STATE OF MICHIGAN
IN THE SUPREME COURT

MOUNT CLEMENS RECREATIONAL BOWL, INC, a Michigan profit corporation, KMI, INC, a Michigan profit corporation, and MIRAGE CATERING, INC, a Michigan profit corporation, individually and on behalf of all others similarly situated,
Plaintiffs/Appellants,

v.

ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services, PATRICK GAGLIARDI, in his official capacity as Chair of the Michigan Liquor Control Commission, and GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,
Defendants/Appellees
_____/

Supreme Court Case No.: 165169

BRIEF OF *AMICUS CURIAE* ANTHONY BANASZAK IN SUPPORT OF APPELLANTS MOUNT CLEMENS RECREATIONAL BOWL, INC, KMI, INC, & MIRAGE CATERING, INC

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BACKGROUND OF AMICUS' INTEREST[1]

Amicus Anthony Banaszak owns a private residence located at 212 Garfield Avenue in Bay City, Michigan (the "Garfield Avenue House") that he rents as a quad-plex. In October 2022, one of the tenants, a confused and wayward septuagenarian, refused to be evicted. The police were called after the tenant threatened the papers-serving court officer with a knife. After later incorrectly claiming to see a gun (which turned out to be a broomstick), officers from the Bay City Public Safety Department and the latter-arriving Michigan State Police Emergency Support Team (effectively a SWAT team) proceeded to storm Banaszak's house using highly destructive tactics. A BearCat (essentially a small tank) rammed a portion of the wall and windows on the southside of the Garfield Avenue House (https://youtu.be/Yf-OtCvv-2Y). The officers also fired dozens of rounds of highly noxious chemical irritants into the house breaking and poisoning the walls, windows, and the building itself. Cole Waterman, *Bay City Landlord Sues City, State After Police Damage Building During Standoff*, MLIVE/BAY CITY TIMES, July 10, 2023, *available at* https://bit.ly/48eYPUu (see photographs associated with news story). The dispersed tear gas and activated cannisters of chemical irritants remained as bio-hazards after law enforcement bolted from the scene following the effectuation of the arrest. Courts around the country have found such to be a type of taking. E.g. *Steele v City of Houston*, 603 SW2d 786 (Tex 1980).

Banaszak filed suit against both the State of Michigan and the City of Bay City on various takings theories in the Bay County Circuit Court. However, the State *sua sponte* self-transferred its portion of the case to the Michigan Court of Claims. The reason was

[1] No party's counsel authored this brief in whole or in part. No one, other than Amicus, contributed any money for this brief's preparation or submission. MCR 7.312(H)(4).

transparent—it was to deny the requested jury trial. Attempts to transfer the case back to the Bay County Circuit Court to hold a jury trial were denied by the assigned Court of Claims judge. The challenge to the constitutionality of the *Court of Claims Act* as denying the right to a jury trial was also denied. **Exhibit A**. The case remains pending.

Banaszak offers this amicus brief to confirm that the desire of suing citizens (like him) for a trial of their peers is not a theorical or academic exercise, or is otherwise limited to the unique facts of this *Mount Clemens* case. While admittedly having more than an idle curiosity in the outcome of this case as future precedent, Banaszak presents this brief to suggest that that a long legal history and tradition exists to require a jury trial on a citizen's civil claims against the government when a valid jury demand is proffered. The jurisprudence of this State has unfortunately strayed from the historical and well-understood obligation of the judiciary to empanel juries to adjudicated cases. This Court has the opportunity in this case to correct that error—and it should do so.

ARGUMENT

Today, the operative provision of the Michigan Constitution provides "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art I, § 14. Like other parts of our Constitution, our highest governing document is *more* protective[2] of the right to a jury than the Seventh Amendment as a counterpart. The Seventh Amendment's "right of trial by jury shall be preserved" but only "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." US Amend VII. The Michigan Constitution, on

[2] See *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429, 454; 952 NW2d 434 (2020) (Michigan's Takings Clause… afford[s] property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain.")

the other hand, does not make this right to a jury limited to only "suits at common law" or otherwise has a separate monetary threshold. Instead, our "legislature may authorize a trial by a jury of less than 12 jurors in ***civil*** cases," Const 1963, art IV, § 44, while not authorizing the Legislature to preclude civil jury trials against the State altogether—as that fundamental right must "remain."

The right to a jury trial is a fundamental one, with a long history that dates back to the founding of our country and beyond. See *Duncan v Louisiana*, 391 US 145, 148-154 (1968) (discussing the fundamental nature of the right and its long history). The jury trial also dates back to before the birth of Michigan's statehood. Our prior territorial "constitution" provided an unconditional right to a jury trial—

> The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, ***and of the trial by jury***; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law.

