STATE OF MICHIGAN
MI Supreme Court

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Case Title:	Case Number:
ELLEN M ANDARY V USAA CASUALTY INSURANCE COMPANY	164772

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American Civil Liberties Union Fund of Michigan

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL T. ANDARY, M.D., Conservator and Guardian of ELLEN M. ANDARY, LIP, RONALD KRUEGER, Guardian of PHILIP KRUEGER, LIP, and MORIAH, INC., d/b/a EISENHOWER CENTER,

Plaintiffs-Appellees,

v

USAA CASUALTY INSURANCE COMPANY and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.
_____/

SC No. 164772

COA No. 356487

Ingham CC No. 19-000738-CZ

MOTION BY THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, DISABILITY RIGHTS MICHIGAN, DETROIT DISABILITY POWER, MICHIGAN STATEWIDE INDEPENDENT LIVING COUNCIL, LEGAL SERVICES ASSOCIATION OF MICHIGAN, AND MICHIGAN STATE PLANNING BODY FOR LEAVE TO FILE AMICUS CURIAE BRIEF

By this motion, and pursuant to MCR 7.312(H), the American Civil Liberties Union of Michigan, Disability Rights Michigan, Detroit Disability Power, Michigan Statewide Independent Living Council, Legal Services Association of Michigan, and Michigan State Planning Body seek leave to file an amicus curiae brief in the above-captioned case.

In support of this motion, the proposed amici state as follows:

1. Amici are legal, advocacy, and social service organizations dedicated to achieving full equality under the law for people with disabilities, limited economic means, and other historically disadvantaged groups.

2. A brief description and statement of interest of each amicus organization is provided in their proposed brief.

3. Amici write to emphasize that the Legislature must speak clearly in order to retroactively apply a law to take away important services and benefits from a disadvantaged group. As explained in amici's brief, services and benefits such as post-accident health care are essential to facilitating Michiganders' lives and their equal citizenship, which the Michigan Constitution guarantees. Courts therefore cannot lightly infer that the Legislature snatched away such essential services and upended Michiganders' lives in the process.

4. The proposed amicus brief accompanies this motion.

For these reasons, the American Civil Liberties Union of Michigan, Disability Rights Michigan, Detroit Disability Power, Michigan Statewide Independent Living Council, Legal Services Association of Michigan, and Michigan State Planning Body request that this Court grant them leave to file an amicus curiae brief, and accept their accompanying brief as filed.

Respectfully submitted,

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Dated: February 6, 2023

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL T. ANDARY, M.D., Conservator and Guardian of ELLEN M. ANDARY, LIP, RONALD KRUEGER, Guardian of PHILIP KRUEGER, LIP, and MORIAH, INC., d/b/a EISENHOWER CENTER,

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, DISABILITY RIGHTS MICHIGAN, DETROIT DISABILITY POWER, MICHIGAN STATEWIDE INDEPENDENT LIVING COUNCIL, LEGAL SERVICES ASSOCIATION OF MICHIGAN, AND MICHIGAN STATE PLANNING BODY

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Dated: February 6, 2023

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union of Michigan** ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting, preserving, and expanding civil liberties, civil rights, and the principles of liberty and equality embodied in our Constitution and civil rights laws. The ACLU advocates to secure and extend rights and opportunities for people and groups who have been historically disadvantaged, marginalized, or overlooked. This includes people with disabilities, low-income people, and others whose ability to live with dignity and participate fully as free and equal citizens in our democracy would be hindered by reading Michigan's amended no-fault act as imposing retroactive caps on the insurance benefits at issue in this case.

Disability Rights Michigan (DRM) is the independent, private, nonprofit, and nonpartisan protection and advocacy organization authorized by federal and state law to advocate for and protect the legal rights of people with disabilities in Michigan. Designated by the governor of Michigan as this state's Protection & Advocacy System, DRM exists to protect the legal and human rights of people with disabilities. 42 USC 15041, 10801; 29 USC 794e. Retroactive application of the 2019 no-fault reform act exclusively and adversely affects people with disabilities, increasing the likelihood that they will require care in more restrictive and less integrated settings. DRM, as its ongoing litigation highlights, has a strong interest in preventing this. See, e.g., *KB v Mich Dep't of Health & Human Servs*, No. 18-cv-11795 (ED Mich); *Waskul v Washtenaw Co Community Mental Health*, No. 16-cv-10936 (ED Mich).

