

STATE OF MICHIGAN  
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS,  
And TEDDY BROE, individually  
and on behalf of a class of  
similarly-situated persons,

Supreme Court Case No. \_\_\_\_\_

Court of Appeals No. 333181

Plaintiffs-Appellees,

Court of Claims

Case No. 2015-000202-MM

Hon. Cynthia Diane Stephens

v.

STATE OF MICHIGAN UNEMPLOYMENT  
INSURANCE AGENCY,

Defendant.

\_\_\_\_\_ /

**PLAINTIFFS-APPELLANTS'**

**APPLICATION FOR LEAVE TO APPEAL**

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## INTRODUCTION AND STATEMENT OF GROUNDS FOR APPLICATION

This case raises a significant issue of first impression under Michigan law: In a case alleging wrongful deprivation of property under Article 1, Section 17 of the Michigan Constitution, does the six-month notice provision of MCL 600.6431(3) start to run when the state places citizens on notice of a possible deprivation of property, or when the state deprives citizens of property? In this case, the Court of Appeals held that citizens whose property is seized by the state must file their due process claims within six months “of the date that [the state] notified them of their alleged fraudulent conduct, and the impact it would have on their unemployment benefits.” Exhibit 1, Court of Appeals Opinion, p. 9.

The Court of Appeals’ opinion is clearly erroneous and contrary to the language of MCL 600.6431(3). The decision is paradoxical because it holds that a due process claim for wrongful deprivation of property accrues before a deprivation of property occurs.

The issue in this case has a significant public interest and involves a claim against a state agency. It is undisputed that the state actions involved in this case resulted in false charges of unemployment fraud against approximately 40,000 people. If uncorrected, the Court of Appeals misinterpretation of MCL 600.6431(3) would wrongfully prevent those individuals from accessing the courts to vindicate their fundamental constitutional right to due process. Furthermore, if uncorrected, the Court of Appeals’ decision will have wide-ranging and unintended consequences for state agencies, state courts, and citizens in cases involving claims for wrongful deprivations of property without due process.

Specifically, the Court of Appeals’ opinion requires citizens to file constitutional cases in the Court of Claims upon receiving any notice that their property might be deprived. Under the Court of Appeals’ reasoning, a claim for wrongful deprivation of property accrues, and claimants must therefore go to court under MCL 600.6431(3) after the Agency issues a notice of

redetermination but before a deprivation of property occurs. Every case proceeding through the Unemployment Insurance Agency could be interrupted, mid-stream, by the filing of a lawsuit in the Court of Claims, so long as the claimant alleges they were deprived of notice and an opportunity to be heard with respect to the redetermination. Such cases would begin after the Agency issues a notice of redetermination notifying a claimant that they are disqualified for benefits, even if the state has not yet deprived them of any property, even if the administrative process is not complete, and even if the claimants have not actually received notice that the state might seize their property. The resulting confusion and filing of premature claims, and needless litigation of those claims, will impose significant costs and burdens on state agencies and the court system.

Accordingly, plaintiffs request this Court grant this application for leave to appeal to decide the question of when the plaintiffs' cause of action accrued for purposes of MCL 600.6431(3). Because the plaintiffs' claim accrued when they were "deprived of...property," this Court should reverse the Court of Appeals' decision below and reinstate the Court of Claims' denial of summary disposition. In the alternative, if leave is denied, the Court should nonetheless remand the case to the Court of Claims to determine if a putative class member with a timely claim should be substituted in as a new class representative.

**STATEMENT IDENTIFYING JUDGMENT**

Plaintiffs request leave to appeal the Court of Appeals' unpublished per curiam opinion dated July 18, 2017 in the matter of *Grant Bauserman, et al v Unemployment Insurance Agency*, Docket Number 333181. Exhibit 1, Court of Appeals Opinion. The Court of Appeals reversed the decision of the Court of Claims denying Defendant's motion for summary judgment. Exhibit 2, Court of Claims Opinion.

