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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INDIVIDUAL PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION

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   Defendants say: Yes

2. Do recipients of unemployment benefits have a clearly established property right to continued payment?
   Plaintiffs say: Yes
   Defendants say: No

3. Are due process rights to continue payment of unemployment the same under PUA?
   Plaintiffs say: Yes
   Defendants say: No

4. Does the Defendant's culpability depend on respondeat superior liability?
   Plaintiffs say: No
   Defendants say: Yes

5. Is injunctive or declaratory relief appropriate in this case to abate an unconstitutional condition?
   Plaintiffs say: Yes
   Defendants say: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

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I. INTRODUCTION

The Defendants' Joint Motion for Summary Judgment misses the forest for the trees. Let's be clear about what happened. At the onset of an unprecedented public health emergency, the Governor of Michigan shut down schools and businesses and urged workers that "[e]nsuring Michiganders have access to state **and federal benefits** during this pandemic [was] a critical part in protecting everyone's health and safety."[1] The UIA's promise to Michiganders was that "*every eligible worker who applies for unemployment benefits…will receive them*."[2] *Id.* Thereafter, the Agency issued determinations that Plaintiffs and putative class members were eligible, but then held payment without notice or explanation. The Agency received hundreds of millions of dollars (or more) in federal assistance based on these payable benefits, but held the money in state coffers and continues to hold it to this day. That money is the property of the people of the state of Michigan being withheld without due process. None of this is reasonably debatable.

Although Defendants were aware of the indefinite holds in violation of clearly established law, they did nothing to fix it. Instead, they brought in public relations

[1] Ex. 1, Governor Whitmer Press Release, April 10, 2020 "Self-Employed, Other Newly Eligible Workers Can Apply for Unemployment on Monday, $600 Federal Payments Also Begin"
[2] *Id.*

handlers to cover up the negative fallout from their actions.[3] Therefore, Defendants' motion should be denied. Rather summary judgement should be directed for Plaintiffs as there is no genuine issue as to the deprivation that occurred.

II. STATEMENT OF FACTS

A. Defendants' Conduct

The due process violation alleged is already extensively briefed in this case. *See* ECF No. 71 at Page ID 1849 and ECF No. 111 at Page ID 3384 (Discussing the nature of the violation). Moreover, the Court has already ruled that unemployment benefits are a property right that requires pre-termination notice and opportunity to be heard. *See* ECF No. 33. And Defendants Motion for Summary Judgment does not provide any adequate reason to unsettle the law of the case.

In short, this case alleges that Defendants operate a flagging system that causes benefit payments on continuing claims to be held indefinitely without any determination or any notice and opportunity to respond. Defendants have continued this system unabated for another two years since this case was filed, in deliberate indifference to the ongoing deprivation and due process violation. The Court denied the Defendants' Motion to Dismiss, concluding that the facts alleged supported a

[3] Ex. 2, Truscott Rossman Strategy Outline 2022 UIA Brand Defense; Ex. 3, Truscott Rossman January 26, 2023 Events and Message Planning Document.

violation of due process, but reminded the Parties that the allegations must be supported by a proffer of evidence at the time of Summary Judgement. They do.

Through discovery, Defendants admit that they continued to hold benefits owed to 265,000 claimants after all Agency decisions had become final in claimants' favor. Ex. 3, Defs' Resp. to Int. #9. Defendants admit that they suspended payments due to 920,000 claimants without issuing a determination or redetermination for more than 21 days. Ex. 5, Defs' Response to Int. #7. As long as Agency leadership decided a risk factor or crossmatch applied, due process was out the window—no need for notice to the claimants.

Claimants who were relying on benefits were immediately suspended. If the Agency thought you were "suspicious" everything stopped, without any opportunity to prove you were not "suspicious." Agency operators were specifically directed to *not mention fraud*. Ex. 6, 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.") After initial Agency attempts to expedite reopening suspended claims over eight weeks old, the process had to be abandoned under the crush of the backlog created.[4] Customer service

[4]Ex. 7, 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*

messaging was to simply tell claimants to wait for reviews to be conducted in the order received, and do not promise a time.

In December 2020, a new Field Release to Agency staff announced an even more ominous turn for the Agency's suspicion machine. In addition to using stop payment indicators ("SPI's") to suspend benefits, the Agency would now turn to using a new "generic availability" label. The criteria didn't have anything to do with the claimants' availability, and it would continue to hold benefits even if a claimant proved they were available for work.[5]

Under the new protocol, backdating a claim (even though legally allowed) was "suspicious," and payments would immediately stop. Age was suspicious, for instance if a worker was under 16 or over 80 (like Plaintiffs I.F. and Brainer) their benefits would immediately stop; and using the same phone number or bank account on multiple claims (such as multiple out of work people in the same household – such as Patricia and Andy Myrold) was suspicious, and benefit payments would stop. Ex. 9, Dec. 2, 2020 Field Release on Reasonable Suspicion on PUA Claims to Detect and Prevent Fraud and Overpayments, RTP #1 at 2034-2036. Ex. 10, Dec. 9, 2020

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.")

[5] Ex. 8, PPT slide on "generic availability" (a clmt protest stating they were able to work does not mean that the case would be reversed NIN [not ineligible].")

Field Release PUA Guidance. How many were suspended based on December Field Release Criteria? 119,862.[6]

Defendant Berry authorized the Agency's "reasonable suspicion" protocol in December 2020. Ex. 11, December 2, 2020, Berry email ("This is Approved"). Berry was the Deputy Director of the Agency in 2020 and through March of 2022. Ex. 12, Berry Dep. Tr. at 17:13. In 2020, Berry was also the highest-ranking official at the Agency in charge of compliance with Agency settlement obligations and the ongoing due process litigation. Ex. 13, Gray Dep. Tr. at 154-155. As Director of Internal Controls and Compliance, Defendant Teresa Burns reported directly to Defendant Berry.

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.[7] Even for eligible claims that were confirmed after a favorable administrative hearing, SPIs prevented payments from going out.[8] Over 2 million "fraud investigations" were

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[6] Def. Response to Interrogatory #3 (Available for *in camera* review).
[7] *See* Ex.14, 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.")
[8] *See* Ex.15, 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

opened and over 2.2 million identity verification issues created – enough to cover the entire population of pandemic era claimants. Ex. 16, Dec. 2023 Office of Auditor General Report at 33.

