, 334 (1976). Determining whether the requirements of due process are met in a given case is a fact-specific inquiry. Thus, as a general rule, courts should not infer a damages remedy in due process claims when such claims are so fact specific.

Even Justice Boyle recognized the difficulties in determining what constitutes a due process violation. *Smith*, 428 Mich at 649, 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). And, neither this Court nor the U.S. Supreme Court has held that a judicially inferred money damages remedy is appropriate for a procedural due process claim. In fact, the U.S. Supreme Court declined to do so. See *Meyer*, 510 US 471 (1994). It is hard to see how this Court can allow a procedural due process claim to move forward as taken from federal precedent when the Supreme Court expressly refused to extend that seminal case—*Bivens*—to such a claim in federal court. The Court of Appeals nevertheless summarily concluded that the "due process protections at issue in this

case are clear and definitive enough that this factor weighs in favor of inferring a judicial remedy." *Bauserman (On Remand)*, 330 Mich App at 568.

2. The text of the Due Process Clause does not weigh in favor of inferring a money damages remedy.

Nothing in the text of article 1, § 17 of the Michigan Constitution supports the imposition of a judicially inferred money damages remedy. In concluding the opposite, the majority below relied on language that appears in the Equal Protection Clause of the Constitution. That provision says that "[t]he Legislature shall implement this section by appropriate legislation." Const 1963, art 1, § 2.

Because similar language is not present in article 1, § 17, the majority concluded it was proper for a court to infer a money damages remedy. *Bauserman (On Remand)*, 330 Mich App at 568–570. But Judge Gadola rightly points out that the absence of such language in article 1, § 17 is not necessarily "an invitation to the judiciary to infer such a remedy where none previously existed." *Id.* at 583 n 4 (GADOLA, J., concurring). Rather, it could mean that the drafters intended for the Legislature to create a damages remedy only for the equal protection provision in article 1, § 2. *Id.* In *Mays*, Justice Viviano noted that this Court and the Court of Appeals have declined to recognize an implied cause of action for money damages for that provision based on that language. *Mays*, 506 Mich at 248 n 57 (VIVIANO, J., concurring in part and dissenting in part.)

The lack of an explicit bar to inferring a damage remedy cannot be the same as an invitation to do so—especially where the people have expressly provided for

causes of actions and remedies for violations of other constitutional provisions. See Const 1963, art 11, § 5 (establishing the classified civil service) ("Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.") Thus, the people have shown their ability to authorize private causes of action for constitutional violations.

3. There are other remedies available to meaningfully address injuries resulting from a denial of due process.

In *Smith*, Justices Boyle and Cavanaugh said they might recognize a money damages remedy for a violation of the state constitution where there would be no other or no alternative remedy available. *Smith*, 428 Mich at 647, 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). They were less likely to recognize a damage remedy "[w]here a statute provides a remedy." *Id.* This Court later described *Smith* as recognizing only "a narrow remedy against the state on the basis of the unavailability of any other remedy." *Jones v Powell*, 462 Mich 329, 337 (2000). But in *Mays*, three Justices of this Court seemed to change this factor in two ways.

First, they changed the focus from the availability of "any other remedy" or "any alternative remedy" to the availability to pursue the same remedy somewhere else. *Mays*, 506 Mich at 197 (opinion by BERNSTEIN, J, joined by MCCORMACK, C.J. and CAVANAGH, J.) (stating that a court "must determine whether plaintiffs have any available alternative remedies *for their constitutional-tort claim against these*

specific defendants."). And the Justices concluded that the plaintiffs in *Mays* could not bring their state constitutional tort claim in federal court because of 11th Amendment immunity and the fact that the state is not a "person" under 42 USC 1983. *Id.* at 198; *Mays*, 506 Mich at 220–221 (MCCORMACK, C.J., concurring, joined by CAVANAGH, J.). This strays too far from Justice Boyle's concurrence in *Smith*, which looked at the possibility of a money damages claim for a constitutional tort to be a claim of last resort that could be recognized when a plaintiff lacked "any other remedy" or "any alternative remedy" *Smith*, 428 Mich at 647, 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). Justice Boyle quoted Justice Harlan's concurrence in *Bivens* where he said for those plaintiffs it was "damages or nothing." *Id.* at 647, quoting *Bivens*, 403 US at 410 (HARLAN, J. concurring).

