IN THE STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS, ERIK VARGA, LISA SHEPHARD, DAWN DAVIS, AND JENNIFER LARKE, individual UIA Claimants,

Plaintiffs,

v.

STATE OF MICHIGAN UNEMPLOYMENT INSURANCE AGENCY and JULIA DALE, in her official capacity,

Defendants.

Case No. 22-000007-MM

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MARCH 10, 2022 MOTION FOR PRELIMINARY INJUNCTION TO SUSPEND COLLECTION ACTIVITIES AND BRIEF IN SUPPORT

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs are among thousands of Michigan residents facing collection activity by the Defendant Unemployment Insurance Agency ("UIA" or "the Agency") in violation of the due process rights protected under the Michigan Constitution. Plaintiffs and putative class members have received notices from the UIA announcing the state's intent to seize their federal and state tax refunds and garnish wages unless immediate payments are made. The Agency's own collection letters confirm it intends to seize thousands of dollars and up to $50,000 or more from each Plaintiff and putative class member. Plaintiffs allege the Agency has no authority to do so. The challenged actions create life-altering consequences for claimants who sought assistance at a time of great need. Plaintiffs sought concurrence on this Motion for Preliminary Injunction to halt collections until the constitutionality of the UIA's actions can be ruled on. The Agency was unable to concur.

Allowing unlawful collection activity to continue will cause irreparable harm to thousands of Michigan residents through collection and seizure of property without the constitutional right to notice and fair process. Failure to stop these collections before a final decision on the merits will make this harm irreversible. For a struggling family, taking 25% of their income or seizing a tax refund they were counting on is a recipe for ruin that cannot be remedied by later return of the money. To prevent such harm and to serve the public interest, Plaintiffs move this Court for an Order for Preliminary Injunction temporarily halting the contested collection activity against Plaintiffs and the putative class members until Plaintiffs' claims that the state actions are unconstitutional and that the UIA is operating outside of its legal authority can be adjudicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this lawsuit on January 28, 2022. Plaintiffs' Complaint alleges that the Agency's practices fail to comport with basic guarantees of due process under the Michigan

Constitution, including Defendants' actions (1) issuing Monetary Redeterminations more than one year after an original Determination; (2) failing to review alleged overpayments for waiver due to administrative error or issuing any determination on eligibility for waiver; and (3) pursuing collections before a final Determination on the merits. *See* Verified Complaint at ¶¶ 117-128.

III. LEGAL STANDARD FOR PRELIMINARY INJUNCTION

MCR 3.310(A) confirms the common law equitable remedy of preliminary injunction. This Court shall grant a preliminary injunction when (1) Plaintiffs have shown that irreparable harm will occur without an injunction; (2) Plaintiffs are likely to prevail on the merits; (3) the harm to Plaintiffs absent an injunction outweighs the harm an injunction would cause to Defendants; and (4) the public interest will be aided if a preliminary injunction is issued. *See Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). A preliminary injunction is appropriate when there is no other adequate legal remedy available to prevent irreparable harm. *See Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

IV. PRELIMINARY INJUNCTION IS NECESSARY AND APPROPRIATE TO PROTECT THE STATUS QUO

The Michigan Legislature enacted the Michigan Employment Security Act ("MESA") "to protect the welfare of the people of this state through the establishment of an unemployment compensation fund," to create the Agency "and to prescribe its powers and duties," "to provide for the payment of benefits," and "to provide for appeals from redeterminations, decisions and notices of assessments." 1936 PA 1, MCL 421.1 through 421.75. Defendants' actions run contrary to the purpose of the MESA and the authority the MESA grants. The Court of Claims has exclusive jurisdiction over claims for equitable and other relief against the state and its departments or officers. MCL 600.6419(1)(a).

Plaintiffs seek a preliminary injunction ordering Defendants to suspend unlawful collections against Michigan workers and families relating to the challenged practices, including ordering Defendants to: (1) suspend all collection activities against claimants that are based on Redeterminations issued more than one year after an initial Determination on the same issue; (2) suspend all collection activities against claimants for whom the Agency has not assessed the claim for Agency error waiver or issued a Determination on Agency error waiver; and (3) suspend all collection activities against claimants who have not yet received a final Determination on the merits of their claims.[1]

Plaintiffs are likely to prevail on the merits of their claims when Defendants' actions violate the unambiguous bounds of the law. Failing to grant a preliminary injunction would result in irreparable harm when the Agency has announced a clear intent to seize property without further due process. There is no other adequate remedy; no administrative process would stop the Agency from acting beyond its authority. The harm to Plaintiffs and the class members outweighs the burden to Defendants; Plaintiffs and the class members are facing hundreds of thousands of dollars in unlawful collection activity, whereas Defendants are simply being asked to follow the law. Moreover, the challenged collections are unrelated to the state's general fund. In most cases, collections will be reimbursed to the federal government or (in a fraction of cases) returned to Michigan's Unemployment Trust Fund—a Fund that the state has projected to be solvent through 2022. Public interest supports an injunction when the violations are systemic and deeply painful to the thousands of Michiganders impacted, and no harm will come to the state from a temporary pause.

[1] The challenged activities are a demonstrable matter of Agency policy and procedure, confirmed by former Agency staff. *See, e.g.*, Ex. 20, Declaration of Starr Doering.