Contemporaneous 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. 17, 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.* As late as June 2023, the agency was still revising policies to deal with indefinite holds. Ex. 18, June 1, 2023 Training Materials "Using MiDAS for Benefit Payment Review in PUA claims" ("Is it reasonable for three people with the same last name to share the same home phone number? Yes, probably").

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close/discard the fraud case, remove the SPI, pay the claimant and them reopen the fraud case? Teresa Burns Agrees with this suggestion.")

In the course of discovery, the Defendants were directly asked to "list all the indicators used in MiDAS that result in immediate halt in benefit payments on a continuing claim series and provide the associated SQR(s) if applicable." The Agency returned a list of about 50 "stop payment indicators," BPR rule additions, identity verification, fraud manager rules, and "other reasons" that the Agency used to stop payment on continuing claims. Ex. 19, Def. Resp. Int. #11; *see also* Ex. 20, Def. Resp. Int #6; Ex. 21, Def. Resp. to Int. #32. Defendant Burns knew this was not in compliance with due process:

> A suspicion of fraud is not enough to stop a claim. That's the same as saying a suspicion of ineligibility or disqualification. If the state has already approved payment before the suspicion arose, then payment is due. There has to be a (re)determination issued that the individual is no longer eligible or qualified in order to stop payment.

Ex. 22, Teresa Burns Feb 1, 2021 email to Berry and other management.

In 2021 and 2022, Burns and Berry were on direct notice of the violations alleged in this action. One of the ways Defendants received notice was through compliance letters. Although these letters have been sent annually since 2021 addressed *Zynda* violations, the conduct reported was sufficient to put a reasonable person on notice of the systematic due process violations alleged by individual Plaintiffs. Another way was through individual cases highlighted by the UM Law School Worker's Rights Clinic. Ex. 23, May 17, 2020 Email to Burns from the WRC (Highlighting a client who "13 months later only about half of his benefit weeks

were finally disbursed" and noting "if there is a secret unrevealed determination that the Agency has, it has failed to notify the claimant…"). Burns was aware that hundreds of thousands of claims had been suspended and that auto-generated misrepresentation issues were holding back payment (including "pending" issues that were never sent to claimants).

Defendants Burns and Berry did nothing in response. Berry, in particular, was unabashedly indifferent to any duty to act on the information. All she did upon receiving the notice was give it "to legal for them to discuss next steps." *See* Ex. 12, Berry Dep. Tr. at 18. As Deputy Director and designated *Zynda* Compliance Liaison, Berry acknowledges no other duty than to pass the information along.

> Q. As the liaison, your only duties were to the pass on the information to the appropriate people?
> A. Correct.
> * * *
> Q. You didn't pass it on or discuss it with anybody other than the attorneys for the Agency?
> A. No.
>
> Q. And you didn't take any action yourself to review or change any policies related to these concerns that were raised in [the September 2, 2021] letter, is that right?
> A. Correct.

(*Id* at 23-24). Defendant Berry reasonably knew that the Agency was violating due process.

I would just note that if the collection goes active on accounts where there are in fact timely protests submitted, the Agency will be in violation of the settlement agreement that it entered in the Frazier case. I believe this is also a term that we must comply with as a result of the Zynda settlement agreement as well. A timely protest or appeal stops collection. If we have a backlog of protests or appeals that have not been applied to cases where restitution is due, the debt is not legally collectible because it is not final.

Julia/Kimberly, you may wish you reach out to Debbie T. and Kim in my absence for copies of the settlement agreements.

Thanks much.

Ex. 24, Dec. 12, 2021 Burns email to Berry.

Defendant Burns was the Administrator for Internal Controls and Agency Compliance at all relevant times. Burns was also on notice of ongoing holds and did nothing. More than two years later, she was still contemplating action on hundreds of thousands of claimants with benefits suspended. Ex. 25, Burns Feb 28, 2023 email ("This request is from January [2023] when we were talking about the roadmap for ***what cases will have payments released***"); Ex. 26, Realign UI Benefits to Mission Spreadsheet (attachment listing several dozen mechanisms holding up payment, for a total of over 700,000 claims on backlog on the "Summary" tab).

Even though they had clear notice of the ongoing suspension system, Defendant Burns and Director Dale abandoned the effort. Defendant Dale testifies that she has no recollection of the problem, and that she relies on her "subject matter experts" (including Burns) to administer the system in compliance with law. (Ex. 27, Dale Dep. Tr. at 232-233 and 87). Defendant Burns says she only has responsibility to review for compliance if requested by leadership. (Ex. 28, Burns Dep. Tr. at 7-11).

B. Defendant Dale Has Been on Notice of the Lingering Holds Since Becoming Director, but Cancelled Efforts to Release Payments

Director Dale was on notice of the problem. 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.[9] For the hundreds of thousands of others stuck in a queue, benefits are still on hold to this day. Dale conferred with Burns as her "subject matter expert" to understand the process[10]

Eventually, 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."

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[9] *See* Pl's Rsp. To Motion to Quash Dep. of Kurz-Crowe, ECF No. 77 at Page ID.2258-2261 (Discussing multiple contacts to Director Dale's Office regarding indefinite holds or stop payment indicators).

[10] Ex. 29*,* Oct. 13, 2022 email to Dale and others ("Why would we exclude issues over 21 days? Those are the ones that are complained about. Only address those within 21 days only goes to the timeliness issue and ALP's (acceptable level of performance standards) but doesn't prevent lawsuits or other issues related to delayed adjudications. If we are applying the option, why restrict it in this way?*). Id.* ("Hey team, we need to get some answers to these questions, can you all take a look?")

Ex. 30, 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.[11] This was just for one subset. *See also* Ex. 31, SQR 36926 Unpaid Claimants Report Due to Nonmons and Other Hold Pay Reasons at RTP #14 2nd Additional Responses at 668; Ex. 32, SQR 37107 Create a SPI Report, Jan 18, 2023 at RTP #1 2615; Ex. 33, 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 two years. Ex. 34, 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 of the unconstitutional deprivation, leadership 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.***

[11] *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. 35, Mar. 21, 2023 Waivers/FCP/Payment Release - Team Meeting, RTP #1 add'l at 529-531 (emphasis added).