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

Detroit Disability Power, a fiscally sponsored project of Michigan Disability Rights Coalition, is a social justice organization dedicated to building the organizing power of the disability community in Detroit. A nonpartisan organization with more than 275 members, Detroit Disability Power organizes for accessible and affordable housing, transportation, healthcare and education. The organization does not think it is fair or safe to have a retroactive cap on insurance benefits provided through Michigan's auto no-fault policies.

The **Michigan Statewide Independent Living Council** (MiSILC) is a cross-disability, consumer-controlled council mandated by the Rehabilitation Act of 1973 as amended. MiSILC ensures the interests of people with disabilities are represented at the state level. MiSILC is composed of 16 individuals appointed by the Governor, a majority being people with disabilities, and other non-voting ex-officio members providing links to state agencies serving people with disabilities. MiSILC advances the Independent Living philosophy through a network of Centers for Independent Living (CILs) and statewide partnerships by engaging in or supporting research, education, employment, community organization, advocacy and systems reform. MiSILC is responsible for the development, implementation and monitoring of a comprehensive multi-year State Plan for Independent Living (SPIL) in partnership with Michigan's network of CILs.

Legal Services Association of Michigan (LSAM) is a Michigan nonprofit organization incorporated in 1982. LSAM's members are eleven of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year. LSAM members have daily contact with low-income and other marginalized persons, including individuals with disabilities, who struggle without appropriate supports to access health care and other needed services. The limits on insurance benefits impacted by the retroactive applicability of the amendments to Michigan's no-fault act will further restrict

the rights of certain individuals to live securely and independently, rights that LSAM members seek to protect.

The **Michigan State Planning Body** (MSPB) is an unincorporated association of about 35 individuals who are leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations and who are interested in Michigan's indigent civil legal aid and indigent defense systems. MSPB acts as a forum for planning and coordinating the state's efforts to deliver civil and criminal legal services to the poor; its mission is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan. Central to the MSPB is its commitment to ensuring equal access to justice for the poor and other underserved populations, including people with long-term disabilities. The amendments to the no-fault act which capped the benefits that can be provided to seriously injured car accident survivors have resulted in important services and benefits being taken away from this historically disadvantaged and vulnerable group. This case has the potential to directly impact many of the clients who are served by the organizations represented by the MSPB, whether the representation is directly related to the individuals' disabilities or the poverty they have found themselves in as a result of the injuries sustained in a car accident.

QUESTIONS PRESENTED

1. Whether, as a matter of statutory interpretation, claimants injured before the effective date of 2019 PA 21 are subject to the limitations on benefits set forth in MCL 500.3157(7) and (10)?

   The Court of Appeals answered: No.
   Defendants-Appellants answer: Yes.
   Plaintiffs-Appellees answer: No.

   Amici answer: No. The Legislature must clearly indicate any intent to take away important services and benefits from a disadvantaged group, and the Legislature did not do so here.

2. Whether application of the amended statutes to such claimants would violate the Contracts Clause of the Michigan Constitution?

   Amici's brief does not address this question.

3. Whether the case should be remanded to the circuit court for discovery to determine whether the no-fault amendments, even when applied only prospectively, pass constitutional muster?

   Amici's brief does not address this question.

INTRODUCTION

There are more than five million motor vehicle crashes reported each year in the United States. National Highway Traffic Safety Administration, *Traffic Safety Facts 2020*, p 69 <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813375>. Thirty percent of those crashes (more than 1.5 million of them) result in an injury. *Id.* In Michigan, there are well over 250,000 motor vehicle crashes every year. Michigan State Police, *2021 Statewide Traffic Crash Data Year End Report*, p 5 <https://www.michigan.gov/msp/-/media/Project/Websites/msp/cjic/Traffic-Crash-Reporting-Unit-Files/YE-2021-FINAL.pdf>.

None of us know whether we will be among the people who are involved in motor vehicle crashes, or whether we will be among the people who are seriously injured in those crashes. But one thing people do know is whether they have obtained insurance that will protect them in case of catastrophic injury. Indeed, purchasing insurance is one of the few things that people can do in order to guard against the risk that they will be severely injured in a vehicle crash.