The decision to grant or deny a preliminary injunction is within the sound discretion of the court. *Grand Rapids v Central Land Co*, 294 Mich 103, 112; 292 NW 579 (1940). Plaintiffs are requesting that this Court exercise its discretion to issue a preliminary injunction requiring the Agency to halt collections resulting from the disputed activity until this Court issues a finding on the merits of these claims.

A. Plaintiffs Are Likely to Prevail on the Merits of Each of Their Claims When Unambiguous Statutory Law Forbids the Very Actions the Agency is Taking

Plaintiffs have to show "likelihood" of success on the merits, not certainty of success on the merits. *See Slis v State*, 332 Mich App 312, 355-356; 956 NW2d 569 (2020). Here, Plaintiffs are likely to prevail on the merits of each claim. The law Defendants must follow is a matter of clear statutory language. Defendants may not collect overpayments more than one year after initial Monetary Determinations addressing the same issue; Defendants did so nonetheless. Defendants must follow MCL 421.62(a) to waive any overpayments due to Agency error; Defendants did not even consider claimants for waiver or issue the requisite appealable Determination on waiver entitlement. Defendants may not engage in collections activity until after a final Determination on the merits is issued; Defendants have regularly collected against Plaintiffs and other putative class members even while aware that there is a protest or appeal pending.

1. The Agency is Prohibited by Statute from Reconsidering an Issue More than a Year After the Initial Determination on that Issue

Defendants are sending Monetary Redeterminations to claimants more than one year after sending claimants initial Determinations on the same issue, including to Plaintiffs Saunders and Davis and putative Jurisdiction Class Members. Plaintiff Kellie Saunders is a wedding photographer whose business was eviscerated by the COVID-19 pandemic and associated shut-downs. Saunders applied for federal Pandemic Unemployment Assistance ("PUA") benefits and

the Agency issued a Monetary Determination on April 23, 2020 finding her entitled to a Weekly Benefit Amount ("WBA") of $362.00. Ex. 6, Saunders 137-139.[2] On October 22, 2021, more than one year later, the Agency issued a Monetary Redetermination retroactively reducing her WBA to $160.00. *Id.* Saunders 141-146.

Plaintiff Dawn Davis was a substitute paraprofessional who lost work when the COVID-19 pandemic shut down schools. Davis applied for PUA benefits, and the Agency issued a Monetary Determination on April 23, 2020 finding her entitled to a WBA of $362.00. Ex. 1, Davis 1-3. On June 1, 2021, more than one year later, the Agency issued a Monetary Redetermination retroactively reducing her WBA to $0.00. *Id.* Davis 9-12.

This pattern continues for putative class members. Eleni Zestos was a preschool provider. The Agency issued a May 13, 2020 Monetary Determination finding her entitled to a $160.00 WBA. Ex. 10, Zestos 244-246. More than a year later, on July 29, 2021, the Agency issued a Monetary Redetermination retroactively reducing her WBA to $0.00. *Id.*, Zestos 247-252. Joshua Eggleston is a self-employed builder whose business was suddenly halted at the onset of the COVID-19 pandemic. The Agency issued a Monetary Determination on April 22, 2020 finding him entitled to a $322.00 WBA. Ex. 2, Eggleston 21-23. On August 31, 2021, the Agency issued a Monetary Redetermination retroactively reducing his WBA to $0.00. *Id.* Eggleston 25-29. Jennifer Hillebrand is a wedding and event photographer whose small business was halted by COVID-19 and public health directives cancelling gatherings. On April 23, 2020, the Agency issued a Monetary Determination finding her entitled to a $334.00 WBA. Ex. 3, Hillebrand 38-40.

[2] For ease of reference, claimant documents have been attached to this Motion as exhibits and bates stamped PI Exhibit XXXXXX (claimant name). In referencing the documents internally, document bates stamps will be shortened. For example, the document bates stamped "PI Exhibit000137 (Saunders)" will be abbreviated to "Saunders 137."

The Agency issued a Monetary Redetermination more than one year later, on October 18, 2021, retroactively reducing her WBA to $216.00. *Id.* 41-47.

The Agency does not have jurisdiction to issue these untimely Monetary Redeterminations. The MESA grants the Agency jurisdiction to issue Redeterminations only within one year after the initial Determination on the disputed issue. MCL 421.32a(1)-(3). Under MCL 421.32a(1), the Agency has 30 days to review a Determination. The 30-day period can be extended up to one year from the initial Determination only upon a showing of good cause for the delay. MCL 421.32a(2). The MESA does not grant the Agency any authority to act to issue Redeterminations after one year.

