STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(CONSOLIDATED PER CURIAM OPINION OF FEENEY, P.J., KELLY, J. AND RICK, J.)

MICHIGAN IMMIGRANT RIGHTS CENTER,
Plaintiff,
v.
GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,
Defendant.

Supreme Court Case Nos. 167300 & 167301

Court of Appeals Nos. 361451 & 362515
(Feeney, P.J., and M.J. Kelly and Rick, J.J.)

Court of Claims No. 21-000208-MZ
(Hon. Elizabeth L. Gleicher)

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF MICHIGAN IMMIGRANT RIGHTS CENTER

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INTEREST OF AMICUS CURIAE[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law- enforcement and detention-facility officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including ten members Michigan. Every year, NPAP members litigate the thousands of cases of law enforcement and detention facility abuse that do not make news headlines as well as many of the high-profile cases that capture national attention. NPAP provides training and support for its member attorneys and resources for non-profit organizations and community groups working on law-enforcement and detention-facility accountability issues. NPAP also advocates for legislation to increase accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

[1] Pursuant to MCR 7.312(H)(4), *Amicus Curiae* NPAP certifies that no party or counsel for any party authored any portion of the brief, in whole or in part. No party or counsel for any party contributed money for the preparation or submission of the brief. No person, other than *Amicus Curiae* NPAP, contributed money for the preparation or submission of the brief.

INTRODUCTION

The Court of Appeals' decision to preclude a plaintiff from suing for repeated harms when the first violation occurred outside of the statutory limit will preclude victims of police and prison abuse from seeking redress for policies that lead to their rights being violated more than once. Without this Court's intervention, civil rights plaintiffs will have a more difficult time seeking justice in Michigan. Many civil rights plaintiffs are repeatedly harmed pursuant to an unconstitutional policy or practice before they are able to sue, including many victims of discriminatory stop and frisk policies and incarcerated people who must endure inhumane conditions of confinement for years before bringing suit. There are a number of practical and legal reasons that a person who has had their civil rights violated cannot sue within the first year of their injury. Particularly when they are challenging an ongoing unconstitutional practice, civil rights plaintiffs require time to obtain an attorney, investigate their case, favorably resolve criminal charges, and heal from physical and psychological injuries. All of this is difficult— and in some cases impossible— to accomplish in one year. Civil rights plaintiffs will not be the only stakeholders impacted. The new tight deadline created by the Court of Appeals could increase the caseload of courts and government defendants as plaintiffs and their attorneys will be forced to sue first and ask questions later. The one-year accrual timeline may lead to more cases being filed that should have

been settled, narrowed, or not brought at all. Finally, the Court of Appeals decision will undermine Michigan's strong state-level civil rights protections. *Amicus* respectfully ask this Court to review the Court of Appeals' decision with due acknowledgment to the impact it would have on victims of state of violence harmed at the hands of police agencies, jails, and prisons.

ARGUMENT

I. The Court of Appeals Order Will Undermine Constitutional Protections of People Harmed by Law Enforcement Misconduct

A. Many Civil Rights Violations Occur as a Result of an Ongoing Unconstitutional Policy, Practice, or Law

Many victims of police and prison misconduct will be prevented from vindicating their rights in Michigan state court if the Court of Appeals' decision is allowed to stay in place. Law enforcement civil rights violations rarely happen in a vacuum. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 435, 494, 506 (2004); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buffalo L. Rev. 1275 (1999). They are often the product of an institutional policy, practice, or custom and many victims are harmed multiple times before they are able to pursue legal remedies. *See* Michael Avery, et al., *Police Misconduct: Law and Litigation*, 15.5 *et seq.* (describing repeated civil rights injuries caused by illegal law enforcement policies). For example, Black

men may be stopped dozens of times over the course of several years pursuant to a police agency's discriminatory stop and frisk policies before they take legal action. One of the plaintiffs in *Bailey v. City of Philadelphia* had been illegally stopped four times over the course of three years pursuant to the police department's unconstitutional "investigation" practices before they filed a lawsuit. *Bailey v. City of Philadelphia*, 2:10-cv-05952, Doc. No. 1 (E.D. Pa. 2011). Plaintiffs in the New York stop and frisk cases were also repeatedly racially profiled by the New York City Police Department before they took legal action. *See, e.g., Ligon v. City of New York*, 288 F.R.D. 72, 81 (S.D.N.Y. Feb. 11, 2013) (noting plaintiffs testified to being repeatedly stopped).