For decades, Michiganders who were injured as a result of car accidents have relied on the coverage they purchased through Michigan's no-fault insurance system. That insurance provided them with personal injury protection (PIP) benefits that covered health care that was adequate to rehabilitate them, and that was sufficient to assist them in living their lives fully, with their long-term injuries. The 2019 no-fault reform act, 2019 PA 21, amended that system for people who were injured after the act's effective date, June 11, 2019.

The central question in this case is whether the law also applies retroactively to persons who were injured before its effective date. It does not. The Legislature did not clearly manifest an intent for 2019 PA 21 to take away the health care that people who were injured before the act's

effective date purchased and expected to be able to rely on. Under this Court's precedents, that is sufficient to resolve the principal question on appeal.

Amici write to emphasize that the Legislature must speak clearly in order to retroactively apply a law to take away important services and benefits from a disadvantaged group. That is for good reason. Services and benefits such as post-accident health care are essential to facilitating Michiganders' lives and their equal citizenship, which the Michigan Constitution guarantees. Courts therefore cannot lightly infer that the Legislature snatched away such essential services and upended Michiganders' lives in the process.

And retroactively applying 2019 PA 21 would indeed upend the lives of Michiganders who were injured before the act's effective date. It would withdraw the insurance coverage that accident victims purchased in order to protect themselves against the risk of catastrophic injuries; it would jeopardize the health care services that have sustained their lives and well-being since their catastrophic injuries; and it would upset their reasonable expectations that they could continue to rely on the care they purchased. The Legislature did not clearly evince an intent to pursue such an unsettling and destabilizing plan. The Court of Appeals was therefore correct: 2019 PA 21 does not apply to persons injured before June 11, 2019.

ARGUMENT

I. The Legislature must clearly indicate any intent to take away important services and benefits from a disadvantaged group.

The Michigan Constitution recognizes that retroactive legislation may be at odds with several principles that are enshrined in the state's Constitution. A few different provisions in the Constitution are accordingly trained at limiting the legislature's authority to enact particular kinds of retroactive legislation. Those provisions include the Due Process Clause, Const 1963, art 1, § 17; the Ex Post Facto Clause, Const 1963, art 1, § 10; the Contracts Clause, Const 1963, art 1, §

10; as well as the separation of powers provision, Const 1963, art 3, § 2; see *Quinton v Gen Motors Corp*, 453 Mich 63, 75-76; 551 NW2d 677 (1996) (invoking the separation of powers provision to construe potentially retroactive legislation). As former Chief Justice MCCORMACK recognized, "[r]etroactive laws are often unfair." *Bd of Trustees of City of Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Trust v Pontiac*, 502 Mich 868, 868 (2018) (MCCORMACK, C.J., concurring). That is because they may "upset settled expectations, impose new burdens, and disrupt old agreements." *Id.*

But not all retroactive laws work the same way, and this Court's cases, as well as the Michigan Constitution, recognize that not all retroactive legislation is necessarily problematic. Other provisions in the Michigan Constitution help to clarify when courts should more closely scrutinize retroactive legislation before concluding that the Legislature chose to make the law operate retroactively. For example, the Michigan Constitution recognizes that laws burdening historically disadvantaged and politically powerless groups raise special concerns. This principle is embodied in the first two provisions of the Michigan Constitution. The opening provision of the Michigan Constitution states that "All power is inherent in the people. *Government is instituted for their equal benefit, security and protection*." Const 1963, art 1, § 1 (emphasis added). The following provision adds that "No persons shall be denied the equal protection of the laws," and expands on those protections as follows: "[N]or shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Const 1963, art 1, § 2. The Michigan Constitution further requires the Legislature to "implement" its equal protection guarantee "by appropriate legislation." *Id.*; see, e.g., MCL 37.1101 *et seq.* (Persons with Disabilities Civil Rights Act); MCL 37.2101 *et seq*. (Elliott-Larsen Civil Rights Act).