The appellate body charged with final administrative review of Agency action—the Unemployment Insurance Appeals Commission ("UIAC")—has repeatedly confirmed the jurisdictional limitations of the UIA. *See, e.g.*, Ex. 11, UIAC Appeal Docket No. 264147W-REH. In Docket No. 264147W-REH, the Agency issued a Monetary Determination on April 29, 2020 finding the claimant qualified for PUA. Ex. 11, UIAC Appeal Docket No. 264147W-REH at 1. The Agency issued a Redetermination on May 19, 2021 reversing the decision on qualification retroactive to the beginning of the claimant's benefit year. *Id.* To establish jurisdiction to issue the May Redetermination, the Agency relied on a March 22, 2021 Redetermination, which ruled on the payment of additional benefits under the American Rescue Plan Act. *Id.* The UIAC noted that the Agency may rule on "a host" of disputed issues, including "identity, qualification, eligibility, and waiver of restitution, among others." *Id.* The UIAC found that the Agency did not have the jurisdiction to issue a May 2021 Redetermination because "[i]t did not reach the issue of claimant's

qualification for benefits," which was first addressed in the April 2020 Determination. *Id.* at 2, 4.[3]

In so ruling, the UIAC relied on Michigan Supreme Court precedent addressing the term "disputed issue" in Section 32a. *See, e.g., Royster v Mich Employment Security Comm*, 366 Mich 415, 421; 115 NW2d 106 (1962); *Dep't of Licensing & Regulatory Affairs/Unemployment Ins. Agency v Lucente*, ___ Mich ___; ___ NW2d ___ (2021) (Docket Nos. 160843, 160844) (Ex. 14). In *Royster*, the "disputed issue" was fraud. The Michigan Employment Security Commission ("MESC") (n/k/a the Unemployment Insurance Agency) initially issued a Determination finding the claimant eligible for benefits. *Id.* at 417. More than one year later, the MESC issued a Redetermination that the claimant was ineligible for benefits, alleging fraud for the first time. *Id.* at 417-418. The claimant argued that the MESC did not have jurisdiction to issue the fraud Redetermination because it was untimely. *Id.* at 418. The *Royster* court rejected this position, finding that the fraud issue was separate and distinct from the earlier eligibility Determination and the "disputed issue" (fraud) had not been previously adjudicated. *Id.*

As the UIAC discussed, the Michigan Supreme Court in *Lucente* more recently affirmed the application of "disputed issue" in MCL 421.32a, specifically reaffirming *Royster*. In *Lucente*, the Agency alleged that it had overpaid the claimants and suspected the claimants had committed fraud. *Id.*, slip op. at 11. The Agency issued documents entitled "Notice[s] of Redetermination" to

[3] *See also* Ex. 12, UIAC Appeal Docket No. 264147W (finding a Monetary Redetermination regarding qualification to be untimely when it was issued more than one year after the original eligibility Determination and the only intervening Redeterminations addressed only additional weeks of entitlement to benefits rather than qualification); Ex. 13, UIAC Appeal Docket No. 264016 (finding that the Agency operated outside of its jurisdictional authority when it issued a Monetary Redetermination reversing the Agency's decision on the claimant's qualification for benefits more than 30 days after the initial Monetary Determination and failed to show good cause for the delay).

the claimants. *Id.* These were the first documents that alerted the claimants to the fraud accusations. *Id.*, slip op. at 11-12. After discussing *Royster*, the Supreme Court stated:

> While the language has changed slightly, the MESA still refers to Agency-initiated "redeterminations" as applying where there is a "disputed issue." See MCL 421.32a(2) ("A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year after the date of mailing of personal service of the original determination *on the disputed issue*…." (emphasis added). As in *Royster*, the issue of fraud was not disputed at the time these appellants received benefits; the Agency first alleged fraud when it issued the "Notice[s] of Redetermination." [*Lucente*; slip op. at 23.]

See also Lee v Michigan Employment Sec Com, 346 Mich 171, 178; 78 NW2d 309 (1956) ("Section 32a also provides that the commission may reconsider a determination for good cause, provided it is made within 1 year from the date of mailing of the original determination on the *disputed issue*.") (emphasis in original).[4]

Because Defendants issued Monetary Redeterminations more than one year after Determinations on the WBA or qualification issues, which violates MCL 421.32a, Plaintiffs are likely to prevail on the merits of their extra-jurisdictional redetermination claim.

2. The Agency Fails to Fulfill Its Duty to Consider Overpayments For Waiver Based on Agency Error and Has Not Issued Required Determinations

The law states that the Agency "shall" waive overpayments resulting from Agency error. MCL 421.62(a). Despite this knowledge, the Agency has assessed and is currently assessing overpayments and pursuing administrative collection activity against claimants without

[4] The only other circumstance in which the Agency is empowered to act more than one year after a Determination is in the case of restitution resulting from fraud. In the instant case, the Agency has made separate determinations conclusively finding no misrepresentation. *See, e.g.*, Ex. 1, Davis 7-8; Ex. 2, Eggleston 32; Ex. 3, Hillebrand 49, 51, 53; Ex. 6, Saunders 140; Ex. 10, Zestos 254 (all stating "type of misrepresentation: none found"). Thus, the Agency cannot avail itself of the three-year limitation on issuing Redeterminations related to fraud. *See* MCL 421.32a(2).

considering whether the alleged overpayment must be waived under the MESA. In cases where the Agency has reviewed and granted waiver for administrative error, it does so at the time the overpayment is assessed. *See, e.g.*, Ex. 4, Larke 111-114. But for Plaintiffs and putative class members, the Agency has assessed overpayments without reviewing for administrative error, providing notice to claimants, or providing an appealable Determination on eligibility for waiver. This leaves claimants without any ability to request a waiver due to administrative error or to appeal any decision denying Agency error waiver.

