UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL KREPS, ET AL,

Plaintiffs,

Case No. 2:22-cv-12020

v.

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY, ET AL,

Hon. Mark A. Goldsmith

Defendants.

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PROSPECTIVE INJUNCTIVE RELIEF AS TO AGENCY DIRECTOR DALE IN HER OFFICIAL CAPACITY

Plaintiffs, by and through their counsel, ask that this Court grant 1) partial summary judgment on the legal issue and finding the practice of suspending benefits

without pre-termination notice and opportunity to be heard violates the due process clause of the constitution by depriving Plaintiffs of benefits when due; and 2) order an appropriate prospective injunction directing Director Dale in her official capacity to cease the practices that resulted (and continue to result in) termination of unemployment benefits prior to reasonable notice and opportunity to be heard.

In compliance with Local Rule 7.1(a), I, David M. Blanchard, certify that I personally conferred with Defendants' counsel Shannon W. Husband by email and by telephone on multiple occasions over several months, most recently on July 16, 2024 regarding this Motion, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; and opposing counsel expressly denied concurrence.

WHEREFORE, for the reasons presented in Plaintiffs' Brief in Support of Partial Summary Judgment, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment and order the requested and appropriate injunctive relief.

Respectfully submitted,
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Dated: July 24, 2024

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PROSPECTIVE INJUNCTIVE RELIEF AS TO AGENCY DIRECTOR DALE IN HER OFFICIAL CAPACITY

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STATEMENT OF ISSUES PRESENTED

I. Whether Director Julia Dale is required to ensure that the Michigan Unemployment Insurance Agency ("UIA") pay all benefits when due unless and until claimants are provided the due process rights of notice and opportunity to be heard.

Plaintiffs say: Yes
Defendants say: No

II. Whether the Court has jurisdiction to order prospective relief requiring Director Dale in her official capacity to end a continuing violation of federal law.

Plaintiffs say: Yes
Defendants say: No

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INTRODUCTION

As a matter of clearly established law, The Michigan Unemployment Insurance Agency is required to provide pre-termination notice and opportunity to be heard before cutting off unemployment benefits. At least since 2020 (if not earlier) the Agency has adopted a practice that violates the law by using indefinite suspension of benefits without notice and opportunity to be heard. There is no room for legal dispute that this practice is unconstitutional and there is no dispute of fact that the practice occurred and continues to impact hundreds of thousands of UI claimants. Due process requires pre-termination notice and opportunity to be heard *before* indefinitely cutting off benefits. Therefore, Summary Judgment on this narrow issue should be granted and prospective injunctive relief should be ordered.

The Agency's stop payment indicator (SPI) practice operates completely outside of the Agency's notice and hearing process. Stop payment indicators used by the Agency cause immediate and indefinite suspension of benefits without notice to the claimant, before any investigation. Defendants are fully aware that the SPI continues to halt benefit payments even if a claimant verifies identity or other information, *and even after a hearing officer confirms the claimant's eligibility*. There is simply no due process – no process at all— by which a claimant can challenge the state's indefinite hold and receive the emergency financial relief of timely UI payments when due. This practice must end.

PROCEDURAL BACKGROUND

Plaintiffs filed this action against the named Defendants for injunctive relief, declaratory relief, equitable relief, and damages on August 26, 2022. (See ECF No. 1). Plaintiffs filed a First Amended Complaint on November 28, 2022, adding the UAW as a Plaintiff asserting that the Agency's actions independently constitute a breach of the prior settlement agreement reached in the related case of *Zynda et al. v. Arwood, et al.,* Case No. 2:15-cv-11449 (E.D. Mich. Filed April 21, 2015). (See ECF No. 10). Defendants filed a renewed Motion to Dismiss Plaintiffs' First Amended Complaint on December 12, 2022. (See ECF No. 19).

On July 12, 2023, the Court entered its opinion and order granting in part and denying in part Defendants' Motion to Dismiss and denying Plaintiff UAW's Motion for Preliminary Injunction for procedural reasons. (See ECF No. 33). In its Order, the Court ruled on two points important to the instant Motion:

1) Plaintiffs have plausibly alleged a procedural due process claim by pleading that their UI benefits were "terminated" before they received "an opportunity to be heard,"[1] and

2) That the Court has jurisdiction against Director Dale in her official capacity for purposes of ordered prospective injunctive relief to end a continuing violation of federal law.[2]

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[1] *Kreps v. Mich. Unemployment Ins. Agency*, No. 22-12020, 2023 U.S. Dist. LEXIS 119800, at *23 and n. 12 (E.D. Mich. July 12, 2023)(quoting *Taylor v. Steinbacher*, N.D. Ohio May 22, 1989) ("Due process requires that a claimant whose unemployment compensation benefits are terminated receive an opportunity to be heard").