More generally, the Michigan Constitution reflects a democracy principle, which entails a commitment to both popular sovereignty and political equality, some version of which is contained in all 50 state constitutions. Bulman-Pozen & Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 Wis L Rev 1337, 1339 (2022). The democracy principle is reflected in many places throughout the Michigan Constitution. See, e.g., *People v Pagano*, 507 Mich 26, 40; 967 NW2d 590 (2021) (VIVIANO, J., concurring) (invoking the structure of the Michigan Constitution to interpret it); *In re Konschuh*, 507 Mich 984 (2021) (CAVANAGH, J., concurring) (same). For starters, the Michigan Constitution begins with the fundamental principle that "[a]ll political power is inherent in the people." Const 1963, art 1, § 1. See Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, 119 Mich L Rev 859, 870 (2021) (citing Michigan's constitutional provision as evidence of the democracy principle). The Michigan Constitution also confers a right to vote. Const 1963, art 2, § 1 ("Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution."). It forecloses particular restrictions on the franchise. Const 1963, art 1, § 2 ("[N]or shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."). And it provides for a ballot initiative process that facilitates direct democracy. Const 1963, art 12, § 2 ("Amendments may be proposed to this constitution by petition of the registered electors of this state."); see *Citizens Protecting Mich's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018).

One key component of the democracy principle is a commitment to political equality. See Bulman-Pozen & Seifter, *Countering the New Election Subversion*, 2022 Wis L Rev at 1339. And

political equality depends on Michigan citizens' ability to participate on equal footing in civic society—so as to ensure that all Michiganders are in a position to enjoy the fundamental liberties and protections that facilitate their lives and political participation. See Schacter, Romer v. Evans *and Democracy's Domain*, 50 Vand L Rev 361, 394 (1997); Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich L Rev 1363, 1410-1411 (2011); NeJaime & Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts*, 96 NYU L Rev 1902, 1944-1958 (2021). Research has found that adequate health insurance in particular helps to facilitate political equality. See generally Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics* (Cambridge: Cambridge University Press, 2018) (finding that individuals who obtain health insurance are more likely to vote than people who are uninsured).

Reading the provisions in the Michigan Constitution together with this Court's cases makes clear that the Legislature must speak clearly if it wants to retroactively withdraw important services from an historically disadvantaged and relatively powerless group. In *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014), this Court explained that "[i]n determining whether a law has retroactive effect, we keep four principles in mind." Those principles are:

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operatively retroactively merely because it relates to an antecedent event. Third, in determining retroactivity we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*Id.* at 38-39.]

These factors incorporate an assessment of *who* the legislation disadvantages and *how* the legislation disadvantages them in order to ascertain the meaning of the law enacted by the

Legislature. As the Court of Appeals has explained, "Whether the Legislature indeed balanced the benefits of retroactivity against the potential for disruption or unfairness is a query specifically contemplated by application of rules three and four [of the *LaFontaine* test]." *Doe v Dep't of Corrections*, 249 Mich App 49, 61; 641 NW2d 269 (2001).

The United States Supreme Court has similarly acknowledged that the nature of the burden imposed, and on whom the burden falls, are relevant to any retroactive inquiry. See *Vartelas v Holder*, 566 US 257, 267-268; 132 S Ct 1479; 182 L Ed 2d 473 (2012) (invoking the "severity of th[e] sanction" to a noncitizen and whether "the loss at stake was . . . momentous" to a noncitizen with family abroad in order to assess whether a statute was retroactive). This is why this Court has recognized that a "statute's relation to a prior event alone will not render the statute retroactive." *LaFontaine*, 496 Mich at 40. Not all retroactive laws are the same, and this Court's retroactivity jurisprudence as well as the Michigan Constitution distinguish between them. Particularly suspect are those retroactive laws that burden historically disadvantaged and relatively politically powerless groups by taking away services and liberties that facilitate individuals' participation in and access to civic society.

II. Applied retroactively, 2019 PA 21 threatens to withdraw critical care from persons who are living with severe disabilities resulting from traumatic car accidents.

Construed retroactively, 2019 PA 21 threatens to withdraw critical care from persons who are living with severe disabilities that resulted from traumatic car accidents—care that allows them to continue living their lives and participate in society. It also has the potential to force some people into institutional settings to the extent that the caps on insurance are not sufficient to cover the kinds of at-home care services that allow them to remain at home, or could be used as grounds to effectively force people into institutional settings. Cf. United States Senate Health, Education, Labor and Pensions Committee, *Separate and Unequal: States Fail to Fulfill the Community*

Living Promise of the Americans with Disabilities Act (July 18, 2013), p 15 <https://www.help.senate.gov/imo/media/doc/Olmstead%20Report%20July%2020131.pdf> (finding a "bias toward institutionalization" of persons with long term disabilities); *id.*, p 44 ("[S]tudies show that the proportion of nursing home residents younger than 65 is increasing over time"); Reaves & Musumeci, *Medicaid and Long-Term Services and Supports: A Primer* (Kaiser Family Foundation, December 2015) <https://www.kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/> (finding "few affordable options in the private insurance market" sufficient to cover "long-term services" that allow individuals with disabilities to live at home). The statute accordingly must be interpreted in light of the clear statement rule against withdrawing important services from historically disadvantaged groups.