The MESA provides that the Agency "shall waive recovery of an improperly paid benefit if repayment would be contrary to equity and good conscience and shall waive any interest." MCL 421.62(a). As the word "shall" makes clear, this waiver of repayment is mandatory if repayment would be "contrary to equity and good conscience." *Id.* Among reasons the MESA mandates waiver of repayment is if "[t]he improper payments resulted from an administrative or clerical error by the unemployment agency." MCL 462.61(a)(iii).

We know the Agency has not reviewed for administrative error waiver because federal law requires all claimants to be notified of any Determination on a waiver and given an opportunity to appeal. Claimants have not been so notified. For example, the Agency erroneously used Plaintiff Saunders' gross income to calculate her WBA, despite the fact that Saunders provided all requested information, including her net income. Ex. 6, Saunders 137-139. Nonetheless, the Agency later realized that it had made an error in calculating the WBA and found Saunders should have been paid a reduced amount. *Id.*, Saunders 141-146. Despite the overpayment being a result of Agency error, the Agency did not waive the overpayment. *Id.* It did not issue any Determination granting or denying waiver for administrative error. The record is devoid of any indication that the Agency actually reviewed Saunders' file to make a Determination whether there was Agency error; instead,

it engaged in collection activity on amounts that it was required by law to waive, providing no mechanism for Saunders to appeal the decision regarding Agency error or request waiver based on Agency error.

A similar putative class member, Jennifer Hillebrand, provided the Agency with all requested proofs of income. Ex. 3, Hillebrand 37. The Agency erroneously used Hillebrand's gross income to calculate her weekly benefit amount, despite the fact that Hillebrand had provided the Agency with all requested information, including net income. *Id.*, Hillebrand 38-40. Nonetheless, the Agency later realized it had made a mistake in calculating the weekly benefit amount because it had mistakenly used her gross income, despite instruction by the DOL to use net income. *Id.*, Hillebrand 41-47. Again, the record is devoid of any indication of a review of Hillebrand's file for waiver due to Agency error or for the opportunity for Hillebrand to seek such waiver or protest the denial of such waiver.

State law cannot be reasonably interpreted inconsistent with federal constitutional rights and binding Department of Labor instructions to the participating states. The United States Supreme Court ruled on the due process rights of unemployment claimants in the seminal case of *California Department of Human Resources Development v Java*, 402 US 121; 91 S Ct 1347; 28 L Ed 23 666 (1971). Under *Java*, a state violates the due process rights of unemployment claimants granted under Section 303(a)(1) of the Social Security Act when it fails to provide reasonable notice and opportunity for a hearing. *Java*, 402 US at 133. In response to the holding in *Java*, the Department of Labor clarified and instructed states that determinations on waiver of overpayments fall within *Java*'s requirements of a notice and opportunity for a fair hearing. Since 1980, the United States DOL has instructed state unemployment agencies that federal constitutional due process rights require notice and opportunity to appeal determinations regarding waiver:

> Where a State agency determines that an individual has received benefits to which he was not entitled and requires that such benefits be repaid, a decision not to waive recovery of the overpaid benefits when allowed by the State law constitutes a denial of a claim for unemployment compensation within the meaning of Section303(a)(3). In such circumstances, the claimant must have the right to appeal such a decision and to have his or her contention for waiver considered and decided by the appellate tribunal on its merits in accordance with any evidence which bears upon the issue. [Ex. 15, U.S. Dept of Labor, UIPL 23-80 (Feb. 28, 1981).]

The United States Department of Labor promulgates regulations related to the interpretation of the Social Security Act that are binding on state agencies. *See* Ex. 16, UIPL 01-96 (stating that these instructions are binding). These are referred to as Unemployment Insurance Program Letters ("UIPL"). Under UIPL 23-80, states have two options for administering state law waiver provisions: either they can be applied at the time an overpayment is assessed, or allow claimants to apply for a waiver. Ex.15, UIPL 23-80 ¶ 5.[5] Therefore, in order to satisfy DOL instructions and due process obligations, the UIA is required to review every overpayment and issue a determination as to whether it is eligible for waiver due to administrative error. *See also* Ex. 17, UIPL 01-16 ("if state law provides for waiver of recovery of overpayments under certain circumstances, states must clearly communicate the potential availability of a waiver to individuals when establishing an overpayment and, if an individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery). Michigan's UIA

[5] Pursuant to UIPL 23-80: "The State may, depending upon the content and interpretation of its law choose between two basic methods of implementing the waiver provisions, they are:

> (1) To make a determination as to applicability of the waiver provision a part of the determination process on every overpayment case; or
>
> (2) Provide, as a part of each overpayment determination, information about State law provisions concerning waiver, and provide that claimants may request consideration of waiver and receive an appeal determination on the action taken. When following this method, it is important that the notice of determination provide specific information for making such a request since that information is deemed necessary for individuals to know and protect their rights under the unemployment compensation law of the State."

does not allow claimants to apply for administrative error waiver; the only available application for waiver is based on economic hardship. *See* Ex. 18, Hardship Waiver Application.