[2] *Kreps v. Mich. Unemployment Ins. Agency*, No. 22-12020, 2023 U.S. Dist. LEXIS 119800, at *14 (E.D. Mich. July 12, 2023) ("Plaintiffs correctly submit that "a federal court may, without violating the Eleventh Amendment, issue a prospective injunction against a state officer to end a continuing violation of federal law." (quoting Price v. Medicaid Dir., 838 F. 3d 739, 746-747 (6th Cir. 2016) (punctuation modified)).

Action is required now because the indisputable evidence confirms the allegations. Four and a half years have passed from the onset of the pandemic shutdown. Two years have passed since this case was filed. Even the latest round of Agency leadership has been indisputably on actual notice of the unconstitutional condition and has failed to cure it.

FACTUAL BACKGROUND

I. UIA Holds are a Product of Intentional Choices by Agency Decisionmakers

Following the due process decision in the case of *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), the United States DOL mandated that states continue payment during appeals. Ex. 1, UIPL 1126. Disregarding the clear mandate, Defendants set their system to automate indefinite suspension of benefits. The automated holds are often followed by automated determinations without any factfinding at all. This was recently confirmed in a report by the state's own Office of Auditor General: "[w]hen denying a paid PUA claim and establishing overpayments for all benefit weeks, UIA programmed MiDAS to automatically create and close a misrepresentation nonmonetary issue without investigation or adjudication." Ex. 2, Jan. 2023 OAG Report at 15-16; *see also* Ex. 3, Nov. 2020 Independent Deloitte Audit.

Instructions to the Agency's staff provide specific "Common Scenarios with Responses" acknowledging the sudden termination of benefits faced by many

callers. If a caller had a Benefit Payment Review ("BPR") holding benefits, claimants were told: "There is a pending review, called a Benefit Payment Review, on your account. These are reviewed in the order the system generates them *and must be completed before your payment can be issued if otherwise eligible.* Ex. 4, Common Scenarios with Responses, RTP #1 18-35 at 22. Similarly, if claimant had a Stop Payment Indicator ("SPI") (such as a pending flag for identity verification, "generic availability" or fraud investigation), they were told: "There is an open non-monetary issue on your account regarding ____. There is currently no definite time frame for when nonmonetary issues or protests will be closed." *Id.*

In the course of discovery, Defendants were asked how many claimants had had benefits suspended more than 21 days without being issued a determination or an explanation of the reason for the suspension: 920,752[3]. Defendants were asked how many claimants had benefits that remained on hold after all determinations were resolved in their favor: 265,600[4] Defendants were also asked how many claimants had one or more benefit week that remained unpaid as of the end of 2020 as a result of stop payment indicator, generic availability, BPR or other holds. The answer: 1,370,534.[5] This data set included nearly all Plaintiffs.

[3] Def. Response to Interrogatory #7. (spreadsheet listing 920,752 claimants) (available for in camera review)
[4] Def Response to Interrogatory #9 (available for in camera review)
[5] Def. Response to Interrogatory #4 (available for in camera review)

By Contrast, since 2020, 162 individuals have been charged in connection with the theft of unemployment benefits in Michigan[6]. Given the Agency's track record of mismanagement, it is undeniable that these practices present a profound danger that many otherwise eligible claimants have suffered and continue to suffer unconstitutional pre-hearing deprivation.

This was not an accident or a computer glitch. It was an intentional programming decision made to immediately suspend benefits. Ex. 5, June 5, 2020, Kratz Clearance Request, RTP #1 at 447-450 ("For Fraud Prevention: over 500,000 non-monetary Identity Verification non-monetary cases and fraud investigation cases have been created within the last two weeks. As part of this process, certifications are not payable because of a Stop Payment indicator.") By June 15, 2020, internal communications confirm that the Unemployment Insurance Agency's parent Department, Labor and Economic Opportunity (LEO), was on direct notice that these indefinite holds were a problem. Ex. 6, Chrzaszcz email to Director Corbin, June 15, 2020, RTP #1 at 414-419 ("Lots of confusion out there. In addition to the email about claimants having their documents denied. Many of them received confirmation that their ID was verified, either verbally or in writing, but they still have the Stop Payment Indicator on their accounts.")