Capped private insurance is often insufficient to cover various forms of care that allow people with longer-term disabilities to maintain access to and participate in society. Many people who live with long-term, severe disabilities need personal-assistance services to help them participate in daily activities that are taken for granted, such as getting out of bed, being able to work, eating meals, going to school, running errands, and myriad other life activities and tasks. See Litvak et al., *Attending to America: Personal Assistance for Independent Living: A Report of the National Survey of Attendant Services Programs in the United States* (1987), pp 1-17; Batavia et al., *Toward a National Personal Assistance Program: The Independent Living Model of Long-Term Care for Persons with Disabilities*, 16 J Health Pol Pol'y & L 523 (1991); Nosek & Howland, *Personal Assistance Services: The Hub of the Policy Wheel for Community Integration of People with Severe Physical Disabilities*, 21 Pol'y Stud J 789, 789-790 (1993). This kind of care is essential to maintain these individuals' dignity and well-being, in addition to their social and political equality. Cf. Belt, *Contemporary Voting Rights Controversies Through the Lens of*

Disability, 68 Stan L Rev 1491, 1493 (2016) ("[P]otential voters with disabilities are up to twenty-one percentage points less likely to vote than potential voters without disabilities."); *id.* at 1495 (identifying transportation obstacles as "a significant problem" for voters with disabilities).

Yet the new caps on PIP benefits will leave injured people who have long-term disabilities without the services that are critical for them to be full members of our community. Caps on insurance make it difficult to cover "the amount that would be necessary to pay for even minimally sufficient care for the targeted conditions." Bagenstos, *The Future of Disability Law*, 114 Yale LJ 1, 28 & n 108 (2004). "[P]rivate insurers" "do not adequately cover[] durable medical equipment and assistive technologies." *Id* at 31-32. This is a particular burden for "[i]ndividuals with disabilities who need . . . forms of ongoing therapy" or "a continuing response to a chronic condition." *Id.* at 30-31. "Private insurance plans" "limit annual payments for durable medical equipment such as wheelchairs, crutches, braces, and ventilators, regardless of medical necessity and at a level that makes the individual's out-of-pocket costs for higher priced items such as motorized wheelchairs prohibitively expensive." Nat'l Council on Disability, *The Current State of Health Care for People with Disabilities* (2009) <https://www.ncd.gov/publications/2009/Sept302009#Gaps>. "One national survey found that health insurance is inadequate for more than one in three people with disabilities who reported delaying care, skipping medication, or going without needed equipment because of cost." *Id.*

Placing individuals who have been receiving uncapped PIP benefits onto the newly capped private insurance system runs the risk of forcing these individuals (back) into a system that unjustifiably institutionalized many people with longer-term disabilities. Studies have found that people with the kinds of private insurance available on the open market are more likely to receive health care in institutional settings rather than at home. Musumeci & Foutz, *Medicaid*

Restructuring Under the American Health Care Act and Nonelderly Adults with Disabilities (Kaiser Family Foundation, 2017) <https://www.kff.org/medicaid/issue-brief/medicaid-restructuring-under-the-american-health-care-act-and-nonelderly-adults-with-disabilities/>. Numerous studies have identified a "bias toward institutionalization" in offering and insuring health care for persons with long term disabilities. See *Separate and Unequal*, *supra*, p 15. Indeed, the defendant-appellant insurers' brief seems to reflect this predisposition toward institutionalization: It singles out at-home care services as prohibitively expensive and uniquely problematic. See Defs-Appellants' Br, pp 1-2 (linking the expense of previous PIP benefits to the fact that "PIP benefits include payments for attendant care" and care charges by "family members").