**STATEMENT OF QUESTION PRESENTED**

1. Article 1, Section 17 of the Michigan Constitution provides that “No person shall be...deprived of... property, without due process of law.” Plaintiffs filed their claim within six months of when the state seized their property. Did the Court of Appeals err in its interpretation of MCL 600.6431(3) by holding that the event giving rise to the plaintiffs’ claim was the issuance of notification to plaintiffs of their alleged fraudulent conduct, and not the seizure that deprived the plaintiffs of their property?

The Court of Appeals answers: No.

The Court of Claims answers: Yes.

Plaintiffs-Appellants answer: Yes.

Defendant-Appellee answers: No.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### Michigan Constitutional Provisions

Const. 1963, Art. 1, §17 provides in pertinent part:

No person shall be...deprived of...property, without due process of law. The right of all individuals...to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

### Statutory Provisions

The statutory provision at issue, MCL 600.6431, states as follows:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 600.6431.

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The facts relevant to this application are not in dispute. From October 2013 to August 2015, the State of Michigan Unemployment Insurance Agency (UIA) utilized an automated system, known as MiDAS, to detect and adjudicate suspected cases of unemployment benefit fraud. Ex. 3, The Detroit News, May 3, 2017.<sup>1</sup> According to well-publicized state records, the MiDAS system “wrongfully accused tens of thousands of people of fraud, often wrongfully garnishing people’s wages over a crime they did not commit.” *Id.* According to the agency, “[a]bout 40,000 people are implicated in the [false fraud] cases.” *Id.*

Plaintiff Grant Bauserman received unemployment insurance benefits from October 2013 through early March 2014, after he was involuntarily separated from his prior employer. Exhibit 4, First Amended Complaint, ¶78. In November 2014, Bauserman learned, for the first time, that the UIA had sent a request for information to him through its online system, MiWAM. *Id.* at ¶¶82-85. In the months between December 2014 and June 2015, Bauserman submitted multiple letters to the UIA in a futile effort to explain why he was not guilty of fraud. *Id.* at ¶¶86-97. Defendant did not acknowledge or respond to any of Bauserman’s appeals. *Id.*

On June 6, 2015, the UIA seized Bauserman’s federal income tax refund. *Id.* at ¶98. It seized his state income tax refund shortly thereafter. *Id.* at ¶99. Approximately three months later, on September 9, 2015, Bauserman filed a class action complaint against the UIA alleging it violated the due process clause of the Michigan Constitution “by improperly intercepting tax refunds, garnishing wages and forcing repayments from claimants” without first affording him due process. Exhibit 1, Court of Appeals Opinion, p. 1 and p. 8 (quoting First Amended Complaint,

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<sup>1</sup> <http://www.detroitnews.com/story/news/local/michigan/2017/05/03/state-botched-unemployment-fraud-cases/101263214/>

¶164).<sup>2</sup> Plaintiffs filed their first amended complaint on October 19, 2015, naming Karl Williams and Teddy Broe as plaintiffs in addition to Bauserman. Ex. 4, First Amended Complaint.

Plaintiffs allege that the Agency's use of the MiDAS system caused them to be deprived of their property without due process in violation of Art. 1, § 17 of the Michigan Constitution. The plaintiffs' complaint alleges that the Agency deprives claimants of property without due process by using its automated decision-making system to detect and adjudicate fraud claims, culminating in the interception of tax refunds and other seizures of property. Ex. 4, First Amended Complaint, ¶¶35- 55. Throughout the process, the Agency uses MiDAS to decide guilt and seize penalties without affording notice and without any hearing to determine guilt. *See, eg*, Ex. 4, First Amended Complaint at ¶¶ 100-101 and 164. The Agency also engages in the formal policy and practice of over-assessing penalties, including the aggregation of penalties, the use of wage garnishments to recover penalties, the conversion of penalty amounts to restitution amounts, the seizure of tax refunds from joint taxpayers, including non-responsible taxpayers, and the assessment of interest on penalties, which deprives claimants of property without due process to challenge the accuracy or propriety of the underlying fraud determinations. *Id.* at ¶¶59-74.