Incarcerated people are even more likely to be subject to multiple civil rights violations over the course of several years due to an unconstitutional policy. Many unconstitutional practices in prisons can persist because of the lack of public scrutiny of abuse that takes place in prisons and additional barriers to finding counsel that incarcerated people face. *See* Andrea C. Armstrong, *No Prisoner Left Behind?: Enhancing Public Transparency of Penal Institutions,* 25 STAN. L. & POL'Y REV. 435, 467 (2014)(discussing lack of independent oversight of prisons); *see also* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1612 (2003)(discussing absence of lawyers in prison litigation). For example, there are many instances of people being placed in solitary confinement without due

process for years before they file suit. *See,* e.g.*, Cheever v. Zmuda*, 2021 U.S. Dist. LEXIS 88408 at *4-6 (D. Kan. May 10, 2021) (policy to automatically place individuals convicted of a capital offense in solitary confinement led to one plaintiff's incarceration for 12 years); *Evelyn v. Jenkins*, 24-1746 (Mass. Super. Ct. Suffolk Cnty. 2024) (a plaintiff was held in solitary confinement for almost two years due to department of corrections policies before filing suit). Deliberately indifferent medical policies can also be in place for years, repeatedly denying incarcerated people access to treatment before the policy is challenged. *See eg. Postawko v. Missouri Dep't of Corr.*, 2:16-cv-04218, Doc. No. 9 (W.D. Mo. 2016)(policy of denying direct-acting antiviral to Hepatitis C for at least a year and a half before lawsuit was filed); *Braggs v. Dunn*, 2:14-cv-00601, Doc. No. 210 (M.D. Ala. 2015)(plaintiffs had diabetes without proper insulin treatment regimen for two years).

These types of policies that violate civil rights exist in Michigan as well. In 2021, Black drivers challenged the Michigan State Police's racial profiling policies that led to years of troopers' illegal stops. *Sankofa v. Rose*, 2:21-cv-11468 (E.D. Mich. 2021). The Court of Appeals' rule would prevent people who suffer these common civil rights abuses from pursuing their claims in Michigan state court.

B. There Are Practical Barriers to Suing Over Government Misconduct Within One Year

Victims of government misconduct face several unique, time-consuming legal requirements and challenges that inhibit their ability to file civil rights claims against their abusers within a one-year accrual time limit. Before filing their claims, plaintiffs often need to conduct a pre-complaint investigation (which may include developing extensive facts to perfect a complaint), obtain public records from government agencies (which often results in separate pre-complaint litigation when requests are denied or productions are delayed), find and retain legal counsel, resolve parallel criminal proceedings (which may include serving jail time), and recover from physical and psychological trauma caused by their injury. While plaintiffs are diligently working to complete these tasks while physically and emotionally recovering from abuse, the accrual time limits continue to run. Enforcing an accrual period in which the date of accrual begins the very first time that harm is caused fails to consider the legal requirements and practical challenges to building a civil rights case, prevents plaintiffs with meritorious claims from seeking redress for civil rights violations, and punishes plaintiffs for trying to build a strong case instead of rushing to throw together a complaint by the filing deadline.

Pre-complaint investigations into civil rights violations takes time, especially if a plaintiff is trying to prove the existence of a pattern and practice of

misconduct. *See Burnett v. Grattan*, 468 U.S. 42, 50-51 (1984) ("Litigating a civil rights claim requires considerable preparation . . . [An injured person] must conduct enough investigation to draft pleadings that meet the requirements of federal rules[.]"); Nancy Leong, *Pleading Failures in Monell Litigation*, 73 Emory L.J. 801, 840 (2024) (describing the process and importance of pre-suit litigation and investigation). Gathering information in the pre-complaint stage is particularly critical for civil rights plaintiffs who may need their complaint to meet heightened pleading standards. *See* Fed. R. Civ. P. 7(a); *see also* Karen Blum, *Section 1983 Litigation: The Maze, the Mud, the Madness*, 23 Wm. & Mary Bill Rts J. 913, 916 (2015) ("Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*[.]"). The investigation stage is also necessary to bolster allegations in the complaint to ensure they can survive motions to dismiss. *Burnett*, 468 U.S. at 50-51. If claims are being filed against an entity or municipality, plaintiffs may need to gather information about similar past incidents, obtain training or hiring records, or research past lawsuits against the parties. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978) (specific allegations regarding the existence of the implementation of a policy or practice adopted by employees are required to survive a motion to dismiss). In addition to gathering materials,

plaintiffs may need to conduct witness interviews and consult with experts to ensure facts are accurate and claims have support, which can be time-consuming, especially if the plaintiff has limited resources.