In processing millions of applications for unemployment benefits, and in the confusion of new law and the ongoing pandemic, Defendants made mistakes in their decisions related to benefits, both as to eligibility and benefit amounts. When the Agency makes these errors, the MESA requires that the Agency waive any overpayment. Despite awareness of this law, the Agency has never implemented a mechanism by which all files are reviewed for Agency error before the Agency begins collection activity. Because the Agency does not send a Determination regarding waiver of overpayment to claimants, there is no mechanism by which claimants can protest or appeal any such Agency decision. While mistakes may be understandable, it is inexcusable that Defendants still seek to collect money from claimants based only on the Agency's prior misapplication or misunderstanding of the law or the facts in a particular case and without reviewing a file for such error or providing a claimant any mechanism to appeal a Determination on the issue of whether there was Agency error.

Through no fault of claimants, the Agency has assessed overpayments against Plaintiffs and putative class members without ever reviewing these files for administrative error waiver. In many cases, the Agency is now seizing property without having followed the law. Because the Agency's failure to consider files for waiver of alleged overpayments is a violation of MCL 421.62(a) and binding federal instruction, Plaintiffs are likely to prevail on the merits of their denied waiver claim.

3. The Agency is Prohibited by Federal and State Law From Collecting Before a Determination Becomes Final

The Agency is knowingly pursuing collection activity against claimants who have pending protests and/or appeals and before a Determination has become final. It has no authority to do so.

Even internal Agency notes on the file confirm that the Agency knowingly pursues collection and garnishment against claimants who have pending protests and appeals. For instance, Plaintiff Varga timely protested his January 8, 2021 Monetary Redetermination. Ex. 9, Varga. 180-181 (noting on February 1, 2021 that a "protest has been filed"). Despite his timely protest, the Agency garnished Varga's 2020 tax refund and has continued to send Varga collection notices, including stating an intention to garnish up to 25% of his wages. *Id.*, Varga 184-243. In the Agency's own records, customer service agents make multiple notes that the timely protest is recorded and the collection activity will not stop. *See, e.g., Id.*, Varga 180, 181 (noting on February 1, 2021 that a "protest has been filed" and thereafter noting garnishment despite not resolving the protest); *see also* Ex. 2, Eggleston 31, 33-36 (noting on September 16, 2021 that Eggleston requested a status on his protest related to an August 28, 2021 denial, yet still sending monthly statements thereafter).

Plaintiff Lisa Shephard is a Michigan resident who was concerned about the lack of COVID-19 safety protocols at her job and became ill with suspected COVID-19 in March 2020. In August and September 2020, the Agency issued Determinations finding Shephard ineligible for benefits. Shephard timely protested findings that she was overpaid. Ex. 8, Shephard 158-159. Nonetheless, the Agency seized a portion of her 2020 tax refund to pay this debt and sent repeated monthly statements. *Id.*, Shephard 160-179.

Plaintiff Larke is a hospital administration worker who moved to Michigan to start a new job prior to the COVID-19 pandemic. She was laid off from her new job in April 2020 due to the COVID-19 pandemic. Although the Agency initially found her eligible for benefits, the Agency later found her ineligible. Larke timely protested a finding that she had been overpaid. Despite her pending protest, the Agency sent Larke a Notice of Garnishment in May 2021 and later seized a

portion of her 2021 unemployment benefits to pay the debt it claims Larke owes for 2020. *Id.*, Larke 60, 82.

Defendants have not limited their unlawful collection activity to the Named Plaintiffs. Putative class member Joshua Eggleston was a self-employed construction worker whose regular work ceased due to the pandemic and public health orders. Later, he was a caregiver for his children who were home from school. On August 31, 2021, the Agency issued a Monetary Determination reducing his WBA to "$0.00" more than a year after the original Monetary Determination finding him eligible for a WBA of $322.00. Ex. 2, Eggleston 21, 25. The Agency assessed an overpayment of over $44,000 claimed to be owed. *Id.*, Eggleston 30. Eggleston timely appealed the Monetary Redetermination in August 2021 and is still waiting for a hearing more than six months later. *Id.* Nonetheless, the Agency has initiated collections and announced its intent to seize his tax refund and to garnish wages unless he starts paying back the $44,000. *See id.*, Eggleston 31, 33-36 (showing that the Agency has engaged in collection activity against Eggleston despite his pending protest and despite the Agency's acknowledgment that it received his protest). Eggleston has been paying monthly toward his overpayment under threat of garnishment, although notices confirm the Agency still intends to seize his tax refund.

Anna Logan is a 75-year-old woman who worked as a manager at a McDonald's franchise when COVID-19 struck. She was immunocompromised, and her doctor advised her to isolate or "self-quarantine." After initially paying benefits to Logan, the Agency then issued an "ability" Determination finding her ineligible for benefits alleging she was not able to work. Her benefits were cut off immediately. Logan timely protested and has still not received a hearing on her appeal. It has been nearly one year since she appealed and requested a hearing. *See* Ex. 5, Logan 126. Regardless, the Agency ceased paying benefits and is undertaking collection activity based

on that ability Determination. *Id.*, Logan 119, 123. It has sent monthly collection letters announcing an intention to seize her tax refund and to garnish wages if she does not make payments immediately. *See, e.g., id.*, Logan 129-136. Logan cannot afford to repay the benefits, and she reasonably fears that her wages will be garnished and tax refunds seized.

