STATE OF MICHIGAN
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Michigan Supreme Court
P.O. Box 30052
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Re: ADM File No. 2021-35
Comments concerning the proposed amendment to MCR 7.202

Dear Chief Justice Clement and Justices of the Court:

This Court, in ADM No. 2021-35, is considering amendments of Rule 7.202 and 7.209 of the Michigan Court Rules. The amendments would remove governmental entities' right to claim an appeal from the denial of governmental immunity and to receive an automatic stay of proceedings in the trial court. The Michigan Department of Attorney General strongly opposes this proposed rule change. The current rules have struck a workable—and necessary—balance between protecting taxpayers from the expense of unnecessary litigation and ensuring prompt and efficient resolution of claims against governmental entities that are not barred by governmental immunity.

The Department appreciates the opportunity to weigh in on this important question, and from its unique vantage point as counsel to state agencies, it asks this Court to weigh four considerations. *First*, governmental immunity is an important aspect of the necessary and important work of state and local governmental entities—and the ability to take an automatic appeal is a paramount aspect of that immunity. *Second*, the inability to take an automatic appeal is likely to have an overarching negative impact on the system and will have real-world costs to the State—costs that are measured not just by financial considerations but also by the impact of disruption to a state agency's or individual state employee's work, the effect of prolonged lawsuits on employee productivity and morale, and increased difficulties in retaining and recruiting qualified employees. *Third*, internal data generated by the Department reveals that the State has been selective in utilizing its right of appeal. Not only is the State generally successful in its assertions of immunity, but, depending on the facts of the case, it often chooses not to exercise its

right to automatically appeal. In short, the State is responsibly using this provision. *Fourth*, the questions and concerns raised thus far by certain members of the judiciary as to the possible drawbacks of immediate appeal are either unsupported or, on balance, not of sufficient import to justify the negative impact of the proposed amendments on governmental entities. These concerns can be addressed, if necessary, absent the drastic amendments proposed. Each of these considerations is discussed in turn.

I. Automatic appeal is an overriding aspect of the State's immunity.

As this Court has recognized, public entities are fundamentally different from private persons. *Ross v Consumers Power Co,* 420 Mich 567, 618–619 (1984). " 'Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.' " *Id*., quoting 4 California Law Revision Comm Reports, Recommendations & Studies, p 810 (1963).

Indeed, governmental immunity is "a characteristic of government" and an important and necessary tool for government actors. *Mack v City of Detroit*, 467 Mich 186, 203 (2002). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft v Iqbal*, 556 US 662, 685 (2009). Swift resolution of valid claims of immunity "prevent[s] a drain on the State's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." *Mack*, 467 Mich at 203 n 18. And it permits " 'employee[s] to resolve problems without constant fear of legal repercussions.' " *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578 (2011), quoting *Odom v Wayne Co*, 482 Mich 459, 476 (2008).

The ability to take an automatic appeal is an important aspect of the State's immunity.[1] The immunity codified by the Legislature is "of considerably diminished value when the government, i.e., the taxpayer, must incur the costs of

[1] See *Watkins v Healy*, 986 F3d 648 (CA 6, 2021), as corrected on den of reh en banc (March 16, 2021), cert den 142 S Ct 348 (2021) ("If a state's immunity law seeks to guard state officials from the general costs of subjecting officials to the risks of trial, that is, the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service, a federal appellate court will conclude that the state intended to immunize its officials from suit and therefore intended to authorize interlocutory appeals from the denial of such immunity.").

extended litigation before being able to invoke the principle of immunity." ADM File No. 2001-07, 466 Mich at xciv (TAYLOR, J., concurring). And these costs can be substantial. Apart from the financial resources expended in litigation, other costs are apparent—"distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow v Fitzgerald*, 457 US 800, 816 (1982).

The rule allowing for automatic appeal was adopted in 2002, and its enactment brought Michigan in concert with the federal court system, which generally permits appeals of orders denying immunity under the federal collateral order doctrine. Essentially, the doctrine permits the immediate appeal of claims that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v Beneficial Indus L Corp*, 337 US 541, 546 (1949). The automatic right of appeal from a denial of immunity exists largely for one important reason: "immunity is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v Forsyth*, 472 US 511, 526 (1985). And because the Legislature has determined that, unless an exception applies, "a governmental agency *is immune* from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," MCL 691.1407(1) (emphasis added), the same reasoning applies to cases where a governmental entity or employee asserts entitlement to governmental immunity. In other words, without an immediate appeal and concomitant stay in the trial court, the immunity provided for is lost if the governmental agency or employee is forced to engage in burdensome discovery —even where, as is most often true, claims of entitlement to governmental immunity are not fact-bound—as it seeks to vindicate its assertion of immunity on appeal. And the burden is often more pronounced when discovery, including depositions, is sought against high-level officers.