Restricting the means that people relied on to continue living in their communities risks forcing people with long-term disabilities into institutions, which causes profound harms. As the United States Supreme Court recognized in *Olmstead v LC ex rel Zimring*, 527 US 581, 601; 119 S Ct 2176; 144 L Ed 2d 540 (1999), "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." See also *KB v Mich Dep't of Health & Hum Servs*, 367 F Supp 3d 647, 660 (ED Mich, 2019) ("[A] plaintiff could show a sufficient risk of institutionalization to make out an *Olmstead* violation . . . ."); *Waskul v Washtenaw Co Community Mental Health*, 979 F3d 426, 460 (CA 6, 2020) ("[C]ourts have widely accepted that plaintiffs can state a claim for violation of the integration mandate by showing that they have been placed at serious risk of institutionalization . . . ."). Access to community care improves the quality of life and well-being of persons with long-term disabilities. Nat'l Council on Disability, *Preserving Our Freedom: Ending Institutionalization of People with Disabilities*

During and After Disasters (2019), pp 31-37 <https://ncd.gov/sites/default/files/NCD_Preserving_Our_Freedom_508.pdf>; Feltz, *Playing the Lottery: HCBS Lawsuits and Other Medicaid Litigation on Behalf of the Developmentally Disabled*, 12 Health Matrix 181, 184 (2002); Bagenstos & Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 Vand L Rev 745, 767 & n 99 (2007) (compiling studies that "the crucial determinants" of happiness among persons with long-term physical limitations "were family involvement, work opportunities, mobility, and social integration"). "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 US at 600. And as the COVID-19 pandemic underscored, institutionalization places people at greater health risks. Araujo et al., *Health Conditions of Potential Risk for Severe Covid-19 in Institutionalized Elderly People*, PLOS One (January 14, 2021) <https://pubmed.ncbi.nlm.nih.gov/33444352/>.

Private insurance, in short, does not adequately cover the services that ensure that persons living with long-term disabilities are able to receive adequate care to sustain their lives and full participation in society. Watts et al., *Medicaid Home and Community-Based Services Enrollment and Spending* (Kaiser Family Foundation, February 2020), p 11; Ctr on Budget & Pol'y Priorities, *Medicaid Works for People with Disabilities* (August 29, 2017), p 1; Bagenstos, *The Future of Disability Law*, 114 Yale LJ at 4. That is doubly true for private insurance benefits that are capped.

Withdrawing the means of accessing the myriad forms of care that are available, but too expensive for the average person to cover out of pocket, for severely injured individuals compounds the ways that legal structures exclude them from society and exacerbates the ways in which individuals' physical limitations amount to disabilities. The social model of disability has explained that whether a person's physical condition amounts to a disability depends not only on

a person's physical capacity, but also on the conditions that are created by laws and physical structures that effectively erect barriers for persons with physical limitations. See Belt & Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in *The Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, 2019), pp 3-5, 7; Harris, *The Aesthetics of Disability*, 119 Colum L Rev 895, 925-930 (2019). In particular, the social model of disability recognizes that "disability is what occurs when a physical or mental condition interacts with social structures and attitudes to create disadvantage." Bagenstos & Schlanger, *Hedonic Damages*, 60 Vand L Rev at 779; tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Cal L Rev 841, 841 (1966) ("Some difficulties in getting about arise out of the conditions of the modern world in combination with the particular disability."). For example, "[a] person who uses a wheelchair, in this view, is disabled only because so many buildings, sidewalks, and modes of transportation are inaccessible, and because so many people have negative attitudes toward people who use wheelchairs." Bagenstos & Schlanger, *Hedonic Damages*, 60 Vand L Rev at 779; *id*. at 767 & n 101, 777. Similarly, a person who cannot see is disabled only because there aren't readily accessible alternative, auditory forms of communication and directives that would allow them to more easily navigate the world around them. Thus, "[f]or a large number of people with disabilities," it is not individual discriminatory acts "but instead deep-rooted structural barriers—such as the lack of personal-assistance services, assistive technology, and accessible transportation and, above all, the current setup of our health insurance system" that impede their access to myriad life activities. Bagenstos, *The Future of Disability Law*, 114 Yale LJ at 23.