On May 10, 2016, the Court of Claims issued an opinion and order denying the defendant's motion to dismiss. Exhibit 2, Court of Claims Opinion. The Court of Claims correctly understood the plaintiff's due process claim as alleging "they possessed a property interest in their unemployment benefits, tax refunds and wages, and that the State garnished and seized such property without due process." *Id.* at 5. In other words, "Plaintiffs' constitutional tort claim is

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<sup>2</sup> The UIA used the MiDAS system to falsely accuse tens of thousands of people of fraud between October 2013 and August 2015. Plaintiffs filed their initial complaint in this matter just weeks after the UIA discontinued its use of the MiDAS system.

premised upon the assertion that they were falsely accused of fraud and wrongly deprived of their property without due process.” *Id.* at 7.

On July 18, 2017, the Court of Appeals issued an unpublished *per curiam* opinion reversing the Court of Claims. The Court of Appeals framed the notice issue as follows:

[W]e are asked to determine whether the six months within which plaintiffs were required to file a notice of intention to file a claim, or the claim itself, began to run (1) when defendant issued notices informing plaintiffs that they were disqualified from receiving unemployment benefits, or (2) when defendant actually seized plaintiffs’ property.

Ex. 1, Court of Appeals Opinion, p. 5.

The Court of Appeals held that the six-month notice period began to run not when the plaintiffs were deprived of property, but rather, “on the date that defendant notified [the plaintiffs] of their alleged fraudulent conduct, and the impact it would have on their unemployment benefits.”

Ex. 1, Court of Appeals Opinion, p. 9. The Court of Appeals reasoned that “the ‘actionable harm’ in a due process challenge consists of the actions allegedly taken by defendant that deprived plaintiffs of their right to notice and an opportunity to be heard, and occurred on the date defendant issued notices informing plaintiffs of their alleged fraudulent conduct.” *Id.* at 10. The Court of Appeals therefore ruled that “plaintiffs...erroneously focus on the potential consequence of a due process violation, the taking of their property, rather than the hallmark of a due process claim, the right to notice an opportunity to be heard.” *Id.* at 10.

## STANDARD OF REVIEW

This case raises an issue of statutory interpretation, which this Court reviews de novo. *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015). This Court also reviews the underlying denial of summary disposition de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006).

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN HOLDING THAT PLAINTIFFS' CLAIM FOR WRONGFUL DEPRIVATION OF PROPERTY ACCRUED BEFORE THE STATE DEPRIVED THEM OF PROPERTY.

This case presents a question of statutory interpretation: When did the plaintiffs' due process claim accrue for purposes of starting the notice clock under MCL § 600.6431(3)? The notice provision in that section of the statute provides: "In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. MCL 600.6431(3).

The Court of Claims Act further provides that "[e]xcept as modified by this section, the provisions of [Revised Judicature Act] chapter 58 [MCL 600.5801, et seq.], relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section." MCL 600.6452(2).

The Revised Judicature Act provides, in relevant part, "All actions and rights shall be governed and determined according to the law under which the right accrued." MCL 600.5869. Plaintiffs claim that the UIA wrongfully deprived them of property through tax refund seizures, wage garnishments, and other means, without due process. Ex. 4, First Amended Complaint, ¶164. In this case, therefore, the issue of when the plaintiffs' claim accrued must be decided with

reference to Article 1, Section 17 of the Michigan Constitution, which states that that “No person shall be...deprived of... property, without due process of law.” Const. 1963, Art. 1, §17.

Because the due process clause prohibits deprivations of property without due process, plaintiffs’ claim accrued when they suffered a deprivation of property. Plaintiffs filed their claims within six months of that event. Plaintiffs’ claims are timely and not barred by the notice provisions of the MCL § 600.6431. The Court of Appeals erred in holding that such claims must be filed within six months of a notice of redetermination, at which time no deprivation has occurred and the agency process was not complete.