An additional benefit of maintaining the status quo is that the bright-line rule of automatic appeal breeds consistency. The proposed rule will not. Removal of this provision will create discretion on the part of the Court of Appeals panels to grant or deny leave to appeal, without explanation, when faced with a claim of governmental immunity. It will also create discretion on the part of the trial and appellate courts regarding the propriety of a stay in the trial court. This uncertainty will make it difficult for state attorneys to properly evaluate the risks associated with a given case.

If the State is subject to the discretion of the trial court and a Court of Appeals panel about whether a stay is proper or an application concerning immunity should be granted, the State will often have to litigate the case as it appeals the denial of immunity. This dynamic could generate a Hobson's choice for the State: either settle a case or face potentially expensive and time-consuming

discovery, even though there is a viable claim of immunity that has not been fully evaluated by the Court of Appeals. This is directly contrary to one of the dominant purposes of the various forms of governmental immunity: immunity *from suit*, not just *from judgment*.

Elimination of the automatic appeal is not just potentially perilous for state governmental agencies; it could also negatively impact our state-court system by unnecessarily increasing the caseload of the state trial and appellate courts.[2] As it stands now, the opportunity to appeal a denial of immunity is largely the same in state and federal court, so there is no incentive to forum-shop. But the proposed amendment would make state courts the better choice for plaintiffs if they believe a government defendant will assert immunity. Since the federal courts permit a right of appeal under the collateral-order doctrine, if the Court adopts this rule change, there would be an added incentive for plaintiffs to file in the state-court system.

To illustrate the impact of the potential shift from the federal courts to Michigan courts, our Department collected data from our various divisions. From approximately 2018 to 2022, the Department asserted immunity in at least 111 federal lawsuits—and that does not include prisoner suits handled by our Corrections Division. That Division typically closes about 800 federal cases a year, and immunity is asserted in a vast number of those. If the Court makes Michigan courts more attractive to plaintiffs who seek to avoid governmental immunity defenses, our Department believes a substantial percentage of the future caseload currently managed by federal courts will shift to Michigan courts.[3]

II. The practical costs of the inability to immediately appeal denials of governmental immunity are varied and concerning.

As described above, the importance of immunity to the State as well as its agencies and employees is considerable. The automatic right of appeal for denials of immunity is the mechanism to ensure that an assertion of immunity is effective at the proper stage of litigation. Once again, as the Supreme Court has explained in the context of qualified immunity under federal law:

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[2] The Chief Judge of the Court of Claims has already requested additional resources to keep up with the Court's high volume of cases, which include high-profile and emergency cases. Gongwer News Service, Wednesday, March 23, 2023, "*Gleicher Asks Approps for Additional Court Clerks.*"

[3] We also anticipate additional state-court litigation based on this Court's decision in *Bauserman v Unemployment Ins Agency*, 509 Mich 673 (2022).

> The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment. [*Mitchell*, 472 US at 526–527.]

The consequences of litigating a case in the trial court despite a valid claim of immunity are not limited to simply more work for state attorneys. The denial of immunity without the right of appeal and the presence of an automatic stay would present significant costs to the State, whether those costs be measured in terms of finances, by interruption to work and impact on employee mental health and morale, or by short- and long-term difficulties in recruitment and retention of qualified employees.

Financial costs to the State and, therefore, the taxpayers

Preparing for an unnecessary trial is financially burdensome to both the Department of Attorney General (the state agencies' attorneys) and the state agency or entity involved in trial and pre-trial activities, whether that be the Department of Health and Human Services, the Michigan State Police, or the judiciary itself (the Department represents members of the judiciary). Discovery presents perhaps the most significant cost. In that respect alone, taking away the automatic appeal and accompanying automatic-stay provision would place a tremendous financial burden on the State.