Restricting the ways in which people with long-term physical limitations can participate more fulsomely in society is concerning in part because of the long history of discrimination against people with disabilities. See Cook, *The Americans With Disabilities Act: The Move to*

Integration, 64 Temp L Rev 393, 399-403 (1991). Persons with disabilities "have been subjected to a history of unfair and often grotesque mistreatment." *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 454; 105 S Ct 3249; 87 L Ed 2d 313 (1985) (Stevens, J., concurring), quoting *Cleburne Living Ctr, Inc v City of Cleburne*, 726 F2d 191, 197 (CA 5, 1984); *id.* at 461 (Marshall, J., concurring); *School Bd of Nassau Co v Arline*, 480 US 273, 279; 107 S Ct 1123; 94 L Ed 2d 307 (1987), quoting S Rep No 93-197, p 50 (1974); *Livonia v Dep't of Social Servs*, 423 Mich 466, 480-481; 378 NW2d 402 (1985).

"The man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world." Prosser, Torts (3d ed), § 32, p 155. Yet construed retroactively, the legislative restrictions on PIP benefits would severely impair the quality of life for persons who have long-term physical limitations as a result of a car accident. Retroactively applied to them, 2019 PA 21 would take away the means that have allowed them to participate more fully in society after an accident. It would take away the insurance they purchased in order to protect themselves in case of catastrophic injury, and that they expected to be able to rely on in order to continue living their lives. And it would add to the litany of legal provisions, social structures, and physical apparatuses that severely disadvantage persons with physical limitations.

While none of us know whether we will be among the people who are catastrophically injured in a car accident, people who were injured before the act's effective date knew that they had purchased insurance that would be sufficient to help them live their lives more fully in the event of a serious vehicle accident. They also expected to be able to rely on the insurance that they had purchased in order to help sustain their lives and well-being. Retroactively applying the law to them would not only upset those expectations; it would compound the unfairness and disadvantage resulting from being among the group of people who happen to be severely injured

in a vehicle accident in a society that lacks structural safeguards and protections for persons with physical limitations.

III. The Legislature did not clearly indicate an intent to apply 2019 PA 21 retroactively.

If it were applied to people injured before the law's effective date, 2019 PA 21 would operate retroactively. That is because the new caps on insurance benefits jeopardize the long-term care that they are currently receiving, and the means of paying for the health care they are receiving for injuries suffered before the law was passed. See *Romein v Gen Motors Corp*, 436 Mich 515, 526; 462 NW2d 555 (1990) (explaining that a law was retroactive because "it imposed liability on coal mine owners for injuries suffered before the date of the new statute").

It is no answer to suggest the law operates only prospectively because it restricts payments for health care services that are provided after the law's effective date. Cf. *Andary v USAA Cas Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 356487) (MARKEY, J., dissenting), slip op at 4-5. It is difficult, sometimes prohibitively so, to parcel into pre- and post-effective date treatments the kind of long-term care that is needed by people who are severely injured in car accidents. Some forms of care, like assistive technologies or rehabilitation or structural home modifications, are long term. See Bagenstos, *The Future of Disability Law*, 114 Yale LJ at 4, 27-32. An injured person who needs daily assistance with bathing and eating does not stop needing those services just because a law was amended to limit the benefits available to injured persons. That is but one example, but many different kinds of care are provided as part of extended treatment plans that span years, not hours or days. Some care, equipment, or services may also have been provided before the law's effective date, with payments spread out well after the law's effective date.

Whatever the specifics, these treatments and services are not provided according to a day-by-day decision. Rather, they are part of a long-term treatment plan that has become part of an

individual's life, daily routine, and well-being. Withdrawing that care, and in the process suddenly altering a person's life and well-being, is a retroactive change. It compromises the health care services that a person became entitled to when they were injured and has been receiving since that time. It also alters the insurance coverage that a person purchased and expected to be able to rely on.

The workers compensation cases do not compel a different conclusion. As this Court has recognized, workers compensation is fundamentally different from insurance offered pursuant to a contract. See *Quinton*, 453 Mich at 90 ("A worker's compensation award is distinguishable from a judgment in an action in tort or for breach of contract."). Moreover, worker's compensation primarily involves "a system of income maintenance," *id.*, whereas Michigan's no-fault act encompasses the provision of health care and insurance coverage for medical and physical conditions.

The Legislature did not clearly indicate that 2019 PA 21 should operate retroactively. The statute expressly provides for an effective date of June 11, 2019. No provision explicitly applies the statute to persons injured before the effective date. Nor do the statute's structure and design compel that conclusion.