NORTHWEST ORDINANCE § 14, art 2 (1787). Pointedly, this particular right was not limited to common-law suits or valued at more than twenty dollars.

Thereafter, our state's original constitution, ordained against the above-referenced backdrop of the Northwest Ordinance, *Madugula v Taub*, 496 Mich 685, 704 fn46; 853 NW2d 75 (2014), mandated that "[t]he right of trial by jury shall ***remain inviolate***." Const 1835, art I, § 9.[3] Thereafter, the subsequently revised state constitutions provided that

[3] As this Court previously recounted in *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642, 669; 698 NW2d 350 (2005)—

> Congress provided in the Northwest Ordinance that the constitutions and governments of the states to be formed in the territory, of which states Michigan is one, "shall be republican." NORTHWEST ORDINANCE OF 1787, art V. This requirement was carried forward by Congress when it severed Michigan from the Northwest Territory in 1800 and made it part of the Indiana Territory, 2 US Stat, Ch XLI, § 2, and again in 1805 when it likewise severed Michigan from the Indiana Territory and established the Michigan Territory, 2 US Stat, Ch V, § 2, by requiring both times that the

"the right of trial by jury *shall remain*." Const 1850, art VI, § 27; Const 1908, art II, § 13; Const 1963, art I, § 14; see also *People v Kirby*, 440 Mich 485, 494; 487 NW2d 404 (1992). The intention of these post-original provisions was "to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed… and suitors cannot constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe." *Tabor v Cook*, 15 Mich 322, 325 (1867); see also *Madugula*, 496 Mich at 704-705 ("a jury trial [is] 'preserved in all cases where it existed prior to adoption of the Constitution,' [and] the constitutional guarantee also applies 'to cases arising under statutes enacted subsequent to adoption of the Constitution which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted.").

Given the language of the Northwest Ordinance (which set the yardstick by which all rights to a jury "shall remain" or "remain inviolate") all the way through Const 1963, art I, § 14 and art IV, § 44, the constitutional mandate is clear—the Legislature can dictate *the mode* by which a jury trial is demanded, not preclude a jury altogether. The teachings of *Tabor* and *Madugula* and the law in effect prior to statehood in the Michigan Territory confirms that such a right to a jury trial existed to be invoked for civil claims made against the government and its officials.

However, this right goes back even further as we have the known English history[4] of requiring a sued government and its officials to answer to a jury. The best example is

government established in those territories was to be "in all respects similar" to that provided in the Northwest Ordinance of 1787.

[4] Recently this Court reiterated that Michigan's "common law is adopted from England, and to identify such law this Court may consider original English cases and authorities." *Rafaeli,* 505 Mich at 463 (quoting *People v Woolfolk*, 497 Mich 23, 25; 857 NW2d 524 (2014)).

Wilkes. During the 1760s, a member of Parliament named John Wilkes engaged in a series of radical political actions, including publishing a broadsheet called the *North Briton*. Wilkes accused King George III of lying about ongoing peace negotiations with France. After criminal charges of seditious libel were dismissed, Wilkes commenced a damages (i.e. civil) action, ***through a jury trial***, for false arrest, trespass, and theft of personal papers. The *Wilkes* jury awarded him the extraordinary sum of £1000 as damages (approximate $325,000 in today's dollars) against a number of governmental officials including the head of the government at that time, Lord Halifax. See *Wilkes v Wood*, 98 Eng Rep 489 (CP 1763). *Wilkes* is recognized as a "celebrated" case "that profoundly influenced the Founders' view[s]…" *West Covina v Perkins*, 525 US 234, 237 (1999) (Thomas, J, concurring). After *Wilkes*, "the friends and adversaries of the plan of Convention, if they agree on nothing else, concur at least on the value they set upon trial by jury." Alexander Hamilton, FEDERALIST PAPER NO. 83. In fact, among the grievances against King George III listed in the Declaration of Independence was "depriving us, in many cases, the benefits of trial by jury." THE DECLARATION OF INDEPENDENCE (US 1776).

Michigan kept with that tradition following *Wilkes*.[5] The 1835 Constitution mandated that "the right of trial by jury shall ***remain inviolate***." Const 1835, art I, § 9. The strong word of "inviolate" is supposed to mean that it "cannot be annulled, obstructed,

[5] A common misunderstanding is that the Legislature has to ***first*** recognize the right to a jury trial against the State before such exists. That is untrue. When Michigan created its first constitution (and created the scope of the sovereign powers of the State of Michigan, the electorate mandated that the "right of trial by jury shall remain inviolate." Const 1835, art I, § 9. Because the People took away the State's ability to take away the jury trial, the Legislature cannot act in violation or in degradation of constitutional handcuffs. "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." *Wolverine Golf Club v Sec'y of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). And when a statute is unconstitutional, it "is as inoperative as if it had never been passed." *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-145; 253 NW2d 114 (1977).

impaired, or restricted by [either] ***legislative*** or ***judicial*** action." *Steelvest, Inc v Scansteel Service Center, Inc*, 908 SW2d 104, 108 (Ky 1995) (emphasis added). In simple terms, the right is supposed to be "unassailable." *Id*.