Since the time the appeal-by-right provision was put in place, e-discovery has exploded and has made discovery much more expensive and time-consuming, particularly for governmental entities, who usually hold the bulk of the documents sought. Often, the State must produce tens of thousands of records, and doing so generally necessitates IT specialists to assist with the collection of information—a process that can require the collection of hundreds of thousands of documents as a starting point before they can be filtered down to the documents sought in discovery. During this process, the State incurs external costs for vendors to process the voluminous information, expends significant resources to review the documents for responsiveness and potential privilege (work that is done either by state attorneys or by temporary contract attorneys) and incurs costs to finally

produce the information to the requesting party.[4] And given the ever-increasing sources of data information (e.g., mobile phones, iPads, messaging tools, emails, shared network drives, paper files, videos, and audio recording devices) and the cost of vendor fees, even the simplest cases can be costly to defend.

These costs are no secret. The threat of voluminous discovery is frequently used as a tool to pressure the State to settle a case early. It is not uncommon for plaintiffs to engage in costly and far-reaching discovery that has no bearing on the outcome of the case. And while discovery imbalances can be brought to the attention of the courts, the State is generally seen as having the resources and expertise to produce a vast amount of information, and objections based on burden are often overruled.

Additional costs include additional hours expended (measured in terms of salaries) by Department of Attorney General attorneys involved in discovery, trial preparation and the trial itself, and hours expended (again, measured in terms of salaries) by state employees who must review documents, prepare for depositions, undergo deposition, or testify at trial.

Work interruption and emotional impact

Being named in a lawsuit is unnerving to a state employee no matter the speed with which issues are resolved. But when the lawsuit is prolonged and discovery ensues in a case where governmental immunity has been denied, the interruption to a governmental defendant or agency's work is substantial. And the negative emotional impact on employee productivity, mental health, and morale cannot be overstated. Multiple state entities have recognized the challenges that litigation brings to the administration of their duties.

As the Michigan State Police notes, "For every lawsuit to which the Department and its members are parties, members are pulled from their public safety duties into time-consuming, litigation-related tasks. Troopers are pulled from the roads, supervisory members are diverted from their responsibilities, and other resources are channeled away from law enforcement and public safety

[4] In a recent case, an estimated $30,000 in expenses was incurred for document review and e-discovery costs alone. When including other necessary discovery costs, the total approximate costs for discovery ballooned to nearly $110,000. In another case, the costs for experts, depositions, and other direct discovery costs, not including attorney time, was greater than $65,000. In yet another matter, the State incurred over $80,000 in discovery expenses (experts and e-discovery vendor fees), not including attorney time. And in a case that spanned several years, the State incurred over $30,000 in e-discovery vendor fees alone.

operations. In other words, limiting the Department's immunity will harm both the State and the public alike."

The Department of Corrections similarly describes the impact of litigation: "Other than the obvious financial impacts, when staff are diverted from their primary roles (in order to participate in litigation efforts) it hinders us from being able to fulfill our mission of offender success and public safety. The department has a 24/7 responsibility to run safe and secure institutions, supervise people in the community on probation and parole, provide custody and care for offenders, provide healthcare, mental healthcare and academic and vocational instruction, and to ensure compliance with state and federal regulations and mandates. When staff are not available to fulfill their job responsibilities due to being diverted to participate in litigation, this has a negative effect on the overall operations of the department. Because the services still need to be provided, the absence of staff requires other staff to work mandatory overtime, which in turn affects the stability of our workforce and the ability to retain staff across all classifications."

The Department of State and Department of Transportation share the concerns expressed by the Michigan State Police and Department of Corrections with respect to the unnecessary burdens placed on employees that come from litigation. Each of these departments recognize that when a case is permitted to continue in the trial courts even though a final appellate decision regarding a government's assertion of immunity has not issued, their employees can be subject to added litigation-related responsibilities on top of their normal duties.