[6] UIA Press Release, April 5, 2024 (https://www.michigan.gov/leo/news/2024/04/05/uia-regulation-agent-wins-federal-award-for-role-in-smashing-benefits-theft-ring)(last visited July 20, 2024)

Many of these holds were mandated from above the Agency level, by LEO leadership. Ex. 3, Nov. 2020 Deloitte Audit at 20 (noting that additional Fraud Manager Criteria were added "through a series of system changes that were implemented from May 22, 2020, through June 29, 2020, some at the direction of LEO.") Defendants reported that these actions resulted in placing an indefinite hold on 470,231 claim files.[7] Into the fall of 2020, the Agency doubled down, applying "suspicion factors" and crossmatches across the claimant population to terminate ongoing benefits.[8] In October 2020, the Agency issued two Field Releases treating everything backdated more than four weeks as suspicious and stopping payment. Ex. 9, October 7, 2020 Field Release. How many more claims were suspended based on October Field Release Criteria? 333,949.[9]

As long as Agency leadership decided a risk factor or cross match applied, due process was out the window—no need for notice to the claimants, no explanation provided. In fact, Agency operators were specifically directed to *not mention fraud*. Claimants who were relying on benefits were immediately suspended. If the Agency thought you were suspicious everything stopped, without any opportunity to prove

[7] Def. Response to Interrogatory #1 (spreadsheet listing 470,231 claim files placed on hold, including Plaintiffs I.F. and Quigg) (available for inspection in camera).
[8] *See e.g.* Ex 7, Oct 23, 2020 Kolar Clearance Request, RTP #1 at 3037 ("Please put a Stop Payment Indicator on each of these accounts and a note that says: 'No wages with Michigan Treasury and Out-Of-State Address - do not pay.'" Ex 8, Oct 26, 2020 Kolar Clearance Request, RTP #1 at 2629-2632 "Please leave a note in the accounts that states "Please verify with claimant that banking information was changed and is accurate. DO NOT release payment until identified claimant verbally confirms banking information was changed and is accurate."
[9] Def. Response to Interrogatory #2 (available for in camera review)

you weren't "suspicious." Ex. 10, Nov 12, 2020, State of Michigan UIA, Do Not Release Payment Indicator, RTP #1 at 3172 ("Advice [sic] the claimant that another department must review the claim. Do not mention Fraud").[10]

In December 2021, a new Field Release to Agency staff announced an even more ominous turn for the Agency's suspicion machine. Instead of using SPI's the Agency would now turn to using a new "generic availability" label, which didn't have anything to do with the reason benefits were being stopped. Under the new protocol, backdating a claim was suspicious and payments would immediately stop; age was suspicious, for instance if a worker was under 16 or over 80 their benefits would immediately stop; and using the same phone number on multiple claims (such as multiple out of work people in the same household) was suspicious and benefit payments would stop. Ex. 14, Dec. 2, 2020 Field Release on Reasonable Suspicion on PUA Claims to Detect and Prevent Fraud and Overpayments, RTP #1 at 2034-2036. Ex. 15, Dec. 9, 2020 Field Release PUA Guidance. How many were suspended based on December Field Release Criteria? 119,862.[11]

[10] Ex. 11, Nov. 19, 2020, Kolar Clearance Request, RTP #1 at 2773-2776 ("Please see attached for list of claims that need a stop payment indicator and a note on the account that says: 'Per cross-match, claimant is deceased.'"). Ex. 12, Nov. 19, 2020, Kolar Clearance Request, RTP #1 at 2095-2098 ("Please see attached for list of claims that need a stop payment indicator and a note on the account that says: 'Per Department of Correction cross-match, claimant was incarcerated at claim of time filing.'" Ex. 13, Nov. 23, 2020, Kolar Clearance Request RTP #1 at 2942-2945 ("Please see attached for list of claims that need a stop payment indicator and a note on the account that says: 'Per NASWA Cross-Match - Claims Filed in Multiple States - DO NOT PAY.'")

[11] Def. Response to Interrogatory #3 (Available for in camera review)

The suspicion machine churned on into 2021, when the Agency brought in treasury cross-matching data to snare another 300,000+ claims in its dragnet. Ex 16, Jan. 2023 Office of Auditor General Report, Agency Comments at pp. 83-84. After initial attempts to expedite suspended claims over eight weeks, the process had to be abandoned under the crush of the backlog created.[12] Customer service messaging was to simply tell claimants to wait for reviews to be conducted in the order received, and do not promise a time.