**A. The Court of Appeals ignored the plain and unambiguous language of the due process clause in holding that plaintiffs’ claim accrued before the state deprived them of their property.**

Plaintiffs’ due process claim arises under Article 1, §17 of the Michigan Constitution, which provides: “No person shall be...deprived of... property, without due process of law.” Const. Art. 1 §17. Due process is defined similarly under both the United States Constitution and the Michigan Constitution. *Kampf v Kampf*, 237 Mich App 377, 381 (1999). It is well-established that Michigan’s due process guarantee “provides protection coextensive with its federal constitutional counterpart.” *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 32 (2005).

The core prohibition of the due process clause is “the prohibition against the deprivation of property without due process[.]” *Fuentes v Shevin*, 407 US 67, 81 (1972). The purpose of the due process “requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property[.]” *Id.* Thus, “the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property[.]” *Id.* at 97. Notice and hearing procedures only comply with due process if they are

“aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property.” *Id.*

In *Sniadach v Family Finance Corp of Bay View*, 395 US 337 (1969), the Supreme Court struck down a Wisconsin law allowing for prejudgment garnishment of wages. As to the nature of the constitutional claim, the Court observed that “the sole question...is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment.” 395 US at 339. The Supreme Court concluded that “a prejudgment garnishment...may as a practical matter drive a wage-earning family to the wall. Where the taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing...this prejudgment garnishment procedure violates the fundamental principles of due process.” *Id.* at 341-42 (internal citation omitted).

Here, Plaintiffs’ due process claim is analogous to the claim in *Sniadich*. Plaintiffs allege that the state deprived them of their property without first affording them adequate prior notice and a hearing to establish the validity of the state’s seizure of their property. This is the core allegation of the plaintiffs’ complaint in this case. See Ex. 4, First Amended Complaint ¶164.

In holding that the plaintiffs’ claim accrued when the state issued a notice of redetermination, and not when the state deprived plaintiffs of property, the Court of Appeals emphasized that the fundamental requisites of due process are reasonable notice and an opportunity to be heard. Ex. 1, Court of Appeals Opinion, p. 9. This is undoubtedly true, but it does not answer the relevant question, which is whether a due process claim accrues before a claimant is deprived of property or after the claimant is deprived of property. Because the due process clause applies only where a person is “deprived of...property, without due process,” a claim such as plaintiffs’,

which is brought to recover damages based on the deprivation, accrues only after the deprivation has occurred.

“[W]hen interpreting the language of the constitution, unambiguous terms are given their plain meaning.” *Musselman v Governor*, 448 Mich 503, 526; 533 NW2d 237(1995)(Riley, J., concurring in part and dissenting in part). The terms of Article 1, §17 are unambiguous. No person shall be “deprived of...property...without due process.” Thus, a person must be “deprived of...property” to state a cause of action to recover damages for the loss of their property. In other words, the due process clause is not violated, and a cause of action cannot be alleged, until a claimant is “deprived of...property, without due process.” Const. 1963, Art. 1, §17.

The due process clause plainly and unambiguously prohibits deprivations of property. It does not proscribe a deprivation of notice or hearings where there is no deprivation of life, liberty or property. Nor does it affirmatively require the issuance of notice or a hearing unless a deprivation of life, liberty or property is at stake. As the Supreme Court held in *Fuentes, supra*, the purpose of the due process clause “is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property[.]” *Fuentes*, 407 US at 81.

The Court of Appeals’ opinion distorts the unambiguous language of the due process clause. In holding that a due process claim accrues upon the issuance of notice and not upon a deprivation of property, the Court of Appeals reasoned:

Specifically, the ‘actionable harm’ in a due process challenge consists of the actions allegedly taken by defendant that deprived plaintiffs of their right to notice and an opportunity to be heard, and occurred on the date defendant issued notices informing plaintiffs of their alleged fraudulent conduct.

Ex. 1, Court of Appeals Op., p. 10.