With the Agency fully aware of the backlog, leadership have shown themselves unable or unwilling to address the problem without court intervention. Ex. 36, March 20, 2023 Fuhrman Email Re: Payment Release-Cancelled ("Canceling this SQR would effectively cancel the entire Backlog Payment Release…can you confirm this is the intent?") Ad hoc solutions applied include having 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.[12]

When it is to their advantage, the Agency acknowledges its due process obligations. In individual administrative proceedings, Defendant Burns can recite the Agency's due process obligation to continue payment as a matter of boilerplate black letter law. (Ex. 38, Collection of Burns Memoranda to the Michigan Office of Administrative Hearings and Rules) (repeatedly affirming obligations under Java, US DOL Unemployment Insurance Program Letter 01-16 and Section 27(a)(1) of

[12] Burns was directly involved in ad hoc decisions to decide who gets benefits (and who does not). *See e.g.* Ex. 37, 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.")

the Michigan Employment Security Act). When challenged by independent auditors, the Agency again justifies their actions by relying on the due process obligation to claimants. "***Under JAVA, we cannot stop payment until a determination is made"*** (Ex. 39, Agency Internal Tracking Spreadsheet for Independent Audits) (Tab: OIG CARES Act Prompt Payment Audit Notes and Agency Position as to "Fact 11"). Yet it happened. It is ongoing, and Defendants Dale, Berry and Burns have been deliberately indifferent to the unconstitutional deprivation.

III. STANDARD OF REVIEW

Summary Judgment is appropriate where there exists no genuine issue of material fact. Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343 (N.D. Ohio May 22, 1989) (Exhibit 61)(granting summary judgment on plaintiffs' claims for injunctive relief to stop pre-hearing termination of unemployment benefits). In this case, where the violation and the rights at issue are determinable as a matter of law, there is no genuine issue of material fact, and the Court should deny Defendants Motion and grant summary judgment in Plaintiffs' favor.

Under Fed. R. Civ.P. 56(f), after giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant

summary judgment on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute. Fed. R. Civ. P. 56(f). A district court may enter summary judgment *sua sponte* if the losing party is "afforded notice and reasonable opportunity to respond to all the issues to be considered by the court." *Bailey v. City of Howell*, 643 F. App'x 589, 600 (quoting *Shelby Cnty. Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 934 (6th Cir. 2000)). This approach aligns with the broader principle of fairness and judicial efficiency, ensuring that cases are resolved on their merits. Plaintiffs assert there is no genuine issue of fact, and summary judgment on liability may be easily resolved in their favor. ECF No. 71.

IV. ARGUMENT

A. The Defendants Authorized, Acquiesced in, and were Deliberately Indifferent to a Flagging System that Operates Entirely Outside of State Law and in Disregard of Established Due Process Rights

This Court has already decided several of the legal issues raised by Defendants in their new Motion for Summary Judgment. Specifically, the Court has ruled that the Colorado River Abstention Doctrine does not apply (ECF 33 PageID.1207), that Plaintiffs have alleged a procedural due process claim (ECF 33 PageID.1209), and that Plaintiffs' rights to adequate notice and a pre-deprivation hearing were clearly established (ECF 33 PageID.1211). Furthermore, this Court has acknowledged that

the Defendants have explicitly conceded that case law supports the Plaintiffs' argument that UI payments are indeed protected property interests. ECF 33 PageID.1208. Therefore, under the law of the case doctrine, these previously decided issues should continue to govern the present stage of litigation.

"Section 1983 provides a cause of action against any person who, under color of state law, deprives an individual of any right, privilege, or immunity secured by the Constitution and federal law." *McKnight v. Rees*, 88 F.3d 417, 419 (6th Cir. 1996). Qualified immunity shields government officials from liability for civil damages under § 1983 only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). At the summary judgment stage, the court views the facts in the light most favorable to the plaintiff and conducts a two-pronged inquiry, asking (1) whether the plaintiff has created a material question of fact that the officers' conduct violated plaintiff's constitutional rights, and (2) whether the constitutional right at issue was "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal citations omitted).

B. Recipients of Unemployment Benefits Have a Clearly Established Property Right in Continued Payment

"**Aid Pending Adjudication is a Due Process Right, Not an Administrative Error**"[13]- Teresa Burns, 11/5/2021

Plaintiffs' right to uninterrupted payment of benefits is a cornerstone of UC law and has been in place since Michigan amended its statute to comport with JAVA in 1971. In the present matter, the Due Process violation alleged has been extensively briefed. *See* ECF Nos. 71 at PageID.1849, 111 at PageID.3384 (Discussing the Nature of the Violation). Moreover, the Court has already ruled that unemployment benefits are a property right that requires pre-termination notice and opportunity to be heard. ECF No. 33 at PageID.1211 ("Sixth Circuit precedent confirms that—on Plaintiff's well-pleaded allegations—Plaintiffs' rights to adequate notice and pre-deprivation hearing were clearly established... The same result is proper here.") Defendants Motion for Summary Judgment does not provide any adequate reason to unsettle settled law. Defense counsel's argument directly contradicts the Agency's own position. Defendant Agency takes the exact same legal position when it is to their advantage. Defendants are estopped from asserting otherwise.

"In determining whether a constitutional right is clearly established, the court must first look to decisions of the U.S. Supreme Court, then to decisions of the Sixth Circuit, and, finally, to decisions of other circuits." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993). The Supreme Court has long held that individuals

[13] *See* Exhibit 38, Collection of Burns Memoranda to the Michigan Office of Administrative Hearings and Rules at p. 1.

have a property interest in their unemployment benefits that is protected by the Due Process Clause of the Fourteenth Amendment. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). In *Cahoo v. SAS Analytics Inc.,* the Sixth Circuit determined that recipients of unemployment compensation have constitutionally protected property interests in unemployment benefits. 912 F.3d 887 (6th Cir. 2019) (Defendant Agency on notice as a party). Additionally, throughout these proceedings, this Court has established that UI payments constitute protected property interests. ECF No. 33 PageID.1208. The Defendants have conceded this point. This Court has ruled that the "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." (quoting *Taylor*, 1989 LEXIS 19343, at *13, at *5). ECF No. 33 PageID.1209. This principle is so firmly established that any reasonable official would understand that terminating UI benefits without providing adequate pre-deprivation process violates well-settled constitutional rights.

It is hard to understand how Defendants' counsel can seriously contest the point since the Agency, by and through Teresa Burns, regularly and repeatedly relies on these same constitutional principles and statutory rights in the Agency's own position statements. Burns in her own words repeatedly relies on these principles:

The US DOL explains the concept of claimants' due process right of aid pending eligibility or appeal:

> "UIPL No. 1145 describes requirements imposed on state agencies as a result of Java. UIPL No. 04-01 addresses payment of IC and timeliness determinations during a continued claim series. …..**If the state agency cannot make an eligibility determination before the date of a timely payment, the state agency 'presumes the claimants' continued eligibility until it makes a determination otherwise…"**

Ex. 40, US DOL, UIPL 01-16, p. 4 (Oct 1, 2015) (emphasis added). In accordance with federal guidance and due process principle, Section 27(a)(1) of the Act states in full:

> 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….