One of the ways in which civil rights lawsuits are distinguishable from other civil lawsuits is the stark imbalance of information between the plaintiff and defendants. *See* Suzette M. Malveux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 Lewis & Clark L. Rev. 66, 92, 130 (2010) (discussing "information inequities"). Information that a plaintiff needs to build their complaint, such the identities of government employees, personnel records, and camera footage, is often in the sole possession of the government defendants. As such, accessing information in the government's possession via public records is essentially a prerequisite for bringing a civil rights case. In most states, including Michigan, members of the public can access government records via records requests. *See* Mich. Comp. Laws Ann. §15.231 et seq. (Michigan Freedom of Information Act); *Blue Cross & Blue Shield of Mich. v. Ins. Bureau*, 104 Mich. App. 113, 127, 304 N.W.2d 499, 504 (1981) ("The expressed purpose of the FOIA is to provide to citizens full and complete information regarding the workings of state government, public officials and employees.").

However, some records are shielded from public view under exemptions, including "investigating records compiled for law enforcement purposes," which may include the exact types of records a civil rights plaintiff would need for their case. Mich. Comp. Laws Serv. § 15.243. In fact, an entire group of individuals who may have legitimate claims against government actors is barred from making any public records requests at all: individuals "incarcerated in state or local correctional facilities." *See* Mich. Comp. Laws Ann. §15.231. Although government agencies are supposed to provide a response to a request within five business days, Mich. Comp. Laws Serv. § 15.235, that response could be a deficient production of records or an outright denial to produce any records at all. If access is denied, plaintiffs can submit an appeal to the head of the government entity or file suit in the circuit court to compel disclosure of the requested records, Mich. Comp. Laws Serv. § 15.240, initiating litigation separate from the civil rights case. While the records release litigation moves forward, the one-year accrual timeline for the civil rights claims would continue to run, forcing plaintiffs to risk missing the filing deadline while they wait for the records to be released or file a civil rights complaint without reviewing the requested records.

It may take significant time for a plaintiff to find and secure counsel for a civil rights case. *Burnett*, 468 U.S. at 50-51 ("He must obtain counsel, or prepare to proceed pro se."); Joanna Schwartz, *Civil Rights Without Representation*, 64 Wm.

& Mary L. Rev. 641, 694 (2023) (describing difficulty many civil rights plaintiffs have in finding lawyers). Even if a plaintiff resides in a jurisdiction with a robust plaintiffs' bar, there are still several obstacles to retaining counsel. For instance, plaintiffs may be unable to pay an attorney's retainer fee or hourly rate due to limited financial resources, and attorneys may be unwilling to take on a case with lower potential damages or unable to take on a case *pro bono* due to their own financial situation. *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986); Joanna Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 346 (2020); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. Chi. L. Rev. 693, 707 (2016); Irving Joyner, *Litigating Police Misconduct Claims in North Carolina*, 19 N.C. Cent. L.J. 113, 143 (1991) (noting capacity to front costs is a common reason attorneys do not pursue police abuse cases).

For plaintiffs who live in "civil legal resource deserts" where there are "great barriers to in-person legal services and online resources," it is nearly impossible to find counsel within their jurisdiction. *See Louisiana Justice for All: Report and Recommendations*, Louisiana Access to Justice Commission, 2020, p.14. (https://www.lsba.org/documents/News/ATJ/JFAFinalReport.pdf). According to the National Center for State Courts (NCSC), Michigan has several "legal deserts" where access to legal resources is impacted by various factors, including a "limited number of attorneys compared to the population, long drive

times to the courthouse, poverty, limited English proficiency, and lack of internet and/or broadband availability." *Data Points Out 'Legal Deserts' in Michigan*, Mich. Cts., Oct. 26, 2023 (https://www.courts.michigan.gov/news-releases/2023/october/data-points-out-legal-deserts-in-michigan/). Further, plaintiffs may not have the resources to seek an attorney outside of their jurisdiction, which may be necessary not only because there is a dearth of options where they live, but because attorneys within their jurisdiction may have conflicts of interest or may decline to take their case due to political considerations.