By the time it was all done, the holds multiplied and there was no functional way to remove them. Special tools and reports had to be developed just to identify the multiplicity of flags put on accounts. There was no way to lift the holds except with an agent manually un-checking each benefit week of each claimant.[13] Even for eligible claims that were confirmed after a favorable administrative hearing, SPIs prevented payments from going out.[14] Over 2 million "fraud investigations" were opened and over 2.2 million identity verification issues created – enough to cover

[12] Ex 17, Adam Martin Nov. 9, 2020 Email, RTP # 19 at 31-32 ("From 8:50am11/9/20 until further notice, the only reason for expediting is proven financial hardship: foreclosure/eviction, shut off notice of major utility, repossession of a vehicle. The cases that meet those standards will still be placed on the same spreadsheet. *For clarity purposes the default message to customers is, pending cases are closed in the order received. The only time you speak of expediting is if the claimant advises of the 3 grounds for expediting. You do not offer it.")*

[13] *See* Ex.18, Sept. 15, 2021 Wilkerson email, RTP #3 at 25 ("…you would have to go into each cert and manually change them no easy way that I know of around that").

[14] *See* Ex.19, Dec. 2, 2022 Hakim email, RTP #14 add'l at 27 ("We suggest paying these claims (because we do not have a decision to hold payments), we could close/discard the fraud case, remove the SPI, pay the claimant and them reopen the fraud case? Teresa Burns Agrees with this suggestion.")

the entire population of pandemic era claimants. Ex. 20, January 2023 Office of Auditor General Report at 33.

It was too much to even be real. It wasn't real. But the hysteria had served its purpose. Benefit payments slowed to a trickle. Fewer overall payments necessarily meant fewer improper payments, and the Agency could claim a victory. Unfortunately, the victory was at the expense of the due process rights of hundreds of thousands of eligible claimants stuck on indefinite hold.

II. The Agency Director Is on Notice of the Lingering Holds, but Abandoned Efforts to Release Payments

Director Dale was on notice. If a claimant was savvy or persistent enough to get to her office, the file might get looked at and the problem might get fixed. For the hundreds of thousands of others stuck in a queue, benefits are still on hold to this day.

In January 2023, the Agency initiated a series of SQRs, some at the Director's request, designed to identify the scope of the SPI problem and potentially lift the holds. For instance, SQR 37037 was generated at the Director's request:

> Report request for Benefit's Leadership/Director: How many claims have stop payment indicators. In report – besides totals, please include Claim #, Account Type, BYB, WBA, if claim is allowed/denied, the Indicator Type, what the indicator does/definition, Date Indicator was added, the impact date of the indicator, if payments were stopped because of the indicator, and if yes (to payments being stopped) – how many weeks were stopped on the claim. If multiple stop indicators are on the claim, list each one separately."

Ex. 21, SQR 37037 Report for Claims with Stop Payment Indicator, Dec 19, 2022 at RTP #1 2605-2607. The results were astounding, they returned over 5 million rows of data.[15] This was just for one subset. *See also* Ex. 22, SQR 36926 Unpaid Claimants Report Due to Nonmons and Other Hold Pay Reasons at RTP #14 2nd Additional Responses at 668; Ex. 23 SQR 37107 Create a SPI Report, Jan 18, 2023 at RTP #1 2615; Ex. 24, SQR 37109 Report for claimants eligible for payment but not paid due to indicator, Jan 20, 2023 at RTP #1 2621.

All relevant leadership, including the Agency Director, were aware of this unconstitutional condition. Yet it has been allowed to persist with uninvestigated un-adjudicated issues holding back benefits for another 19 months. Ex. 25, Feb. 28, 2023 Kristine Kratz Email Backlog Payment Release ("we have been discussing this option since late September/early October [2022]. I know there is a report request to see how many people have been impacted – at the time, that is sqr 37109"). After realizing the scale, Agency executives made an intentional decision to continue withholding benefits:

> ***Determination has been made at the executive level to cancel the Backlog Payment Release effort. This SQR has been closed as a result and will be removed from future agendas.***

[15] *Id*. ("Art, There are about 4400 week level stop indicators. I attached an example of a week indicator and it was added by a user. There are about 925K account level indicators on claimant customers. There are about 2.2 million customer level indicators on claimants.")

Ex. 26, Mar. 21, 2023 Waivers/FCP/Payment Release - Team Meeting, RTP #1 add'l at 529-531 (emphasis added). Nothing has been done, and nothing will be done unless the Agency Director is specifically ordered to lift the indefinite holds and release payments.

With the Agency fully aware of the backlog, leadership have shown themselves unable or unwilling to address the problem without court intervention. Ad hoc solutions applied include having named defendant Teresa Burns review categories of backlog and decide who can be released and who cannot. Never mind that the claimants still do not get an explanation of why they are on hold or any opportunity to challenge the adverse action on the account.[16] It's time to stop gum-and-tape attempts to make it appear as if the Agency is following the law. Instead, the Court should order the Agency to actually follow the law.