Mich. Comp. L. 421.27(a)(1). (*See* Exhibit 38) (repeatedly affirming obligations under Java, US DOL Unemployment Insurance Program Letter 01-16 and Section 27(a)(1) of the Michigan Employment Security Act).

The Agency's own policy manual also confirms an understanding of Java rights to continuing benefits. Ex. 41, UIA Manual Section 7902 at 3 ("JAVA" refers to a court decision which held that unemployment benefits are immediately payable once a determination is issued allowing benefits. Further, benefits once allowed and not exhausted ***cannot be discontinued unless a [decision] is issued holding the claimant ineligible or disqualified. (See Section 27(a)(1) of the MES Act"***).

C. Due Process Rights to Continued Payment of Unemployment are No Different Under PUA

"**The requirement to pay when due is federal and applies to all claim types, not just the PUA claims…**"[14]– Teresa Burns 2/1/2021

Contrary to Counsel's legal argument, Defendants have never been confused about the due process right to continued payment – for PUA or any other program. Throughout internal communications, the Agency management affirm and acknowledge that the UIA is required to pay continued benefits unless and until it makes a contrary determination. *Id.* Defendants knew that PUA was no different in the property rights conferred or the due process obligations that attach. Further, the Agency's manual instructs and acknowledges the same constitutional principle for PUA. ***"[R]equests for supporting documents and investigative and adjudication practices should be done in accordance with UIPL No. 01-16 to ensure due process.***" Ex. 42, UIA Manual Section 0802 (regarding processes for handling PUA and other CARES Act Programs and also affirming that "to ensure that appeals and hearings are held promptly, the applicable state and federal law provisions concerning the right of appeal and fair hearing apply"); *See* also Exhibit 38 (arguing the Agency is constitutionally required to "issue payment to claimant because he self-certified that he met PUA eligibility requirements, and to pay claimant while his

[14] Ex. 43, Teresa Burns, Feb 1, 2021 advice to Berry and other managers.

claim was pending final adjudication.") (citing UIPL 01-16 and *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971)).

Defendants' practice and statements affirm there is no fundamental difference between pandemic unemployment assistance (PUA) or any of the multitude of other unemployment benefits administered by Michigan. Funding for Plaintiffs' benefits and all claimants moved fluidly between them based on the determinations of the state, not the election of the claimant. If the state determined a claimant was ineligible for regular UI, they might transfer a claim to PUA. Similarly, the Agency was under a duty to periodically evaluate PUA recipients for eligibility for "regular UI" and transfer claimants back if they are determined to have become eligible for that funding source. Funding sources and eligibility determinations for the various unemployment benefits operate interchangeably and outside of the control or knowledge of the claimant.[15]

[15] See e.g. Ex. 44, **10-2021 Resp to Audit Kreps v UIA_000306462 ("**The MIDAS system allows multiple claim types/programs at the same time; however, a certification week is attached to only one claim type. Business and system rules dictate which program is determined to be the active and correct claim type so that the week of certification attaches for possible payment. Rules would include monetary eligibility as well as non-monetary eligibility. If the week is eligible to be paid from a different program, the week is transferred from one claim type to another. The transfer may be automated or require manual processing. In the examples provided, the claimant had more than one claim type attached to their record, but none of the claimants were paid from more than one program at the same time. Due to the pandemic, Michigan has a backlog of manual transfers that continue to be worked to ensure claimants are paid on the correct claim type.")

During the relevant time, unemployment benefits for each Plaintiff would have come from at least 4 or 5 funding sources. One program paid for the first week of benefits, FPUC paid $600 supplemental on top of that, regular UI paid the first 26 weeks or PUA if regular UI was not eligible, EB paid for other weeks, or maybe PEUC. Collectively, they are all "unemployment benefits." *See* 15 USC §9023(i)(2) (defining all the various programs administered under agreement with the secretary of labor as "unemployment benefits"). The procedures and rights are no different based on the program or funding source.

Defendants are correct that PUA was created by an act of Congress. So too was PEUC, FPUC, LWA and MEUC. In 1970, Congress created the Extended Benefits program (EB). Congress also created TRA, EUX, and STC. Defendants administer all of them as voluntary participation programs under contract with the Secretary of Labor—and are obligated to administer all of them according to state unemployment law. Like all federal-state funding programs, unemployment benefits (including CARES Act programs) were dependent on voluntary participation of the state.

In exchange for federal dollars, Michigan signed an agreement promising that PUA would be administered just like every other UC benefit. Under the contract with the Secretary of Labor, the Agency was required to: (1) apply methods of administration required by section 303(a)(l) of the Social Security Act (42 U.S.C.

503(a)(l)); (2) to process and pay benefits for all weeks of unemployment which end prior to the date of termination for which such payments are due; and to (3) participate in the provision's program and abide by the requirements in the statute, operating instructions and guidance, and program-specific addendum. (Ex. 45, Michigan CARES Act Contract).

PUA funding regulations, like all other unemployment benefit regulations, specifically affirm inviolate rights in PUA are coextensive with claimants' rights in so-called "regular" benefits:

> The rights of individuals to PUA must be protected in the same manner and to the same extent as the rights of persons to regular UC are protected under the applicable state law. Such measures must include protection of individuals from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to PUA. In the same manner and to the same extent, individuals must be protected from discrimination and obstruction in regard to seeking, applying for, and receiving PUA."

Ex. 46, UIPL No. 16-20, Attachment 1 at p. I-14.

The analysis under *Mathews v. Eldridge* is no different depending on the funding program. If anything, the rights of the unemployed were even more exigent (and the danger of wrongful deprivation more severe) in the 25% jobless period of the pandemic than in 'normal' times. *Cahoo v. SAS Analytics Inc.,* 912 F.3d at 898 (Nonetheless, "an official can be on notice that his conduct violates established law even in novel factual situations.") (*quoting Littlejohn v. Myers*, 684 F. App'x 563,

569 (6th Cir. 2017) and *Hope v. Pelzer*, 536 U.S. 730, 731 (2002)). *Mathews v Eldridge*, 424 U.S. 319 (1976)

As with all unemployment benefits, once the state determines a claimant is eligible for benefits, a property interest arises in ongoing timely payments. Whether CARES Act provides a private right of action is beside the point. Once the state notifies a claimant of eligibility for benefits, Plaintiffs and putative class members had a property interest in those benefits, regardless of the funding source. Any reasonable person, including the defendants, knew that the indefinite holds violated due process rights of claimants.