The three Justices in *Mays* further expanded on this factor by saying the *availability* of alternative remedies (e.g., seeking claims in federal court) is not enough to foreclose a judicially inferred money-damages remedy. Thus, for them the question appears to be whether plaintiffs will be *successful* in obtaining relief on those claims. *Mays*, 506 Mich at 197 n 14 (opinion by BERNSTEIN, J, joined by MCCORMACK, C.J. and CAVANAGH, J.). The Justices offered no support for the proposition that a remedy is "available" to a party only if the party is ultimately successful in obtaining the remedy.

For its part, the Court of Appeals below also changed the question under this factor to "whether 'a judicially imposed damage remedy for the alleged

constitutional violation is the only available avenue for obtaining *monetary* relief'." *Bauserman (On Remand)*, 330 Mich App at 572, quoting *Mays*, 323 Mich App at 67 (emphasis in *Bauserman*)). But that assumes that plaintiffs are entitled to that form of relief. As already discussed, neither this Court nor the U.S. Supreme Court has held that. In fact, the U.S. Supreme Court held the opposite in a similar case.

In *Schweiker v Chilicky*, 487 US 412 (1988), the Court held that relief in the form of money damages was not available in an action against government officials for allegedly violating claimants due process rights in denying them social security disability benefits. The statutory adjudication and review system in *Schweiker* was substantially similar to the MES Act: an agency made an initial eligibility determination pursuant to codified standards; the claimant could then ask the agency to review that initial decision; if the claimant was still dissatisfied, they could ask for a hearing before an ALJ; they could then appeal the ALJ's decision to an administrative appellate body; and finally, they could "seek judicial review, including review of constitutional issues." *Schweiker*, 487 US at 424. And, like the MES Act, the federal statute in *Schweiker* did not allow for money damages. *Id.* In declining to create a *Bivens*-style damages remedy, the Court held that Congress "provided what it considere[d] adequate remedial mechanisms for constitutional violations that may occur in the course of [the] administration [of the government program]." *Id.* at 423–424. The Court expressly rejected the conclusion (like the one reached by the Court of Appeals in this case) that "the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory

scheme impl[ies] that the statute has provided 'no remedy' for the constitutional wrong at issue." *Id*. at 427–428 (emphasis in original).

In this same way, this Court should view the Legislature's provision in the MES Act of a remedy for addressing any constitutional violations that might occur in the administration of the unemployment insurance program. The fact that the Legislature chose not to provide for a money damages remedy does not mean that there is *no* remedy for addressing constitutional claims. Allowing for such claims to be addressed and adjudicated on appeal is the "special role" of a legislature that was a specific factor "militating against a judicially inferred damage remedy" noted by Justice Boyle in *Smith*. See 428 Mich at 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.).

Plaintiffs have several other remedies available to them for the injuries they allege, which weighs against inferring a money damages remedy in this case.

As an initial point, state law gives claimants the ability to contest issues relating to their unemployment claims, which would allow for a judicial determination on whether they are eligible and qualified for benefits, liable for fraud penalties, etc. See MCL 421.32a, 421.33, 421.34, and 421.38. If a claimant is successful in challenging an Agency adjudication, they could also get back any money collected by the Agency pursuant to that adjudication. This would result in the return of the property a claimant might allege they were deprived of without due process. And as this Court has already found, plaintiffs have received that precise form of relief. *Bauserman*, 503 Mich at 175–176. The Court of Appeals held

that the MES Act does not provide a "suitable avenue" for plaintiffs to "mount[] a direct and large-scale challenge to the Agency's" alleged violation of their due process rights. *Bauserman (On Remand)*, 330 Mich App at 572–573.