STANDARD OF REVIEW

Once the party moving for summary judgment has shown there exists no genuine issue of material fact, the nonmoving party must take affirmative steps to avoid the entry of a summary judgment. *See* Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To refute such a

[16] Named Defendant Teresa Burns was directly involved in ad hoc decisions to decide who gets benefits (and who does not). *See e.g.* Ex. 27, Minutes of Backlog Discussion Meeting 1/18/2023, RTP #1 2555-2560 at 2560 ("No requirement of 21 days; within the back log, which is anyone who has a claim over 28 days, categorized as less likely of having fraud on claim. (Teresa will provide a document of categorizes that are less likely of having fraud, will need to compare sources listed here to that document").

showing, the nonmoving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material, factual dispute. *Celotex*, 477 U.S. at 322. A mere scintilla of evidence is not enough; the evidence must be such that a reasonable jury could find for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); See also *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343 (N.D. Ohio May 22, 1989) (Exhibit 28)(granting summary judgment on plaintiffs' claims for injunctive relief to stop pre-hearing termination of unemployment benefits).

An official capacity action seeking declaratory and injunctive relief constitutes an exception to sovereign immunity. *See Ex Parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (holding that the Eleventh Amendment immunity does not bar prospective injunctive relief against a state official). The state cannot avoid judgment or claim immunity on an ongoing violation of federal law where plaintiffs seek proper prospective relief.[17]

ARGUMENT

I. Defendants' Practice of Pre-Hearing Deprivation of Property is Prohibited by Well-Established Law

The due process law prohibiting pre-termination notice is so well established

[17] *Verizon Md. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (holding that because the claim does not implicate past liability of the State, "[i]t does not impose *upon the State* "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.") (citing *Edelman* v. *Jordan*, 415 U.S. 651, 668, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)).

it requires only brief mention. "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963). Once determined eligible, unemployment agencies are required to pay benefits when due and must provide reasonable notice and opportunity for a hearing before depriving UI claimants of property. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133-135 (1971). Department of Labor (DOL) instructions have further confirmed this unremarkable principle. Ex. 29, UIPL 01-16.[18]

In *Java*, the plaintiff challenged California's policy by which payment of a claimant's benefits is automatically stopped while there is a pending appeal. *Id.* at 128. The Court found that a state violates the due process rights of unemployment claimants when it fails to provide notice and opportunity for a hearing before halting benefits. *Id.* at 133. The Court further found that payments must be made at the initial determination stage and that payments must continue while an appeal is pending. *Id.* at 133-134. The Court ultimately enjoined California's practice, finding that halting

[18] As part of the federal oversight process, the DOL issues Unemployment Insurance Program Letters ("UIPL"), which are binding instructions to state unemployment programs defining the administrative requirements of federal law. Ex. 30, UIPL 01-96. The DOL requires continued payment of benefits until a final determination of ineligibility. *See* Ex. 29, UIPL 01-16 (requiring states to "continue to make timely UC payments (if due) and wait to commence recovery of overpayments until an official determination of ineligibility is made"). The DOL also allows states to prohibit recovery collecting an overpayment unless it has become final, as Michigan has in MCL 421.32a. *See id.* (stating that "States may not initiate recovery of an overpayment until an official determination of the overpayment has been made" and noting that "State law may prohibit recovery of an overpayment until the overpayment determination, including any appeal, has become final under state law").

payment of benefits because an appeal is pending violates claimants' constitutional rights. *Id.* at 135.

From 2014 to 2017, individual plaintiffs and the UAW litigated due process rights of unemployment claimants accused of fraud based on nothing more than a defective computer crossmatch:

> [T]he Supreme Court has already recognized that § 303(a)(1) of the Social Security Act does create an enforceable right, *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (1971), and this court is no position to reconsider this question of law.… In *Java*, the Court entertained an action under § 303(a)(1) brought by a class of claimants and enjoined the enforcement of a state statute that the Court held violated the "when due" provision of that section. … Therefore, the court will not dismiss Plaintiffs § 1983 claims arising under the "when due" provision of the Social Security Act.

Zynda v. Arwood, 175 F. Supp. 3d 791 (E.D. Mich. 2016), 175 F. Supp. 3d at 812-13.

Following *Java*, the *Zynda* Court found the Social Security Act creates an enforceable right. Plaintiffs here raise a claim under Section 1983 that Defendants violate due process by their failure to comply with the Social Security Act. This right is confirmed and enshrined throughout the legal framework of Michigan's UI system and affirmed by the Sixth Circuit.