In addition, plaintiffs who have had their civil rights violated often face the unique dilemma of needing to resolve parallel criminal before filing. For instance, if a plaintiff is subjected to false arrest, they may need to challenge the false arrest in their criminal proceeding and obtain a final resolution on that issue before filing their civil rights claim. Otherwise, they may risk self-incrimination in the civil proceeding while attempting to prove their civil rights claims that may then be offensively used by the prosecution in the criminal proceeding. As a result, plaintiffs are often counseled to wait to file suit until after the criminal proceeding is over. During this waiting period, the one-year timeline to file claims would be running. In some cases, the government entity that perpetrated the initial harm may arrest the plaintiff—or have the plaintiff arrested—as an intimidation tactic or in retaliation for planning to file a civil rights case, creating a situation in which the

plaintiff's civil rights case is stalled while they deal with the criminal proceeding. It is crucial that plaintiffs be able to hold government entities accountable for their repetitive harms, especially when additional harmful acts are being carried out solely to prevent a civil case from being filed and shield the government entity from accountability.

Plaintiffs who have suffered physical injuries due to a government entity's violations may need to spend a significant amount of time recovering in hospitals, rehabilitation centers, and physical therapy facilities. During the recovery period, there may not be any time to dedicate to searching for counsel, engaging in pre-complaint investigation, requesting public records, or otherwise building a case. In wrongful death cases, the loved ones of the decedent may need time to recover from the grief and trauma associated with the violence that caused the death before turning their attention to a civil rights case. *See* Jocelyn R. Smith Lee *et al.*, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, J. of Black Psych., Apr. 2019, at 127, 150 (internal citations omitted) ("[T]raumatic loss describes experiences of death that are characterized by one or more of the following features: sudden or unexpected, untimely, violent, victim mutilation, suffering, harmful intent of the perpetrator, preventable in nature, unfair or unjust, multiple deaths, or a death that was witnessed. These features can

complicate healthy grief processes and lead to the development of poor mental health. . . . When grief follows a traumatic loss, trauma responses may interact with grief and complicate healing. Research examining traumatic loss resulting from homicide largely reports adverse health outcomes associated with this experience, including PTSD, substance use, social isolation and stigma, and complex bereavement.").

Plaintiffs without physical injuries may need just as much time—if not longer—to recover from the trauma associated with the civil rights violation. *See* Thema Bryant-Davis *et al.*, *The Trauma Lens of Police Violence against Racial and Ethnic Minorities*, The J. of Soc. Issues, 2017, at 852, 854 (internal citations omitted) ("[T]he traumatized person may be the direct victim of the act of aggression, may witness or learn that it has happened to someone close to him or her, or may be repeatedly exposed to the details of the event. Psychological trauma may result in posttraumatic stress disorder (PTSD; intrusive thoughts, avoidance, and hypervigilance) but it is also associated with depression, distrust, affect dysregulation, panic, substance dependence, self-harming behaviors, shame, and difficulty focusing and functioning. Applying this definition to police brutality against racial and ethnic minorities, we define racially motivated police brutality trauma as an act of violence or the threat of violence perpetrated by police officers against racial or ethnic minorities.").

It is unsurprising that victims of government misconduct, particularly law enforcement misconduct, and their family members are hesitant to re-engage with government actors in a civil rights case after experiencing trauma due to those same government actors' actions. In some states, lawmakers have acknowledged and enacted legislation to address the reality that victims need time to cope with their mental trauma before pursuing and filing a civil lawsuit. *See*, *e.g.*, La. H.B. 724 (extending one-year statute of limitations to three years for victims of child abuse); La. H.B. 556 (extending one-year statute of limitations to three years for victims of sexual assault). Earlier this year, this very court upheld extending the statute of limitations for certain sexual assault cases to allow more time for minor victims of criminal sexual conduct to bring a cause of action. *McLain v. Roman Cath. Diocese of Lansing*, No. 165741, 2024 Mich. LEXIS 1277 (July 10, 2024) (ruling 2018 law expanding three-year statute of limitations allows claims of childhood sexual abuse to be filed up until the victim's 28th birthday or three years after the victim connects the abuse to injury or trauma). Victims of government misconduct similarly need more time to process their injury and trauma after suffering physical and psychological abuse.

Plaintiffs who spend significant time and resources building a case, including conducting factual and legal research, obtaining counsel, hiring experts, and researching defendants may never get to file because by the time they gather

enough information to firmly support their allegations of civil rights violations, the limitations period has passed. Complaints that are filed on time may lack adequate support because there was not enough time to gather the necessary facts to bolster claims, leaving the complaint ripe for dismissal before a plaintiff even gets a chance to prove their case. Plaintiffs are either being punished for taking time to diligently build their case or set up to fail when forced to file under-researched, rushed complaints. In both instances, the government actors who violated civil rights are shielded from accountability and left to commit the same violations repeatedly with impunity.