D. All Plaintiffs and all Putative Class Members were Similarly Impacted by Defendants Ongoing and Intentional Holds on Benefits

All Plaintiffs and putative class members were and are impacted by the Defendants' practice of imposing indefinite holds on benefits without notice or determination. The harm is ongoing, and Plaintiffs were impacted and have standing. Defendants' attempts –four years later – to retroactively justify indefinite holds and continued non-payment, are a symptom of the problem, not a serious defense. *See e.g. Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013) (discussing *Goldberg v. Kelly* and noting that the due process clause 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."*)

The only relevant facts regarding Plaintiffs are those facts that conclusively establish that (1) Plaintiffs were determined to be eligible by the Agency and (2) the Agency continues to hold benefit payments without providing any determination otherwise. "There has to be a (re)determination issued that the individual is no longer eligible or qualified in order to stop payment." *See* Exhibit 43. Each and every Plaintiff has been impacted and continues to be impacted by the Agency's flagging system and indefinite holds. Most are still unpaid for multiple weeks – more than four years later.

i. Plaintiff Paul Kreps

Paul Kreps applied for unemployment benefits in April of 2020 and received his initial eligibility determination on or about August 5, 2020. He certified for benefits on a regular basis and responded to redundant requests that he verify his identity. Each week showed a "stop payment indicator" on his account. He submitted documentation on April 15, 2020, August 11, 2020, September 10, 2020, and October 14, 2020. The Agency is in possession of his marriage license, his driver's license, his social security card and his birth certificate. Still, he did not receive benefits. In December 2021, an additional hold was put on his account requiring updated banking information. He received nothing in 2021, 2022, or 2023. On September 5, 2024, the Agency issued Mr. Kreps a check for $18,000 in past due 2020 benefits, even though he is still owed almost $10,000 more. Federal Lost Wage

Assistance supplements that were available in 2020 have never been paid. A stop payment indicator remains visible on his account. The Agency has still not issued any notice or appealable determination to explain why remaining 2020 and 2021 benefits are unpaid.

By October 2020, Mr. Kreps had been without income for seven months. He lost his pest-control business, laid off two employees and his work vehicles were repossessed. Ex. 47, Kreps Dep. Tr. at 21-23 and 66-68. In the end, he pawned everything of value, but still faced eviction, utility shut offs (while his children struggled with remote schooling) and survived on food from food banks. *Id*. at 86-87, 94, 97-98. He suffered all the deprivations and degradations unemployment benefits are intended to mitigate. The Agency issued an adverse decision in October 2020 but later reversed it. After that, the Agency still failed to pay him, and they blame him for failing to update his banking information in 2022. Banking information has nothing to do with eligibility and Defendants have no authority to withhold benefits (for years) because of it. The instruction to update banking information was just another impermissible hold on Mr. Kreps' account. Defendants were able to pay him by check in August 2024 (3 months ago). Even now, there are still 18 weeks of unexplained stop payment indicators holding payment on Mr. Kreps account and Defendants offer no excuse. (Ex. 48, Paul Kreps Documents Collected).

ii. Plaintiff Diana Boudrie

Diana Boudrie received her eligibility determination on or about April 23, 2020. Payment began May 6, 2020. By September, six weeks of eligibility were missing/unpaid and additional benefit weeks were placed on hold without timely notice. Two months after benefits were stopped, the Agency officially issued an adverse determination. The Agency's untimely decision was rejected by an administrative law judge in August 2024. Despite reversal, payments remained suspended until October 2024, when two payments were released. The weekly benefit amounts were paid in October 2024, she never received the $300 per week Lost Wage Assistance supplement that would have been available if Defendants had issued timely payment in 2020. Ms. Boudrie still has no way to access benefit payments for unpaid weeks of May 2, May 15 through June 20 and all weeks to which she was entitled after September 2020.

Defendants claim that Ms. Boudrie received payments for weeks between April and August, but this is misleading. Ms. Boudrie received nothing for six of those weeks and she received none of the benefits to which she was entitled after September 2020 because Defendants wrongly accused her of misrepresentation and ordered her to repay more than $9,000 under threat of criminal prosecution. (Ex 49, Boudrie Documents Collected).

iii. Plaintiff Richard Brainer

Richard Brainer received his eligibility determination on or about April 22, 2020. The first payment was issued on May 12, 2020. Payment was suspended for six weeks between July and September and again between December and April 2021. Eight months later, the Agency reversed its initial decision and asserted that Mr. Brainer had never been eligible at all. He was told to repay $25,000. (The Agency even took his 2021 tax refund to pay the alleged debt). In January 2023, an administrative law judge rejected the Agency's ultra vires decision and reinstated Mr. Brainer's eligibility, but by 2024, the Agency still held his tax refund and Mr. Brainer was never paid for eligible weeks after his claim was stopped three years ago. (Ex 50, Brainer Documents Collected).

iv. Plaintiff I.F.

I.F. received her initial eligibility determination on or about April 23, 2020. She received her first payment the same day. Benefits stopped for six weeks between July and September. In December, her claim was stopped indefinitely. Four months after that, I.F. received an adverse determination. In July 2022, the administrative appeals commission reinstated her eligibility, and the Agency sent her a debit card. She checked the card "every day for probably a year", but she has never been paid for any of the weeks after benefits were stopped. (Ex. 51, I.F. Dep. Tr. at 36:10). (Ex. 52, I.F. Documents Collected).

v. Plaintiff Christine Holifield

Christine Holifield received her initial eligibility determination on or about April 23, 2020. Her first payment was issued on April 25, 2020. Benefits were suspended in June, before the Agency issued its first adverse determination in July. The Agency's adverse decision was reversed after two more years, but by then the claim was closed and she received nothing. A portion of the benefits due in 2020 were finally paid in 2023. Federal lost wage benefits that were available in 2020 have never been paid. In October 2024, the Agency reconsidered her eligibility after nearly five years and determined that she should be denied benefits retroactively from January 2021 forward. Defendants do not dispute that benefits were stopped BEFORE they issued an adverse determination, nor do they dispute that they failed to pay her for an entire year even after all decisions were final and in her favor. (Ex. 53, Holifield Documents Collected).

vi. Plaintiff Andrew Myrold

Andrew Myrold received his initial eligibility determination on or about May 13, 2020. The first payment was issued on May 12, 2020 (a day earlier). This was the only payment issued to Mr. Myrold that year. The Agency stopped his claim and did not issue another payment until May 2021. The first adverse determination came in September 2021 and was reversed by an Administrative Law Judge (ALJ) in 2023. Mr. Myrold has never received benefits for the many weeks of eligibility between May and August 2020 and there is no path forward for him to compel the Agency to

pay him. Mr. Myrold sought an order compelling payment, but Defendants objected, and the ALJ, the Appeals Commission and even a circuit court judge all ruled that, because no determination had been issued, the administrative appeals process lacked jurisdiction to compel payment.