Putative class member Hillebrand submitted her tax returns when she applied for pandemic unemployment assistance. More than year after calculating her WBA as $334.00, the Agency sent a Monetary Redetermination retroactively reducing her WBA to $216.00, ultimately assessing an overpayment of over $11,000.00. Ex. 3, Hillebrand 38, 41, 56. Agency staff advised her to appeal only the Monetary Redetermination since she was found not to have misrepresented anything. Ex. 3, Hillebrand 59. Her overpayment was never reviewed for administrative error waiver. She is still waiting for a hearing. Nonetheless, the Agency has initiated collection activity and, like it has done to other claimants, announced its intent to seize her tax refunds and to garnish wages if monthly payments are not made. *Id.*, Hillebrand 56-59.

Procedural due process requires a state actor to provide notice and opportunity to be heard before depriving a person of property. *See Dow v State*, 396 Mich 192, 206; 240 NW2d 450 (1976) ("The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. The opportunity to be heard includes the right to notice of such opportunity."). Meaningful opportunity to be heard requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) (quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950)). The Michigan Supreme Court also recently ruled that a denial of benefits requires the UIA to issue a formal adjudication, or

Determination, finding a claimant ineligible for benefits. *See Lucente* (Ex. 14).

The MESA specifies the process that is due to unemployment claimants, permitting the Agency to seek collection on an alleged overpayment only after all appeals have been exhausted and a Determination has become final. *See* MCL 421.32a(1)-(3) (stating that a Redetermination is not final if an appeal has been filed within 30 days after notice of a Determination or Redetermination, or one year with good cause); *see also* MCL 421.62(a) (stating that the Agency may seek restitution only after "the date of *finality* of a determination, redetermination, or decision reversing a previous finding of benefit entitlement.") (emphasis added); MCL 421.62(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.") (emphasis added).

Federal law also requires notice and opportunity to be heard before seizing alleged overpayments. Under federal law, the state of Michigan is prohibited from collecting overpayments without notice, without providing an opportunity to be heard, and without an opportunity to consider any evidence. *See* 26 USC 6402(f)(3)(A) (providing that a state may not take action to collect unless it "notifies the person owing the covered unemployment debt that the State proposes to take action pursuant to this section"); *see also* 26 USC 6402(f)(3)(B) (prohibiting collection action unless the state "provides such person at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt"); 26 USC 6402(f)(3)(C) (prohibiting collection activity unless and until the state "considers any evidence presented by such person and determines that an amount of such debt is legally enforceable and is a covered unemployment compensation debt"). Similarly, Section 303(a) of the Social Security Act mandates that states provide claimants with an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment are

denied." 42 USC 503(a)(3).

Because the Agency's collection activity before a final Determination on the merits is not authorized by state law under MCL 421.32a(1)-(3) and MCL 421.62(a), (c), and because federal law and regulations also prohibit collection before a Determination has become final, Plaintiffs are likely to prevail on the merits of their claim regarding unauthorized early collection. Therefore, the Court should preliminarily enjoin Defendants from pursuing collections against claimants who have pending protests and appeals and who have not yet had a hearing. This action is required to preserve the status quo and prevent imminent due process violations.

B. Irreparable Harm will Result Without an Injunction When Defendants Seize Property Without a Hearing and Before Plaintiffs Have Had an Opportunity to Challenge the Constitutionality of State Collection Activity

Defendants have sent collection notices to Plaintiffs and putative class members stating, "Under an Administrative Garnishment, your employer will be required to deduct and send to UIA up to 25% of your disposable earnings each pay period until the debt is paid in full." *See, e.g.*, Ex. 4, Larke 235; Ex. 9, Varga 211-214. Defendants have seized tax refunds and deducted portions of UI benefits in order to collect overpayments Plaintiffs contend are not actually owed. *See, e.g.*, Ex. 4, Larke 60; Ex. 9, Varga 188. Defendants allow claimants to elect to assign "voluntarily" 15% of their wages to UIA for repayment of the debt. *See id.* This assignment is not truly voluntarily. Individuals are coerced into repaying a smaller amount on a debt not actually owed in order to avoid the Agency wreaking further financial havoc on them. Defendants send this coercive collection even when there is no final determination on the merits or when waiver is required by law. *Id.*

Because of Defendants' actions, Plaintiffs and thousands of other Michiganders are facing financial instability, food instability, inability to pay for transportation, late payment fees and

utility shut-off fees, inability to pay rent or mortgages, and exorbitant interest rates on loans simply to pay for basic necessities of life. Should the Agency continue its collection activity, Plaintiffs and others fear losing their jobs, being unable to buy food, being unable to pay for utilities, and more because of Defendants' unlawful actions. Plaintiffs and the putative class members are faced with imminent tax refund seizure and garnishment of wages.

The United States Supreme Court has long held that preliminary injunctions are appropriate when individuals are facing irreversible harm to their property rights. *See Cavanaugh v Looney*, 248 US 453, 456 (1919) (stating that an injunction should issue where court intervention "is essential in order effectually to protect property rights against injuries otherwise irremediable."). To obtain a preliminary injunction, the harm that would result in the absence of the injunction must be "irreparable." *Sampson v Murray*, 415 US 61, 90; 94 S Ct 937; 39 L Ed 2d 166 (1974). Where the payment of money would not be sufficient, a court can find that the resulting loss would be irreparable. *Philip Morris USA Inc v Scott*, 561 US 1301, 1304; 13 S Ct 1; 177 L Ed 2d 1040 (2010).