The Court of Appeals distorted the plain language of the due process clause by substituting the words “right to notice and an opportunity to be heard” for the word “property.” The due process states: “No person shall be...deprived of... property, without due process of law.” Const. Art. 1 §17. It does not state that “no person shall be deprived of notice and an opportunity to be heard.” While a lack of notice and an opportunity to be heard are aspects of a claim for wrongful deprivation of property, they are insufficient, in and of themselves, to constitute an “actionable harm.” To hold otherwise, as the Court of Appeals did, is to ignore the plain and unambiguous language of the controlling constitutional provision.

The Court of Appeals opinion ignores the plain language of the due process clause because it holds that a cause of action accrues before a claimant is “deprived of...property.” Furthermore, the reasoning of the Court of Appeals would require claimants to file due process cases in the Court of Claims before the state deprives them of property and before administrative proceedings are complete, leading to wasteful litigation, misuse of state and judicial resources and absurd results.

**B. If uncorrected, the Court of Appeals’ decision will have wide-ranging and unintended consequences for state agencies, state courts, and citizens in cases involving claims for wrongful deprivations of property without due process.**

The Court of Appeals’ opinion requires persons with due process claims to file a notice or claim in the Court of Claims upon receiving any notice that their property might be deprived. Under the Court of Appeals’ reasoning, a claim for wrongful deprivation of property accrues, and claimants must therefore go to court under MCL 600.6431(3), after the Agency issues a notice of redetermination, but before the state deprives the claimant of property. Under this reasoning, every case proceeding through the Unemployment Insurance Agency could be interrupted, mid-stream, by the filing of a notice or lawsuit in the Court of Claims, so long as the claimant alleges they

were deprived of notice and an opportunity to be heard with respect to the redetermination. Such cases would begin after the Agency issues a notice of redetermination notifying a claimant that they are disqualified for benefits, even if the state has not yet deprived them of any property, even if the administrative process is not complete, and even if the claimants have not actually received notice that the state might seize their property. The resulting confusion and filing of premature claims, and needless litigation of those claims, will impose significant costs and burdens on state agencies and the court system.

The Court of Appeals reasoning would require claimants to initiate litigation before the agency process was complete, in which case their wrongful deprivation claims would be unripe. *See, e.g., Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989)(holding, in case brought under 42 U.S.C. §1983, that the plaintiff's wrongful taking claim was unripe because the underlying administrative process had not yet been completed).

Defendant implicitly acknowledged the absurdity of this position in its appeal brief. In the Court of Appeals, defendant argued that “[t]he notice or claim that section 6431(3) mandates be filed can only be filed *following* the happening of the event giving rise to the cause of action.” (Appeal Brief of Defendant-Appellant UIA, p. 16). Defendant further argued: “it simply would not make sense to allow a plaintiff to first file his complaint and wait for an event to occur and then claim compliance with section 6431(3).” *Id.* at 18.

Because plaintiffs' claim arises under the due process clause, and the due process clause prohibits deprivations of property without due process, their claim could not properly be filed until a specific event – a deprivation of property – had occurred. The Court of Appeals' conclusion to the contrary was clearly erroneous. The Court of Appeals reasoning will lead to absurd results because claimants who are dissatisfied with a determination or redetermination issued by the UIA

will go to the Court of Claims with due process challenges that will either (1) be dismissed as unripe for a lack of a final agency decision, or (2) proceed on the merits even though a deprivation of property has not yet occurred.

**C. Under well-established principles of accrual, plaintiffs' claim accrued when the state deprived them of their property.**

The Court of Claims Act provides that "[e]xcept as modified by this section, the provisions of [Revised Judicature Act] chapter 58 [MCL 600.5801, et seq.], relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section." MCL 600.6452(2). Furthermore, the Revised Judicature Act provides, in relevant part, "All actions and rights shall be governed and determined according to the law under which the right accrued." MCL 600.5869. Here, the law under which the right accrued is Article 1, Section 17 of the Michigan Constitution, which states that that "No person shall be...deprived of... property, without due process of law." Const. 1963, Art. 1, §17. Furthermore, MCLA 600.5827 provides: "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCLA 600.5827.