Defendants argue that they provided "adequate" due process because they issued a decision and provided instructions to challenge it.[16] Defendants ignore the obvious fact that they suspended payment for more than a year without notice of any kind, and they continue to hold his benefits even though all determinations have long been resolved in his favor. (Ex 54, Andrew Myrold Documents Collected).

vii. Plaintiff Patricia Myrold

Patricia Myrold received her initial eligibility determination on or about May 13, 2020. Her first payment was issued on May 12, 2020. The Agency stopped her benefits later in May and did not issue another payment for 12 months. Adverse determinations were finally issued in 2021, but those have all been reversed. The Agency recently voided the last of its adverse determinations, but Ms. Myrold has never received benefits she is owed for the many weeks of eligibility between March and August 2020.

[16] *See* ECF 110, Def. brief at pp. 13.

Defendants argue that Ms. Myrold would have been paid if she had only filed a new claim in 2021.[17] Defendants are wrong in every way. Ms. Myrold was entitled to 2020 benefits in 2020. Instructions to file a new claim in 2021, do not cure the deprivation. Even worse, Ms. Myrold ***did*** file a new claim in May 2021, but it was a pointless exercise because Defendants still refused to pay her. (Ex 55, Patricia Myrold Documents Collected).

viii. Plaintiff Marissa Quigg

Marissa Quigg received her initial eligibility determination on or about April 8, 2020. The first payment was delayed until July 23, 2020. In September, the Agency stopped her benefits. Six months later, the Agency reversed its initial eligibility decision. In February 2022, the administrative appeals commission voided the Agency's improper decision and reinstated her entitlement. Instead of releasing the overdue 2020 payments, the Agency added an additional hold in July 2022. A portion of the benefits due in 2020 were finally paid in 2023. Federal lost wage benefits that were available in 2020 have never been paid. (Ex. 56, Quigg Documents Collected).

ix. Plaintiff Robin Shipe

[17] *See* ECF No. 110, Def. brief at pp. 14

Robin Shipe received her initial eligibility determination on or about October 9, 2020. After three months without a payment, the Agency reversed its decision and notified Ms. Shipe that she was not eligible. In December 2022, the initial eligibility determination was reinstated, but Ms. Shipe was never paid. In October 2024, the Agency issued an untimely determination finding Shipe ineligible for certain benefit weeks in 2020 and 2021. Yet, many additional weeks remain unpaid without any adverse determination to justify the hold. (Ex. 57, Shipe Documents Collected).

E. Qualified Immunity does not Apply when Government Officials Intentionally Deprive Citizens of their Property without Notice

"Your Understanding is Correct. Director Dale has approved canceling the California Backlog SQR"[18]

Qualified immunity only shields government officials from liability for civil damages under § 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Durham v. Niffenegger*, No. 23-4040, 2024 U.S. App. LEXIS 28493, at *13 (6th Cir. Nov. 7, 2024) (citing *Harlow*, 457 U.S. at 818). At the summary judgment stage, the court must view the facts in the light most favorable to the plaintiff and conduct a two-pronged inquiry, asking (1) whether the plaintiff has created a material question of fact that the officers' conduct violated plaintiff's constitutional rights, and (2)

[18] Ex. 58, SQR Log 37181 Creation of Backlog Payment Release, final lines ("solution aborted").

whether the constitutional right at issue was "clearly established" at the time of the alleged misconduct. *Id.* (citing *Pearson*, 555 U.S. at 232).

When it comes to wrongfully withheld benefits, the unconstitutional condition is ongoing unless and until the policies and practices causing the deprivation are lifted. *See Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) (a "continuous wrong" exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiff accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided); *Miner v. Ogemaw Cnty. Rd. Comm'n*, 594 F. Supp. 3d 912, 921 (E.D. Mich. 2022).

As discussed above, Defendants were on actual notice and acknowledge the right to adequate notice and a pre-deprivation hearing. *See* also ECF No. 33 PageID.1211; ECF No. 77 Page ID.1849; ECF No. 111 Page ID.3884; *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887 (6th Cir. 2019); *New Mexico Dept. of Workforce Solutions v. Garduno*, 363 P.3d 1176 (2015); *American Federation of Labor v. Employment Dev. Dept.*, 88 Cal.App.3d 811 (1979); *Graves v. Meystrik*, 425 F. Supp. 40 (E.D. Mo. 1977). Further, it is clear from the Defendants own internal memos, communications, and from materials collected throughout discovery that the Defendants were aware that their conduct violated claimants due process rights. Counsel's claims to the contrary should be rejected.

F. Defendants Culpability does not Depend on Respondeat Superior Liability

Plaintiffs do not intend to hold Defendants responsible for the acts of others. Rather, Defendants are responsible for their own conduct in approving, acquiescing in and knowingly failing to address ongoing unconstitutional deprivations. Proffered evidence establishes that the Defendants were on actual notice of the deprivation, had the ability to remedy the situation and made an affirmative decision to 'abort.' Section 1983 liability arises when a superior knows of the unlawful acts of the subordinate and acquiesces in them. For example, in *Shehee v. Luttrell*, the Court of Appeals in the 6th Circuit held that a supervisory official's failure to supervise, control, or train the offending individual is not actionable unless the supervisor either encouraged the specific incident of misconduct or directly participated in it. 199 F.3d 295 (6th Cir. 1999). A plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. *Id* at 295.

In *Schnell v. City of Chicago*, news photographers covering the Democratic National Convention sought to enjoin the Superintendent of Police and officers from interfering with their right to gather news. 407 F.2d 1084 (7th Cir. 1969). Regarding the superintendent's liability, Judge Swygert of the Seventh Circuit Court of Appeals held:

> From a legal standpoint, it makes no difference whether the plaintiff's constitutional rights are violated as a result of police behavior which is the product of active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In

> either situation, if the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred during the Convention, they are proper defendants in this action.