> Recipients of unemployment compensation have constitutionally-protected property interests in unemployment benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)); *Berg v.*

> *Shearer*, 755 F.2d 1343, 1345 (8th Cir. 1985) ("Unemployment benefits are a property interest protected by the due process requirements of the fourteenth amendment."); *Ross v. Horn*, 598 F.2d 1312, 1317-18 (3d Cir. 1979) ("[A]ppellants certainly have a property right in receiving unemployment benefits to which they are entitled by statute . . . [t]hus it is clear that they may not be deprived of this right without due process."); *Drumright v. Padzieski*, 436 F. Supp. 310, 319 (E.D. Mich. 1977) ("[T]he due process clause . . . appl[ies] to terminations of unemployment compensation benefits because they are statutorily created property interests, within the meaning of the Fifth and Fourteenth Amendments.").

Cahoo v. SAS Analytics Inc., 912 F.3d 887, 900 (6th Cir. 2019). Defendants' failure to pay benefits "when due" violates claimants' rights to due process.

Once the Unemployment Insurance Agency determined that Plaintiffs were eligible, Plaintiffs had a protected property interest in the benefits. *See, e.g., Goldberg*, 397 U.S. at 262, 267-68 (holding the "termination" of public benefits payments "involves state action that adjudicates important rights" and requires a hearing); *In re Bank of Am. Cal. Unemployment Benefits Litig.*, 674 F. Supp. 3d 884, 942 (S.D. Cal. 2023) (holding that "once EDD [the California unemployment agency] determined that Plaintiffs were eligible, Plaintiffs had a protected property interest in the benefits" that could not be turned off without notice and opportunity to be heard); *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343, at *17 (N.D. Ohio May 22, 1989) (concluding that unemployment recipients are

entitled to pre-termination notice and opportunity to be heard and granting summary judgment for Plaintiffs on the issue).

II. The Due Process Right to Pre-termination Notice is so Well Established that it Repeats Throughout Department of Labor Instructions, State Law and the State's Agreements

Agency decisionmakers knew that a huge subset of claims were caught in their net with benefits on hold without notice and opportunity to challenge the determination. This system was not just directly contrary to due process standards articulated by the Supreme Court and the Sixth Circuit, but also violated binding Department of Labor instructions,[19] state law, and state cross-matching agreements.

In recognition of Goldberg v. Kelly/Java Rights, state agencies have long been instructed to provide notice and opportunity to be heard prior to terminating benefits.[20] Moreover, once they start paying, claimants must be presumed eligible if agencies are unable to make a timely determination of ineligibility. UIPL 01-16, Change 1 states:

> If a determination of ineligibility has not yet been made, a benefit payment must be made by the end of the week following the

[19] As part of the federal oversight process, the federal Department of Labor issues Unemployment Insurance Program Letters ("UIPL"), which are binding instructions to state unemployment programs defining the administrative requirements of federal law. Ex. 30, UIPL 01-96. The DOL requires continued payment of benefits until a final determination of ineligibility. *See* Ex. 29, UIPL 01-16 (requiring states to "continue to make timely UC payments (if due) and wait to commence recovery of overpayments until an official determination of ineligibility is made").

[20] Ex. 31, UIPL 16-21. Under the DOL's Unemployment Insurance Program Letter ("UIPL") 16-21, If the individual does not respond timely or responds but does not provide adequate information, the state must provide notice and opportunity to challenge the determination. ("[t]he agency must give each claimant a written notice of … [a]ny…determination which adversely affects a claimant's right to benefits"). The determination must explain the reason for the decision, including the facts: what the individual was asked to provide; what was received; and, if information was received, why that information was insufficient to verify the individual's ID").

> week in which an issue is detected. In practice, that means that states would have at most 7-10 days to make a determination of ineligibility ***in order to not issue the benefit payment***. For example, if an issue is detected via cross-match with the NDNH on a Tuesday during week five of the claim, the state must either make a determination or make a payment by the end of the following week, in this case on Friday of week six, which is 10 days later. Absent a determination of ineligibility during a continued claim series, there is a presumption of continued eligibility and benefit payments must be issued timely.

(Ex. 32, UIPL No. 01-16, Change 1, p. 6 *Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers).*

Moreover, the Computer Matching Protection and Privacy Act requires the UIA and every state unemployment agency accessing federal databases for cross matching purposes enter into a Computer Matching Agreement (CMP) to affirm their obligation to provide notice and independent investigation before relying on the data. Ex. 33, SWA Computer Matching Agreement, p .11. The CMP specifies that the UIA procedures for verifying information produced in the matching program and an opportunity to contest findings, in accordance with subsection (p).

> (1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until
> (A)(i) the agency has independently verified the information;

> (B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and
> (C)(i) the expiration of any time period established for the program
> by statute or regulation for the individual to respond to that notice; or
> (ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on
> which notice under subparagraph (B) is mailed or otherwise provided to the individual.