This Court has held that the term "wrong" as used in the statute "specified the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Frank v Linkner*, \_\_\_ Mich \_\_\_; 894 NW2d 574 (May 15, 2017) (quoting *Moll v Abbott Lab.*, 444 Mich 1, 12, 506 NW2d 816, 822 (1993). "To determine when the plaintiffs' actions...accrued, this Court must determine the date on which plaintiffs first incurred the harms they assert." *Frank*, 894 NW2d at 584. "The relevant 'harms' for that purpose are the actionable harms alleged in a plaintiff's cause of action." *Id.*

In *Frank*, the plaintiff's cause of action arose under the shareholder oppression sections of MCL 450.4515. This Court referred to that statutory cause of action to analyze what actionable

harms were raised under that statute. *Id.* The statute itself identified the actionable harm as the “substantial[]interfer[ence] with the interests of a member as a member.” *Id.* at 585. The statute of limitations therefore began to run after the act of substantial interference had occurred.

In this case, the “actionable harm” proscribed by the due process clause, Art. 1, §17, can only be determined by reference to the plain language of the due process clause itself. The constitutional provision states, in mandatory terms:

No person shall be...deprived of...property, without due process of law.  
Const. 1963, Art. 1, §17.

Under the clear and unambiguous language of the Constitution, there was no “cause of action” or “actionable harm” until a specific, constitutionally-proscribed event—a deprivation of property—occurred. The Court of Appeals’ contrary interpretation of MCL 600.6431 would mandate the filing of a claim for deprivation of property at an earlier date, when a redetermination had occurred but a deprivation of property had not occurred. This holding is contrary to the plain language and purpose of the law.

Here, the Court of Appeals was wrong when it declared that its decision regarding the accrual of plaintiffs’ due process claim “accords” with this Court’s decision in *Frank*. See Ex. 1, Court of Appeals Opinion, p. 9-10. In *Frank*, this Court made it clear that the question of when a claim accrues must be answered by looking at the specific cause of action at issue. There, the “actionable harm” was specifically defined in the member oppression statute, and the relevant “harm” therefore occurred upon an act of prohibited shareholder interference, with or without actual damage to the member. *Frank*, 894 NW2d at 584. This Court carefully distinguished the member oppression claim at issue from claims for other personal injuries, such as “tortious injury to a person,” which typically accrues when a party incurs an actual injury. *Id.* at 585.

Here, the “relevant harm” for purpose of the accrual analysis must be determined with reference to the cause of action at issue, which is rooted in Art. 1, §17 of the Michigan Constitution. The due process clause unambiguously states that no person shall be “deprived of...property, without due process.” Const. 1963 Art. 1, §17. The “relevant harm” occurred when the state deprived the plaintiffs of property, and not when they issued an underlying redetermination. Under MCL 600.6431(3), the plaintiffs had six months from when they incurred the relevant harm, ie, the deprivation of their property, to file their claim. The Court of Appeals’ decision to the contrary was clearly erroneous.

**D. The Court of Appeals’ reasoning will divest tens of thousands of Michigan citizens of their right to access the courts to vindicate their fundamental constitutional right of due process.**

The notice provision at issue in this case provides: “In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. MCL 600.6431(3). The Court of Appeals interpreted this section to bar plaintiffs claim because they should have filed suit (or notice) at a time when the agency proceedings regarding their unemployment claims were not complete and before the state deprived plaintiffs of any property within the meaning of the due process clause.