But this conclusion does not adequately consider the fact that a claimant can appeal an Agency adjudication to the appellate courts of this state and make a host of constitutional arguments. MCL 421.38. An appellate court could conclude that the Agency violated a claimant's due process rights in a given case and could grant that claimant various forms of relief under the MES Act. Thus, it appears the Court of Appeals is conflating the form of the action available (class action versus administrative appeal) with the form of relief available. That is the wrong analysis.

Plaintiffs claim the *only* way they can challenge the constitutionally of the Agency's practices is through a constitutional tort claim. (Resp to App for Lv, pp 26–31.) Plaintiffs' main support for their assertion is that neither the Agency nor the administrative tribunals can decide constitutional issues. (*Id*. at 27–30.) While true, that is not the end of the story.

On appeal to appellate courts, in addition to correcting an improper denial of benefits, claimants may make broad arguments attacking the constitutionality of Agency practices. This is the same as the "challenge [to] the Agency's systematic and concerted deprivation of their due process rights promulgated by the Agency's implementation of the MiDAS system" or "direct and large scale challenge to the Agency's administrative process" that the Court of Appeals held could only be pursued in a constitutional tort claim for money damages. *Bauserman (On*

Remand), 330 Mich App at 572–573. Thus, a constitutional tort claim is not the *only* way to challenge the Agency's practices on constitutional grounds.

Furthermore, a claimant could also pursue claims for money damages against policymaking individuals for violating their due process rights in federal court. Congress has expressly provided for a cause of action for a federal constitutional violation under 42 USC 1983. In fact, a putative class action claim brought by several aggrieved claimants on that very claim, *Cahoo, et al v SAS Institute, Inc., et al*, Case No. 17-cv-10657, is currently pending in the U.S. District Court for the Eastern District of Michigan. Thus, there are other remedies available to *pursue* to meaningfully address plaintiffs' claims, irrespective of whether they can ultimately establish an *entitlement* to that relief.

Because there are several existing ways plaintiffs can seek redress for their alleged injuries, the Court of Appeals erred in concluding that this factor weighed in favor of inferring a money damages remedy. This Court should grant leave to appeal and reverse this holding.

4. The egregiousness of plaintiffs' allegations should not factor in to judicially inferring a claim for money damages.

The Court of Appeals also held that the "outrageousness" of the Agency's actions, as alleged by plaintiffs, weighed significantly in favor of inferring a damage remedy. *Bauserman (On Appeal)*, 330 Mich App at 575–576, citing *Mays*, 323 Mich App at 72. The Court of Appeals distinguished the highly analogous *Schweiker* case based on this very concept. *Id*. at 575 ("Notably, *Schweiker* did not involve highly egregious facts such as those alleged in the instant case."). More recently, in *Mays*,

three Justices of this Court thought it "appropriate to give substantial weight to the shocking and outrageous nature of defendants' alleged conduct." *Mays*, 506 Mich at 199 (opinion by BERNSTEIN, J, joined by MCCORMACK, C.J. and CAVANAGH, J.).

Such an "outrageousness" factor has no basis in *Smith*, *Bivens*, or any other decision from this Court or the U.S. Supreme Court. Rather, it appears this factor was created by the Court of Claims and adopted by the majority of the *Mays* panel. *Mays*, 323 Mich App at 72. And this factor's focus on the specific facts in a given case is inconsistent with the other factor's focus on legal considerations—"the nature of the constitutional right at issue, whether it was clearly violated, whether there is any historical support for a damages remedy, and whether another remedy is available." *Mays*, 506 Mich at 250 n 61 (VIVIANO, J., concurring in part and dissenting in part). If left to stand, this factor would only encourage plaintiffs to load-up their complaints with egregious allegations with the hope that a court would give considerable weight to this factor in creating a judicially inferred money damages remedy. Indeed, as Justice Viviano recognized, "focusing on the egregiousness of the facts alleged would . . . lead to arbitrary outcomes." *Id.*

CONCLUSION AND RELIEF REQUESTED

Given the importance of the legal issues presented in this case, coupled with the lack of clear guidance from this Court on those issues, the Unemployment Insurance Agency respectfully asks that this Court grant leave to appeal and reverse the Court of Appeals' decision.

Respectfully submitted,

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