Defendants' position that the harm is only temporary does not recognize the reality UI claimants face. The Agency engages in collection activity with impunity, knowing that there is no process in place for Plaintiffs to recover overpayments wrongfully recouped, and that any later recovery is unlikely to make them whole. Defendants have already likely collected hundreds of thousands of dollars (or more) from vulnerable Michiganders. Defendants' failure to issue mandatory waivers immediately will result in additional collections activity. When Defendants waive overpayments, they do not also retroactively refund Plaintiffs for money the Agency illegally collected. If money is collected or withheld now, Plaintiffs are also losing the time value of money and facing further economic insecurity.

The tax filing deadline is quickly approaching, and many Michigan residents are returning to work and depending on tax refunds and tax credits to get back on their feet. Instead of gaining financial stability when they return to work, many Michiganders are faced with further financial instability due to the Agency's actions seeking to garnish their wages. Every day, putative class members are facing collections and dire financial circumstances due to Defendants' unlawful actions. If the Agency's collection activity is not halted, collection and seizure of property will continue without the constitutionally-required process, and the harm will be irreparable.

C. Plaintiffs Have No Adequate Remedy Other than Injunction When, Absent an Injunction, Seizure of Property Will Occur Before the Constitutionality of Collection Activity Can Be Adjudicated

By the time this case reaches the end of litigation, Defendants will likely have wrongfully recouped millions of dollars outside of the law, with no clear statutory remedy for returning this money to those harmed. While the MESA, Michigan administrative rules, federal law, and constitutional due process requirements were intended to prevent the very collections activity Defendants are now engaging in, these same provisions provide no remedy for recoupment when Defendants wrongfully seize the assets of unemployment claimants. The collections activity must be stopped before Defendants wrongly commandeer more money from Plaintiffs and the putative class members.

Because Defendants staunchly refuse to follow the law by issuing extra-jurisdictional Redeterminations, failing to waive overpayment when the MESA requires it, and collecting before a final determination on the merits, the violations are capable of repetition yet evading review. Given the Agency's procedures, even if the Agency issues a late Redetermination finding each of these claimants eligible for benefits, pursuing the present administrative remedy would be futile because any adjudication in favor of Plaintiffs and putative class members could simply be

answered by the Agency's issuance of yet more extra-jurisdictional Monetary Redeterminations and unlawful collections. *See Cummins v Robinson Twp*, 283 Mich App 677, 713; 770 NW2d 421 (2009) (finding futility to be an exception to the general rule of exhaustion of administrative remedies); *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994) (same); *see also* Corrigan, *Collateral Attacks on Deportation Orders: The Second Circuit Banishes the Ghost of Spector*, 50 Brook L Rev 721, 746 (1984) ("[administrative] exhaustion is not required when a party might suffer irreparable injury from pursuing the administrative remedy, when agency jurisdiction is absent or the agency's position is clearly illegal, or when a dispositive question of law is presented that is peculiarly within judicial competence.").

D. Plaintiffs Face Imminent Harm and Defendants Do Not Suffer Any Immediate Burden By Pausing Collections Related to the Challenged Practices

The burden on Plaintiffs and the putative class members is great when Defendants are permitted to seize tax refunds and garnish wages and future UI benefits, without due process or a mechanism to recover that seized property. The families who rely on these streams of income face immediate and concrete harm to their livelihood when Defendants engage in the contested collection activity. When Defendants interfere with streams of income for families who are already financially stressed due to job loss and the ongoing pandemic, this impacts whether they can put food on the table. It impacts whether they are getting eviction notices. It impacts whether they are able to pay electric bills. And it can cause claimants to face even deeper debt when families are forced to take out high-interest loans in order to meet the basic necessities of life.

The relevant question is whether the harm of an injunction *outweighs* harm that would occur absent an injunction; an injunction should be denied only when the harm of an injunction *outweighs* harm absent an injunction. *Attorney Gen v Thomas Solvent Co*, 146 Mich App 55, 61-62; 380 NW2d 53 (1985). In this case, Plaintiffs are not asking Defendants to provide any

extraordinary relief; they are simply requesting that Defendants follow the law that applies to Plaintiffs and the putative class members they seek to represent. Plaintiffs are asking the Agency to suspend collection activity for alleged overpayments resulting not from Plaintiffs' or from putative class members' failures, but from Defendants' failures. This action must be stopped until this Court can decide the constitutional validity of the Agency's practices and the ultimate issue of whether collection activities under these practices violates the constitutional rights of unemployment claimants.

The requested relief will have the beneficial effect of allowing thousands of Michiganders to be free from the stress of receiving bills for tens of thousands of dollars of alleged overpayments that the Agency never should have issued and to file their tax returns without fear. Allowing the Agency to continue collection activities until a final ruling in this lawsuit underscores the fact that any harm suffered by Defendants will be substantially outweighed by the harm suffered by Plaintiffs and thousands of unemployment claimants should this Court allow Defendants to continue their unlawful collection activities. The requested relief will alleviate the day-to-day financial stress that claimants face when the contested collection activity impacts their ability to provide the basic necessities to their families.