As early as 1885, the United States Supreme Court held that “[t]he Fourteenth Amendment ...undoubtedly intended...that all persons...should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts...” *Barbier v Connolly*, 113 US 27, 31 (1885). “[W]hen wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.” *Flast v Cohen*, 392 US 83, 111 (1968)(Douglas, J., concurring). The fundamental right

of all Americans to access the courts is a core aspect of the first amendment right to “petition for redress grievances,” *United States Transp Union v State Bar*, 401 US 576 (1971); the due process clauses of the fifth and fourteenth amendments, *Boddie v Connecticut*, 401 US 371 (1971), the sixth amendment guarantee of a speedy and public trial, *Smith v United States*, 369 US 1 (1959) the fourteenth amendment privileges and immunities clause, *Chambers v Baltimore & ORR*, 296 US 142 (1907) and the fourteenth amendment equal protection clause. *Griffin v Illinois*, 351 US 12 (1956).

Under Michigan law, an exception to a statute of limitations exists where "it can be demonstrated that [statutes of limitations] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163; 339 NW2d 7 (1983) (citations omitted).

The facts of this case demonstrate the absurdity and fundamental injustice of the Court of Appeals' reasoning. Here, defendant issued the disputed notice of redetermination to Plaintiff Grant Bauserman on December 3, 2014. Exhibit 4, Notice of Redetermination. More than six months later, on June 6, 2015, the state intercepted Bauserman's federal income tax refund. Ex. 4, First Amended Complaint, ¶98. Under this timeline, it would have been impossible for Bauserman to be “deprived of property” within six months of the event that, under the reasoning of the Court of Appeals, triggered the running of the statute of limitations. In the months between December 2014 and June 2015, Bauserman submitted multiple letters to the UIA in a futile effort to explain why he was not guilty of fraud. See Ex. 4, First Amended Complaint, ¶¶86-97. Defendant did not acknowledge or respond to any of his appeals. *Id.*

The Court of Appeals' reasoning would divest tens of thousands of Michigan citizens of the ability to vindicate the Agency's constitutional violations by depriving them of access to the courts. As Bauserman's situation demonstrates, the UIA issued the applicable notices to claimants more than six months prior to the actual seizure of their property, and at a time when the claimants still had "appeal rights" in the administrative process. See Ex. 5, Notice of Redetermination as to Bauserman. When claimants such as Bauserman contacted the Agency to explain why they were not guilty and should not be penalized for fraud, the Agency ignored their appeals.

Under these circumstances, the Court of Appeals' reasoning would place the plaintiffs in an impossible position. Claimants could file a due process challenge in the Court of Claims before being deprived of property, and before the administrative process is completed, in which case their claims would be "timely" (under the reasoning of the Court of Appeals) but could be dismissed for ripeness or failure to exhaust remedies. See *Electro-Tech, Inc, supra*. Or they could attempt to contact the Agency directly, only to be ignored. See Ex. 4, First Amended Complaint First Amended Complaint, ¶¶86-97. Or they could wait for a date, as-yet-unknown, when the state might garnish their wages or intercept their tax refunds, in which case they would have suffered a deprivation for due process purposes, only to have their case dismissed as "untimely" under the reasoning of the Court of Appeals.

In this case, the event giving rise to the cause of action cannot be the Agency's initial fraud determination because the future economic losses stemming from that determination were not readily apparent at the time of fraud determination happening. If an initial fraud determination triggers the notice requirement, regardless of when the actual property deprivation occurs, then a dismissal under MCL 600.6431(3) would divest plaintiffs of the ability to vindicate the alleged constitutional violations by depriving them of access to the courts.

Furthermore, it is undisputed that when the agency used MiDAS to handle fraud cases, it routinely failed to notify claimants of what was happening in their cases:

Often, the accused were never even properly notified the agency had flagged them for fraud because staff or the computer program would send them a message on an internal unemployment benefit messaging system rather than by email, phone or even their actual email address, Murray [spokesman for the Talent and Economic Development Department] said. A state Auditor General's Office report also noted this problem. Ex. 3, The Detroit News, "State botched 6,650 more unemployment fraud cases," May 3, 2017.<sup>3</sup>

The fact that claimants did not even know that the agency had issued a fraud determination against them demonstrates the fundamental unfairness of requiring the filing of a notice or lawsuit within six months of the date of redetermination, rather than the date of deprivation.