II. The Court of Appeals Order Will Lead to Court Inefficiency

If the Court of Appeals' rule requiring a claim to accrue within a year of the first violation is left to stand, plaintiffs' attorneys will be disincentivized from vetting and settling claims, instead filing claims that are not yet ready to be litigated. This will in turn lead to attorneys filing claims that could be resolved outside of the court system. As previously discussed, civil rights attorneys typically need significant time to thoroughly investigate the facts of a prospective client's case and evaluate the viability of their claims. *See supra* Section I(B). Attorneys facing a fast-approaching time-bar have a difficult dilemma: reject a potentially strong case or file a case without all the facts. Electing the former will deprive their prospective client of access to justice, whereas electing the latter could lead to

them filing a frivolous case. Not only does filing a frivolous claim put the attorney at risk for reputational and professional consequences, but it can also result in avoidable burdens on government defendants and courts alike.

It may take months or even more than a year for a plaintiff's attorney to learn about factual weaknesses in their case through the discovery process. *See A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage of Loss*, Am. Bar Assoc. Comm'n on Immig. Poli'y, Prac., and Pro Bono at II-10. Body worn camera footage, agency reports and policies, statistics, and many other types of evidence can reveal that civil rights claims lack a factual basis. *See* Michael Avery, et al., *Police Misconduct: Law and Litigation*, 6.4 *et seq*. (Clark Boardman Callaghan 2024) (describing the types of information essential for evaluating a police misconduct case). This evidence can also be obtained prior to litigation if an attorney is given adequate time to investigate but will only be accessible through discovery once a case is filed. Mich. Comp. Laws § 15.243(v) (providing an exemption from disclosure for records and information related to a civil action in which the requesting party and the public bodies are parties). Discovery can often be delayed due to dispositive motion briefing, scheduling issues, and overbroad objections by defense counsel. *See* Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 Cardozo L. Rev. 81, 96 (2004) (noting that discovery is

typically deferred until after dispositive motions are resolved by the court). During that time, the case requires government agencies to expend valuable attorney time and resources on the case while requiring courts to devote docket space and precious judicial resources to a case that otherwise should not have been filed until more facts had been gathered.

The press of a claim accrual deadline can also interfere with pre-litigation settlement efforts. Where possible, pre-suit settlement is the cheapest and most efficient way to resolve claims because the case can be settled without payment of significant attorney's fees and litigation expenses. *See* William H. J. Hubbard, *Stalling, Conflict, and Settlement*, Coase-Sandor Working Paper Series in Law and Economics, No. 839 at 10 (2018) (explaining that settlement negotiations after a lawsuit is filed "[are] more costly because litigation costs accrue as long as bargaining continues"); *see also* Am. Bar Assoc. Guideline B-7 on Negotiation (explaining that pre-litigation settlement "may be a useful way to resolve the issues in controversy without a significant expenditure of the organization's resources").

Tight notice and filing deadlines greatly reduce the time that parties can engage in robust pre-litigation negotiations. This is particularly true in civil rights cases where settlements must undergo approval by multiple government entities before they can be finalized. *See Eg.* Joanna Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1175 (2016). The Court of

Appeals' rule requiring that cases be filed within one year of the initial injury will push cases that could have been settled, or at least narrowed, pre-suit into lengthy litigation.

II. The Court of Appeals' Order Threatens Protections Created by *Bauserman II*

Michigan is currently a standard bearer for state-level civil rights protections. The state not only has robust statutory protections against discrimination in the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, but this Court has also recognized an implied private right of action under the state constitution. *Bauserman v. Unemployment Insurance Agency*, —N.W.2d—, 2022 WL 2965921, at *6 (Mich. 2022). Indeed, Michigan's state civil rights protections received an A-minus rating from the Institute for Justice. *See* 50 Shades of Government Immunity: Complications With Bringing Civil Rights Claims Under State Laws, Int. for Just. (2023). The Court of Appeals' ruling will undermine the viability of the state's unique civil rights protections and accountability measures by making it harder for plaintiffs to develop and timely file claims in Michigan state court.

CONCLUSION

For the foregoing reasons, the application for review should be granted.

Respectfully submitted,

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WORD COUNT STATEMENT

This brief complies with the type-volume limitation of Michigan Court Rules 7.212(B)(1)-(3). Excluding the parts of the document that are exempted under MCR 7.212(B)(2), this brief contains no more than 16,000 words. The total number of countable words contained in this brief is 5,073.