The inferences and implications identified by Defendant-Appellants are not sufficient to overcome the clear statement rule against retroactively applying laws that would withdraw essential care and services from historically disadvantaged groups. Take the provisions regarding treatment and training. See MCL 500.3157(7). Defendant-Appellants make much of the fact that a sub-sub-section in MCL 500.3157(7) refers to "treatment or training rendered after July 1, 2021." See Defs-Appellants' Br, pp 20-21. Yet nothing in that provision about treatments, or any other provision in the act, applies the statute to persons injured before the June 11, 2019 effective date

of the act. Defendants insist that this clause "presupposes that the provisions apply retroactively." Defs-Appellants' Br, p 21. It does not. The effective date of the act is June 11, 2019, and the staggered dates for reimbursing treatment could just as plausibly serve to facilitate switching persons who were injured soon after the act's effective date onto the newly permitted capped systems of private insurance, which insurers could need time to implement and administer. In any case, a presupposition that is purportedly implied by the actual language of the act is not sufficient to clearly indicate the Legislature's intent to apply the act retroactively.

The same holds true for Defendant-Appellants' observation that "there is no other qualifying or restrictive language in these provisions beyond the date of service." Defs-Appellants' Br, p 21. That interpretation flips the clear statement rule on its head: It reads *the absence of language* regarding persons injured before the act's effective date as sufficient to make the law retroactive. That is not how clear statement rules work. Clear statement rules require affirmative clarity or some other kind of explicit evidence in order for the law to operate retroactively. Rather than indicating retroactivity, the absence of language indicating whether the act applies to persons who were injured before the act's passage is good evidence that the law does *not* apply to them.

So too for the savings provision, MCL 500.2111f(8), which instructs insurers to pass on "savings realized from the application of Section 3157(2) to (12) . . . to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred before July 2, 2021." Here too, the argument for retroactivity rests on implication, not on any language directing the application of the law to persons injured before the act's passage. In any case, the date identified in that provision post-dates the effective date of the act; it does not indicate an intent to apply the act retroactively. Moreover, as the Court of Appeals recognized, this provision is contained in a different part of the Insurance Code than the provisions that would threaten to take away essential

care from persons who were injured before the act's effective date. *Andary*, ___ Mich App at ___; majority slip op at 11. This provision does not apply the restrictions on insurance retroactively.

The Court of Appeals decision in *Doe v Dep't of Corrections*, 249 Mich App 49; 641 NW2d 269 (2001), underscores that inferences that are drawn from scattered provisions in a law are not sufficient to conclude a law operates retroactively by taking away important benefits from historically disadvantaged groups. In that case, the Court of Appeals concluded that an amendment to the Persons with Disabilities Civil Rights Act that excluded incarcerated persons from the law's protections did not operate retroactively. (A group of incarcerated persons had challenged the Department of Corrections decision to exclude them from community residential programs because of their HIV-positive status.) The amendment to the law indicated that it was "curative" and "expresses the original intent of the legislature" that enacted the Persons with Disabilities Civil Rights Act. 1999 PA 201. But, the Court of Appeals concluded, these statements were not sufficient to apply the law retroactively, given "the potential for disruption or unfairness" to the incarcerated persons with HIV. *Doe*, 249 Mich App at 60-61. The same is true here; the inferences drawn from scattered provisions, none of which clearly authorize the application of this law to persons injured before the law's enactment, are not sufficient to apply the law retroactively to them and jeopardize the care they are currently receiving.

That is especially true when this law is read against the backdrop of the corpus of statutes that contain explicit, affirmative language indicating the provisions apply retroactively. See, e.g., MCL 141.1157 ("This act shall be applied retroactively."); MCL 324.21301a(2) ("shall be given retroactive application"); MCL 224.19(s) ("are retroactive"). The Legislature does not always have to use the magic words of retroactivity. See *LaFontaine*, 496 Mich at 40 n 30 (interpreting provisions that begin with the preface "Notwithstanding any agreement" to apply retroactively).

But to apply provisions retroactively, there must be more than oblique inferences from scattered provisions where, as here, the law would have substantially negative effects on the lives of members of an historically disadvantaged group.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: February 6, 2023

WORD-COUNT CERTIFICATION

I hereby certify that this brief contains 5,218 words in the sections covered by MCR 7.212(C)(6)-(8).

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