5 U.S.C. § 552a(p)(1). The CMPPA covers and includes all cross-matching activities that utilize social security numbers, such as UC records.

Similarly, the state of Michigan has utilized crossmatches from the "integrity Data Hub" – a joint collaboration between state agencies and the Department of Labor. Every agency must sign a participation agreement, which also affirms the obligations under *Goldberg v. Kelly*, *Java*, and DOL instructions:

> IDH is intended only to flag suspicious claims and/or potentially suspicious activity. As such, State shall not establish an improper payment on a claim based solely on IDH data. Independent verification of the data and appropriate investigation must be conducted by the State in accordance with Unemployment Insurance Program Letter (UIPL) No.1-16 (Federal Requirements to Protect Individual rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures).

Ex. 34, NASWA IDH participation Agreement, as of 2018, p. 7.

The deprivations are neither accidental nor the result of negligence. Instead,

Defendants intentionally programed their systems to withhold benefits to UI claimants based on crossmatches, without notice to the claimant or any independent verification. The Agency is responsible for how it uses its programming and selects its vendors.[21]

Defendants' programs automatically put UI claimants on an indefinite hold, providing no way for claimants to lift the hold. Although some claimants could protest or appeal if there was a Determination or Redetermination, that protest or appeal did not stop the indefinite hold. Some claimants had no Determination or Redeterminations to protest or appeal, and many had no way to address the indefinite hold because any (Re)determinations issued had nothing to do with whatever caused the indefinite hold.

For instance, when a claimant filed a claim backdated more than four weeks, the system automatically generated a generic "availability" Determination, despite there being no evidence of an availability issue and despite the fact that claimants are permitted to backdate claims. "Misrepresentation" Determinations were generated without any actual evidence of misrepresentation. If multiple family

[21] Ex. 32, UIPL 01-16 Change 1 p 6, Frequently asked question:
Will the Department determine whether specific products or services offered by vendors comply with the requirements of UIPL No. 01-16?
No. States must ensure that the services and products provided by vendors comply with all applicable Federal and state laws, regulations, and policies. Even when the Department provides funding to a state for a specific automation project, the state must ensure that the project meets all requirements…

members lost work and applied for benefits on the same computer, the entire family's claim would be put on indefinite hold. As a result, entire families were cut off from benefits during a period of extreme financial vulnerability. These systems were designed and intended to deprive claimants of benefits indefinitely without a hearing.

III. The Administration is Unable or Unwilling to End this Unconstitutional Policy without Court Intervention

Defendants have been on notice of the violation since this case was filed in August 2022, if not much earlier. Plaintiffs have sought to confer on the relief requested over many months and have proposed specific prospective remedies to end the offending practice, but Defendants have been unable to concur in the relief sought. The harm is ongoing and Plaintiffs were impacted and have standing. See e.g. *Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013) (discussing *Goldberg v. Kelly* and noting that the Court required a hearing prior to termination of welfare benefits, notwithstanding the availability of arguments that the particular Plaintiffs would still be denied benefits if the hearing were granted).

Moreover, each of the Plaintiffs were subject, are subject, or may in the future be subject to the Agency's unconstitutional SPI policies. Moreover, the injury is otherwise capable of repetition yet evading review. The record is replete with examples of repetitive indicators, flags, and BPR's on each single plaintiff's file. In

fact, there are apparently more SPI flags on claims than all the claimants who sought financial relief during the pandemic shutdown.

IV. Prospective Injunctive Relief is the Appropriate Remedy

A. Federal Courts have Clear Jurisdiction to Order Prospective Injunctive Relief to End Unconstitutional Practices

Plaintiffs seek prospective equitable relief, requesting that this Court intervene to stop future violations of the United States Constitution. *Ex parte Young* allows for injunctive relief against a state official. *Ex parte Young*, 209 U.S. 123, 159 (1908). The Supreme Court determined that "'a federal court may, without violating the Eleventh Amendment, issue a prospective injunction against a state officer to end a continuing violation of federal law.'" *Price v. Medicaid Dir.*, 838 F. 3d 739, 746-47 (6th Cir. 2016) (citing *Ex parte Young*, 209 U.S. at 159).

B. Injunction would not interfere with a proper administrative process as the Agency remains able to issue determinations and provide meaningful notice and opportunity to be heard.