Finally, the impairment of access to the courts for UIA claimants is compounded by the practical difficulty of initiating claims against the state and state agencies under the Court of Claims Act. *See, eg, Fairley v. Dept of Corr*, 497 Mich 290; 871 NW2d 129 (2015)(requiring strict compliance with all procedural requirements, including signature and verification requirements, to file notice and maintain suit against a state agency). The vast majority of UIA claimants are laypersons who are not trained in the arcane rules of procedure that govern their claims. From a claimant's perspective, the filing of a notice to perfect a constitutional claim is just as challenging as the filing of a lawsuit. The effect of the Court of Appeals' reasoning, in combination with the difficulty of pursuing a claim against the state, will prohibit claimants from accessing the courts to vindicate their rights, even when fundamental constitutional rights are at stake.

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<sup>3</sup> <http://www.detroitnews.com/story/news/local/michigan/2017/05/03/state-botched-unemployment-fraud-cases/101263214/>

In summary, this is a case where the Court of Appeals' holding is "so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." As such, the decision of the Court of Appeals should be reversed and the Court of Claims' denial of summary disposition should be reinstated.

**E. In the alternative, this Court denies leave to appeal, the Court should nonetheless remand the case to the Court of Claims to determine if a putative class member with a timely claim should be substituted in as a new class representative.**

Plaintiffs' complaint was filed on September 9, 2015 and tolled the statute of limitations. The claims based on the deprivation of property are therefore timely. The claims of class members are timely if they accrued within three years prior to that filing. Under Michigan law, the statute of limitations is tolled with regard to all class members upon the filing of a complaint asserting a class action. MCR 3.501(F)(1). The statute resumes running upon entry of an order denying class certification. MCR 3.501(F)(2)(c). Thus, in a putative class action, the statute of limitations is tolled for all class members until class certification is denied. *Cowles v Bank West*, 476 Mich 1, 20-21 (2006). Michigan law only requires the "assert[ion] of class action to trigger tolling...[T]he class members should be able to fully rely on the 'asserting' of the class action, without having to independently determine whether the person 'asserting' it possesses standing, whether he has brought claims that are not time-barred, or whether he has set forth every single legal argument that could conceivably have been made." *Id.* at 26 n. 10. In the alternative, therefore, if leave is denied because Bauserman's individual claim was not timely, this Court should nonetheless remand the case to the Court of Claims to determine if a putative class member with a timely claim should be substituted in as a new class representative. Given the fact that the case was filed within weeks of the discontinuation of the MiDAS system, it is likely that a class member with such a timely claim is available to take the place of Bauserman as the named plaintiff class representative.

## CONCLUSION AND RELIEF SOUGHT

A cause of action under Art. 1, §17 accrues when a person is “deprived of property” by the state without due process. The Court of Appeals ignored the unambiguous language of the due process clause in holding that a cause of action accrues when the state deprives a person of notice or a hearing, but without any deprivation of property. If uncorrected, the Court of Appeals’ holding will divest tens of thousands of Michigan citizens of access to the courts to vindicate their fundamental rights under Art. 1, §17. The Court of Appeals’ decision also will have wide-ranging and unintended consequences for state agencies, state courts, and citizens in cases involving claims for wrongful deprivations of property without due process.

Accordingly, plaintiffs request this Court grant this application for leave to appeal to decide the question of when the plaintiffs’ cause of action accrued. Because the plaintiffs’ claim accrued when they were “deprived of...property,” and not when the UIA issued a notice in the course of the administrative process, this Court should reverse the Court of Appeals’ decision below and reinstate the Court of Claims’ denial of summary disposition. In the alternative, if leave is denied, the Court should nonetheless remand the case to the Court of Claims to determine if a putative class member with a timely claim should be substituted in as a new class representative.

Respectfully submitted,

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Date: August 29, 2017

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**PROOF OF SERVICE**

On August 29, 2017, I mailed and e-mailed one copy of Plaintiffs-Appellants' application for leave to appeal to:

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I declare that the statements above are true to the best of my knowledge, information and belief.

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