Unfortunately, that constitutional right has come under direct assault and has been heavily battered and bruised (but hopefully not dead). When crafting the *Court of Claims Act*, our Legislature statutorily precluded the suing party's right to a jury trial when the suit is against the State. MCL 600.6443.[6] That was a direct failure to abide by the notion that the Legislature did not have discretion to assail the right to empanel a citizen-jury; it renders such course of action unconstitutional. The requirement of a jury trial remains bound by applicable and overriding provisions of our State Constitution. It is "settled" that the Legislature cannot take away the right of trial by jury as it existed and was adopted by the Constitution. *People v Bigge*, 288 Mich 417, 424; 285 NW 5 (1939). "[A]ny act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional." *Risser v Hoyt*, 53 Mich 185, 196; 18 NW 611 (1884). As such, the *Court of Claims Act*, to the extent that it precludes a civil jury trial in the Court of Claims (or prevents the transfer of the case back from to the original trial court that can hold a jury trial) for a case regarding money damages against the State and its officials for violating the takings provisions of the state and federal constitutions runs contrary to our Constitution's mandate for a required jury trial. Correction by this Court is needed.[7]

[6] As both this case and *Banaszak* establish, the Court of Claims is regularly refusing to transfer these cases with jury demands back to a general jurisdiction circuit court who can hold a jury trial.

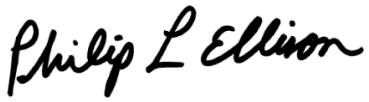
[7] As a final note, a common refrain from attorneys for the government as a counter-argument to amicus' position is the idea that the State cannot be sued as the sovereign unless the latter first consents and, by extension, may condition its consent on prerequisites of its own fiat or discretion. That is blatantly

CONCLUSION

By this pending case, the Court is requested to decree that all Michigan trial courts of appropriate jurisdiction must provide, when properly requested, a trial by jury for takings-based civil suits involving the government and its officials.[8]

Date: December 26, 2023

RESPECTFULLY SUBMITTED:



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incorrect—*the People* are the sovereign with "all" the "political power"; the State of Michigan was merely "instituted" (i.e. created) by the People of the Territory of Michigan "for their equal benefit, security and protection." Const 1835, art I, §§ 1-2; see also Const 1963, art I, § 1. The Preamble of the 1835 Constitution confirms it—

> We, the PEOPLE of the territory of Michigan, as established by the Act of Congress of the Eleventh day of January, in the year one thousand eight hundred and five, in conformity to the fifth article of the ordinance providing for the government of the territory of the United States, North West of the River Ohio, believing that *the time has arrived when our present political condition ought to cease, and the right of self-government be asserted*; and availing ourselves of that provision of the aforesaid ordinance of the congress of the United States of the thirteenth day of July, one thousand seven hundred and eighty-seven, and the acts of congress passed in accordance therewith, which entitle us to admission into the Union, upon a condition which has been fulfilled, do, by our delegates in convention assembled, *mutually agree to form ourselves into a free and independent state, by the style and title of "The State of Michigan,"* and *do ordain and establish the following constitution for the government of the same*.

In short, the People have *already* and continuously ordained that a right to a trial by jury for suits against the government and its officials "shall remain" inviolate. NORTHWEST ORDINANCE § 14, art 2 (1787); Const 1850, art VI, § 27; Const 1908, art II, § 13; Const 1963, art I, § 14.

[8] Michigan jurisprudence lost its way starting in *Hill v State Highway Comm'n*, 382 Mich 398; 170 NW2d 18 (1969). There, the case involved a dispute over an alleged taking due to an installed roadway. This Court held, with no reference to the language, text, of history of the Michigan Constitution, that "neither the Constitution of 1908 nor 1963 provides a constitutional right to a jury in a condemnation hearing and since there is statutory authority for nonjury proceedings by the highway commission, the [] claim of a right to a determination of damages by a jury is without merit." *Id.* at 406. Respectfully, that misstatement of the law misframes the correct understanding of the constitutional right to a jury trial. The right to a jury trial is inviolate. For the Legislature to take away or water-down that right, it must point a *different* provision within the Constitution that authorizes such. To assert the obvious, it does not exist.

WORD COUNT STATEMENT

The body of the filing consists of 2,668 words as determined by the Word Count feature in the Microsoft Word computer program.