Id. at 1085

Here, Defendants were undoubtedly on notice that their computer programing and subordinates' actions resulted in the indefinite suspension of payments in ways that violated clearly established due process law AND the prior settlement agreements of the Agency in prior due process actions. Surely, Defendants conduct was not merely "passive or negligent" but clearly involved "active participation and tacit approval of the unconstitutional actions of subordinates" such that § 1983 liability attaches. *See Webb v. United States*, 789 F.3d 647 (6th Cir. 2015); *Crawford v. Tilley*, 15 F.4th 752 (6th Cir. 2021); *Turner v. Taylor*, 412 F.3d 629 (6th Cir. 2005).

G. The Court has Already Rejected Colorado River Abstention

First, the Court has already ruled that the legal doctrine of Colorado River does not require federal court abstention in this case. The law of the case doctrine dictates that Defendants attempts to reargue the same points must be rejected by the Court. Second, the State court case referred to has been settled, so there is no danger that federal court proceedings could conflict. In state court, the presiding judge did rule that the plaintiffs' claim that the agency violated the state constitution **rights** of claimants when activating collection activity before considering pending protests and appeals. However, that case settled, and Defendants admitted no

liability.[19] (Pending final settlement approval hearing on March 20, 2025). Plaintiffs here, such as Diana Boudrie who received a bill for $9,000 just before Thanksgiving 2020, are still entitled to a ruling that agency collection before considering protests and appeals violates due process.

Dale and Burns conferred. Despite Burns identifying the violation, the Director was so motivated to minimize repayment obligations to the federal government, that she approved activation of a five-billion-dollar collection machine against Michiganders who were jobless in the pandemic. Plaintiffs could any day face a new Agency determination that 2020 benefits were improperly paid. They have a right to seek a definitive court ruling that such activities are unconstitutional. The Court has sufficient evidence to determine the Agency collection activity before considering protests and appeals violated the claimants due process rights under the U.S. Constitution.

The court has already determined that *Colorado River Abstention* is inapplicable in this matter. The *Colorado River* considers whether there are "concurrent state and federal actions" that are "parallel." *Romine v. Compuserve Corp.*, 160 F.3d 337, 339 (6th Cir. 1998) and necessitates abstention only in a "truly

[19] Ex. 59, Saunders Settlement Agreement, Section 33, "The Agency's agreement to this Settlement is not and should not be construed as, a direct or implied admission or acknowledgment of any wrongdoing, illegality, liability, or responsibility to any person or party for any conduct or omission, alleged or unalleged, whatsoever.")

exceptional circumstances." In Defendants' motion to dismiss (ECF No. 33), Defendants point to *Saunders v. Mich Unemployment Ins. Agency*, a case brought in the Michigan Court of Claims in which plaintiffs alleged that the UIA's recollection of overpayments violated the Michigan Constitution. While the Saunders case was proceeding, this Court already determined that the doctrine does not apply. ECF No. 33 Page ID.1207 ("continued proceedings will be necessary in this Court regardless of the disposition of *Saunders.*") Moreover, the *Saunders* matter has now been settled and pending final Court approval. Colorado River abstention certainly does not apply now.

H. Public Interest Compels Injunctive Relief

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. 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).

In *Grand Trunk*, the court emphasized that declaratory judgments should serve to clarify and settle legal relations and provide relief from uncertainty. The court adopted the following considerations governing the grant of declaratory

judgment. *Grand T. W. R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). The factors to be considered in determining whether declaratory relief should be granted include:

> (1) whether the declaratory action would settle the controversy;
> (2) whether it would serve a useful purpose in clarifying the legal relations in issue;
> (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race of res judicata";
> (4) whether use of a declaratory action would increase friction between federal and state courts and improperly encroach upon state jurisdiction; and
> (5) whether there is an alternative remedy which is better or more effective.

Allstate Ins. Co. v. Green, 825 F.2d 1061, 1063 (6th Cir. 1987) (quoting *Grand Trunk* at 326.).

In *Green*, this Circuit adopted the *Grand Trunk* factors and required District courts to consider the two sets of factors when determining whether declaratory relief is appropriate. *Allstate Ins. Co. v. Green*, 825 F.2d at 1063.

Federal courts across the country routinely issue permanent injunctions to stop state actors from further violating its citizens constitutional rights regardless of the availability of class relief or money damages. ECF No. 88, PageID.2668-70. "When it has been held unconstitutional to deny benefits to otherwise qualified persons on the ground that they are members of a certain group, the officials have the obligation to cease denying those benefits not just to the named plaintiffs but also to all other

qualified members of the group." *Soto-Lopez v. N.Y.C. Civil Serv. Com.*, 840 F.2d 162, 168-169 (2d Cir. 1988) ("[t]he availability of such injunctive relief is not limited to class actions. When a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute."); *Warmsley v. Thaler*, No. 5:10cv2, 2010 U.S. Dist. LEXIS 101437, at *8-9 (E.D. Tex. Aug. 25, 2010)(*See* Ex. 61) ("In this case, a class action is not necessary because the same relief sought can, for all practical purposes, be obtained through the entering of permanent injunctive relief if such relief is shown to be warranted."); *Fairley v. Forrest Cty.*, 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) ([t]he Court finds that the declaratory and injunctive relief sought by the plaintiffs will have the same effect as a class action regardless of whether the Court certifies this matter as a class action or not). In *Lentz v. McMahon*, the court held that welfare recipients could raise the defense of equitable estoppel in administrative hearings and issued a declaratory judgment and permanent injunction against the Department of Social Services for refusing to consider claims of equitable estoppel in such hearings. *Lentz v. McMahon*, 49 Cal. 3d 393, 406-7 (1989). In *Tinicum v. Fife*, the court upheld a declaratory judgment requiring a township to provide medical insurance benefits to retired police officers. *Tinicum v. Fife*, 95 Pa. Commw. 516 (1986). In another Pennsylvania case, *Stilp v. Commonwealth*, the court addressed a declaratory judgment action challenging benefits provided to state legislators. The court found that the petitioner had standing

and that the controversy was sufficiently imminent to warrant relief under the Declaratory Judgments Act. 910 A.2d 775, 786 (Pa. Commw. Ct. 2006).