Requiring the Director to comply with established due process law will not interfere with the lawful administration of the UIA system. As Defendant has previously noted, the State law enabling act itself plainly requires benefit payments be made when due in the absence of a determination of ineligibility: "When a determination, redetermination, or decision is made that benefits are due an unemployed individual, the benefits become payable from the fund and continue to be payable to the unemployed individual, subject to the limitations imposed by the

individual's monetary entitlement, if the individual continues to be unemployed and to file claims for benefits, until the determination, redetermination, or decision is reversed, a determination, redetermination, or decision on a new issue holding the individual disqualified or ineligible is made[…] MCL 421.27(a)(1).

C. Delay Only Compounds Damage to Claimants and Jeopardizes State Coffers

A delay of even a few weeks is devastating to unemployed workers, the impact is immediate and harmful in ways that they may never recover from. See Ex. 35, Preliminary Report and Declaration of Economist Kathryn Edwards. Many unemployed workers do not have an alternative source of income so that loss of employment or employment benefits becomes serious. The process of deciding a continuing eligibility issue can take several weeks leaving the claimant without benefits during that period. See *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343, at *6-7 (N.D. Ohio May 22, 1989) (applying the standard in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976) and concluding the unemployment benefits, like welfare benefits are entitled to a pretermination evidentiary hearing). General notice that they may be denied for failure to meet program requirements are not sufficient to satisfy pre-termination due process. *Camacho v. Bowling*, 562 F. Supp. 1012 (N.D. Ill. 1983).

By compounding the delay, the state also places its own coffers in jeopardy, as the federal reimbursement for COVID dollars is not going to continue indefinitely.

Already funding that would have reimbursed the state had timely benefits been made is beginning to evaporate. For instance, the Lost Wages Assistance (LWA) program administered through FEMA closed out in June 2022. Moreover, the CARES Act had funded the first week of benefits for all unemployment recipients, including those on regular state UI benefits. As of this year, states have been requested to close out their balance sheets for reimbursement of this funding. (Ex. 36, UIPL 20-20, Change 1) (instructing states to reconcile books and close out reimbursement for first week supplemental payments). This alone will cost the state millions of dollars (perhaps hundreds of millions). It would be folly to believe that the more significant federal reimbursement will not also be closing in the near future, such as funding for expanded pandemic era emergency relief in the Cares Act. The multi-year year delay, knowingly tolerated by the Director, could end up costing the state billions if she is not ordered to act now.

CONCLUSION

The Court should not accept administrative excuses. Plenty of time has elapsed to allow the Agency to do the right thing. There is no factual dispute that Director Dale is aware of the ongoing unconstitutional practices and has the power to stop them. Therefore, Plaintiffs request this Court issue an order: 1) granting partial summary judgment on the legal issue and finding the practice of suspending benefits without pre-termination notice and opportunity to be heard violates the due

process clause of the constitution by depriving Plaintiffs of benefits when due; 2) Ordering an appropriate prospective injunction directing the Director in her official capacity to cease the practices that result in this unconstitutional condition.

Respectfully submitted,
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Dated: July 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, whereupon it is electronically served on all counsel of record.

Respectfully submitted,
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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
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Exhibits to be filed pending resolution of protective order issues

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2. Jan. 2023 OAG Report at 15-16

3. Nov. 2020 Independent Deloitte Audit

4. Common Scenarios with Responses, RTP #1 18-35 at 22

5. June 5, 2020, Kratz Clearance Request, RTP #1 at 447-450

6. Chrzaszcz email to Director Corbin, June 15, 2020, RTP #1 at 414-419

7. Oct 23, 2020 Kolar Clearance Request, RTP #1 at 3037

8. Oct 26, 2020 Kolar Clearance Request, RTP #1 at 2629-2632

9. October 7, 2020 Field Release

10. Nov 12, 2020, State of Michigan UIA, Do Not Release Payment Indicator, RTP #1 at 3172

11. Nov. 19, 2020, Kolar Clearance Request, RTP #1 at 2773-2776

12. Nov. 19, 2020, Kolar Clearance Request, RTP #1 at 2095-2098

13. Nov. 23, 2020, Kolar Clearance Request RTP #1 at 2942-2945

14. Dec. 2, 2020 Field Release on Reasonable Suspicion on PUA Claims to Detect and Prevent Fraud and Overpayments, RTP #1 at 2034-2036

15. Dec. 9, 2020 Field Release PUA Guidance

16. Jan. 2023 Office of Auditor General Report, Agency Comments at pp. 83-84

17. Adam Martin Nov. 9, 2020 Email, RTP # 19 at 31-32

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28. *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343 (N.D. Ohio May 22, 1989)

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32. UIPL No. 01-16, Change 1

33. SWA Computer Matching Agreement, p .11

34. NASWA IDH participation Agreement (2018)

35. Preliminary Report and Declaration of Economist Kathryn Edwards

36. UIPL 20-20, Change 1