In contrast, there is no harm or burden to Defendants in suspending the challenged activity. If this Court ultimately finds for Defendants, the *only* harm is the temporary delay in collecting overpayments during the pendency of this litigation—the majority of which would be reimbursed to the federal government, rather than to the State of Michigan. Any funds that would instead be reimbursed to the Unemployment Trust Fund will not make a meaningful difference. The Unemployment Trust Fund just received a $150 million deposit, and the Agency projects the Fund to be solvent through 2022. Ex. 19, Agency Newsletter.

If the injunction is denied and Plaintiffs ultimately prevail, the resulting harm is that Plaintiffs and putative class members will be faced with continued collection activity, threatening the wellbeing of themselves and all those for whom they care, with no mechanism to later recover any previously-collected wrongful overpayment. In the face of impending collection activity, the harm to Plaintiffs and putative class members absent an injunction far outweighs the harm to Defendants if the injunction is granted.

E. The Public Interest Favors Preliminary Injunction When Defendants' Collection Activity Is Unconstitutional

The MESA provides an explicit statement of the public interest it is meant to protect. The Michigan Legislature has made an explicit legislative finding of public policy as it relates to the maintenance of unemployment benefits. Section 2 of the MESA, entitled "Declaration of Public Policy," specifically provides:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his or her family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state. [MCL 421.2(1).]

This has been especially true during the COVID-19 pandemic, a time of extreme financial instability and uncertainty.

The public interest mandates enforcement of the protections of the Michigan Constitution with respect to the very citizens it is meant to protect. Because the requested injunction seeks to enjoin Defendants temporarily from collecting penalties that Plaintiffs allege were

unconstitutionally or unlawfully assessed, this factor weighs heavily in favor of granting the relief sought. It is hard to imagine a public interest that would be served by allowing Defendants to continue collecting such unconstitutional penalties.

The public interest is always best served when government officials are made to obey the protections afforded by the laws they purport to obey (and the same laws they enforce against citizens when it is to their own benefit). *See Connection Distributing Co v Reno*, 154 F 3d 281, 288 (CA6 1998) ("[T]he determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the [constitutional] challenge because it is always in the public interest to prevent the violation of a party's constitutional rights.").

The requested relief will serve the public interest that the MESA, and hence Defendants, purport to support. The requested relief will limit the negative economic consequences associated with involuntary unemployment and subsequent attempts by the Agency unlawfully to collect benefits already paid. Plaintiffs and the putative class members have felt the crushing force of unemployment. In violation of their own policies, Defendants seek to recover tens of thousands of dollars from Plaintiffs and putative class members—benefits that were given to Plaintiffs and putative class members in a time of great need to pay for the basic necessities of life and that Defendants have no right under the law to collect. There is no public policy that would justify unimpeded violations of the law that create concrete harm for Michigan residents.

F. Plaintiffs and Putative Class Members Have Standing to Raise Their Claims in This Venue

Plaintiffs have standing to raise these claims in this venue. To have standing to request the relief, a party "is normally required to have a sufficiently concrete interest in bringing a case that it can be expected to provide effective advocacy." *Mich Coalition of State Emple Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 217 (2001). "[S]tanding has been described as a requirement

that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed to having a generalized interest in the same manner as any citizen." *Id.* at 217-218. Plaintiffs have standing to raise these claims because they have been harmed by the Agency's actions, and the continued wrongdoing demonstrates that the Agency's actions are capable of repetition, yet evading review. Even if Defendants claim that Plaintiffs do not have standing because of alleged failure to exhaust administrative remedies, the doctrine of exhaustion is inapplicable because Plaintiffs are raising constitutional issues. *See Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 39; 494 NW2d 787 (1992).

V. CONCLUSION

Defendants' unlawful actions have served only to increase the instability and fear that unemployment benefits are intended to prevent. Due to these actions, Plaintiffs and putative class members are collectively faced with bills for hundreds of thousands of dollars that they do not owe. These bills, and the associated collection activity, harm Plaintiffs and claimants through food insecurity, inability to pay rent or mortgage, inability to pay for transportation, late payment fees and utility shut-off fees, extended borrowing on retirement accounts, or excessive interest rates on "payday loans" or other short-term, high-interest bridge loans essential to meet immediate needs during the pandemic. In addition to creating great day-to-day difficulty in the lives of claimants, these harms act as a barrier for claimants to seek re-employment. Defendants then provide no mechanism by which claimants can recover money wrongfully collected. Defendants' unlawful collections activity must be suspended now, before more irreparable harm takes place.

As such, Plaintiffs request that this Court enter an Order:

1. Ordering Defendants to suspend all collection activities against claimants that are based on Redeterminations issued more than one year after an initial Determination;

2. Ordering Defendants to suspend all collection activities against claimants for whom the overpayment has not been assessed for administrative error waiver under MCL 421.62(a) or against claimants who have not received a Determination regarding their eligibility for administrative error waiver under MCL 421.62(a);

3. Ordering Defendants to suspend all collection activities against claimants who have not yet received a final Determination on the merits of their claims; and

4. Ordering any other relief that the Court finds just and equitable to prevent irreparable harm stemming from the challenged collection activity.

Respectfully submitted,

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