I. Declaratory Judgment is Appropriate to Abate An Unconstitutional Condition

As discussed in Plaintiffs' Motion for Summary Judgment, ECF No. 71, a delay of benefits by even a few weeks is devastating to unemployed workers, and the impact is immediate and harmful in ways that they may never recover from. *See* Ex. 60, 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 unemployment benefits is devastating. 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 (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).

Here, each of the Plaintiffs have standing to seek injunctive relief requiring Agency practices be brought into compliance with the constitution. The first two general factors under *Grand Trunk* are undoubtedly achieved by granting declaratory

relief (clarifying and settling the legal relations and terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding). Although the law is clear, the violation is clear, and no amount of money damages can remedy the harm caused by continued delay in benefits, *it's even more clear that the Defendants will not act in the public interest unless this Court compels it* to.

The remaining *Grand Trunk* factors also clearly favor declaratory relief, because factors (3) and (4) do not apply to the facts of this case and there is no alternative remedy, as fully briefed in Plaintiffs' reply in further support of its motion for summary judgment. ECF No. 88, PageID.2668-70.

V. CONCLUSION

Since at least 2020, the Agency has maintained a practice of indefinitely suspending unemployment benefits without notice, hearing opportunity, or investigation. This ongoing practice violates the constitutional rights of all benefit seekers by unlawfully depriving them of their established property rights through improper benefit determination procedures. The Defendant's subsequent decision to continue the holds despite recognizing these problems, establishes knowing acquiescence to ongoing constitutional violations. Instead of implementing necessary systemic changes after identifying these issues, Defendants permitted the unconstitutional practices to continue. Therefore, qualified immunity does not apply.

Plaintiffs respectfully request that this Honorable Court deny Defendants' Joint Motion for Summary Judgment for the reasons and authorities discussed above, as well as the reasons and authorities discussed in Plaintiffs' Motion for Summary Judgment (ECF No. 71). Moreover, the Court should consider resolving liability issues in Plaintiffs favor on summary judgement because the legal principles are already decided, and the factual record is now well established:

As to Counts I and II, the Court should grant summary judgement for Plaintiffs on Defendants liability for knowing, ongoing violations of clearly established due process rights, as no genuine factual issue exists.

As to Count III, the Court should grant summary judgement against the Agency, holding that the Agency's collection activity before finality of protests and appeals violates due process.

As to Count IV, the Court should grant summary judgment that the prior settlement agreement between the UAW and the Agency in *Zynda v. Arwood* was violated, and order compliance, for reasons stated in the Response Brief on behalf of Plaintiff UAW.

Respectfully Submitted,

/s/ David M. Blanchard

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Dated: December 9, 2024

CERTIFICATE OF SERVICE

I, Leslie M. Wenzel, hereby certify that on December 9, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notifications of such filings to all participating attorneys.

/s/ Leslie M. Wenzel
Leslie M. Wenzel, Law Office Assistant

INDIVIDUAL PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION
INDEX OF EXHIBITS

Exhibits to be filed pending resolution of protective order issues

1 Governor Whitmer Press Release, April 10, 2020

2 Truscott Rossman Strategy Outline 2022 UIA Brand Defense

3 Truscott Rossman January 26, 2023 Events and Message Planning Document

4 Defs' Resp. to Int. #9

5 Defs' Response to Int. #7

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

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

8 PPT slide on "generic availability"

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

10 Dec. 9, 2020 Field Release PUA Guidance

11 December 2, 2020 Berry email

12 Berry Dep. Tr. at 17:13, 18, 23-24

13 Gray Dep. Tr. at 154-155

14 Sept. 15, 2021 Wilkerson email, RTP #3 at 25

15 Dec. 2, 2022 Hakim email, RTP #14 add'l at 27

16 January 2023 Office of Auditor General Report at 33

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

18 June 1, 2023 Training Materials "Using MiDAS for Benefit Payment Review in PUA claims"

19 Def. Resp. Int. #11

20 Def. Resp. Int #6

21 Def. Resp. to Int. #32

22 Teresa Burns Feb 1, 2021 email to Berry and other management

23 May 17, 2020 Email to Burns from the Workers Rights Clinic

24 Dec. 12, 2021 Burns email to Berry

25 Burns Feb 28, 2023 email

26 Realign UI Benefits to Mission Spreadsheet

27 Dale Dep. Tr. at 232-233 and 87

28 Burns Dep. Tr. at 7-11

29 Oct. 13, 2022 email to Dale and others

30 SQR 37037 Report for Claims with Stop Payment Indicator, Dec 19, 2022 at RTP #1 2605-2607

31 SQR 36926 Unpaid Claimants Report Due to Nonmons and Other Hold Pay Reasons at RTP #14 2nd Additional Responses at 668

32 SQR 37107 Create a SPI Report, Jan 18, 2023 at RTP #1 2615

33 SQR 37109 Report for claimants eligible for payment but not paid due to indicator, Jan 20, 2023 at RTP #1 2621

34 Feb. 28, 2023 Kristine Kratz Email Backlog Payment Release

35 Mar. 21, 2023 Waivers/FCP/Payment Release - Team Meeting, RTP #1 add'l at 529-531

36 March 20, 2023 Fuhrman Email Re: Payment Release-Cancelled

37 Minutes of Backlog Discussion Meeting 1/18/2023, RTP #1 2555-2560 at 2560

38 Collection of Burns Memoranda to the Michigan Office of Administrative Hearings and Rules

39 Agency Internal Tracking Spreadsheet for Independent Audits

40 US DOL, UIPL 01-16, p. 4 (Oct 1, 2015)

41 UIA Manual Section 7902 at 3

42 UIA Manual Section 0802

43 Teresa Burns, Feb 1, 2021 advice to Berry and other managers

44 10-2021 Resp to Audit Kreps v UIA_000306462

45 Michigan CARES Act Contract

46 UIPL No. 16-20, Attachment 1 at p. I-14

47 Kreps Deposition Transcript at 21-23, 66-68, 86-87, 94, 97-98

48 Paul Kreps Documents Collected

49 Boudrie Documents Collected

50 Brainer Documents Collected

51 I.F. Dep. Tr. at 36:10

52 I.F. Documents Collected

53 Holifield Documents Collected

54 Andrew Myrold Documents Collected

55 Patricia Myrold Documents Collected

56 Quigg Documents Collected

57 Shipe Documents Collected

58 SQR Log 37181 Creation of Backlog Payment Release

59 Saunders Settlement Agreement, Section 33

60 Preliminary Report and Declaration of Economist Kathryn Edwards

61 Unpublished Cases