The ongoing challenges of recruiting and retaining state employees

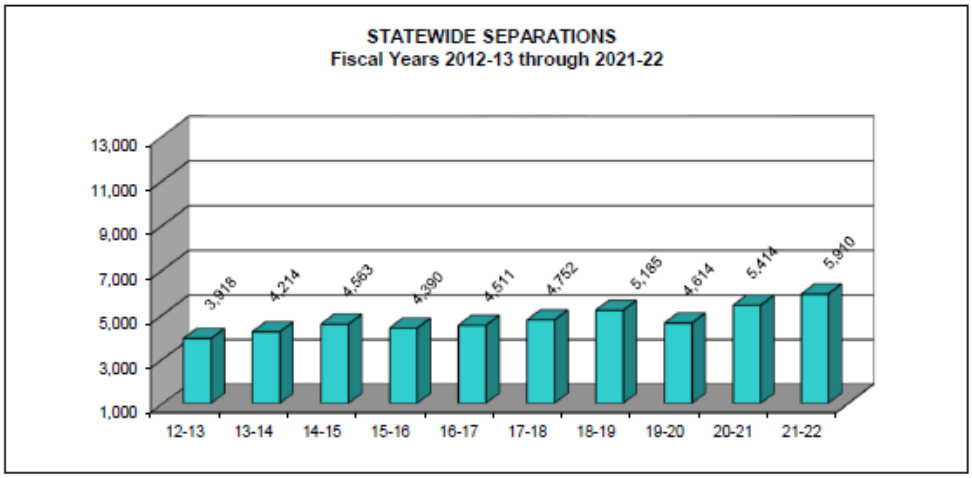
Like many other entities, the State is currently facing challenges in recruitment and retention of qualified employees. Applicants are fewer, and in the current employee-friendly workforce environment, it is increasingly more difficult to retain talented employees in all areas of state government. Chipping away at yet another state benefit—the ability to quickly resolve frivolous lawsuits or lawsuits where immunity is appropriate—will make it that much more difficult to recruit and retain.

The State needs our best and brightest to serve Michigan and its citizens, and, as described above by our various state agencies, the increased risk of the stressors of unnecessary litigation—stressors over and above the often-demanding jobs that our state employees handle every day—provides another disincentive for qualified employees to join, and stay in, public service. In terms of retention, a ten-

Table 3-2

STATE OF MICHIGAN
STATEWIDE SEPARATIONS BY REASON
Fiscal Year 2021-22

SEPARATION REASON	TOTAL	PERCENT OF SEPARATIONS
INVOLUNTARY SEPARATIONS		
Death	102	1.7%
Dismissal	274	4.6%
Expired Appointment	261	4.4%
Total Involuntary Separations	637	10.8%
VOLUNTARY SEPARATIONS		
Resigned Classified Employment	3,339	56.5%
Layoff/Leave of Absence Rights Expired	194	3.3%
Waived Rights Leave of Absence	297	5.0%
Settlement	0	0.0%
Total Voluntary Separations	3,830	64.8%
RETIREMENT		
Retirement	1,345	22.8%
Disability Retirement	31	0.5%
Deferred Retirement	67	1.1%
Total Retirements	1,443	24.4%
UNDEFINED SEPARATIONS	0	0.0%
TOTAL SEPARATIONS	5,910	100.0%



Comments: Separations included separations of all classified employees who were full-time, part-time, permanent-intermittent, limited-term, seasonal, noncareer, or on workers' compensation in primary positions only, except for the following noncareer appointments: STUDENT ASSISTANT-E, TRANSPORTATION AIDE-E, and STATE WORKER. These positions represent most noncareer appointments at the end of FY 2021-22.

Source: Michigan Civil Service Commission HWF10 for each fiscal year.

year lookback shows a steady increase in separations from state service, with voluntary resignation driving the majority of those separations:[5]

A look at last year's data shows that there were 6,679 separations from state employment, not including seasonal layoffs. (Workforce Report at 3-25.) In many areas, notably Corrections, Michigan Department of Health and Human Services, Natural Resources, and Transportation, separations outstripped hires:

STATE OF MICHIGAN Table 3-3

NEW HIRES, RETURNS, AND SEPARATIONS BY DEPARTMENT

September 19, 2021 Through September 17, 2022

	NUMBER OF HIRES AND RETURNS					NUMBER OF SEPARATIONS AND LAYOFFS						
DEPARTMENT	CAREER HIRES	NON CAREER HIRES	RECALLS	RETURNS FROM WAIVED RIGHTS LEAVES	TOTAL APPOINTMENTS	SEPARATIONS	SEASONAL LAYOFFS	RIF LAYOFFS	MED LAYOFFS	UNDEFINED LAYOFFS	TOTAL SEPARATIONS	NET TOTAL
AGRICULTURE & RURAL DEVELOPMENT	41	8	0	0	49	35	0	0	0	0	35	14
ATTORNEY GENERAL	60	10	0	0	70	41	0	0	0	0	41	29
AUDITOR GENERAL	12	9	0	0	21	16	0	0	0	0	16	5
CIVIL RIGHTS	3	0	0	0	3	9	0	0	0	0	9	-6
CIVIL SERVICE COMMISSION	37	9	0	0	46	34	0	1	0	0	35	11
CORRECTIONS	1,251	14	0	3	1,268	1,563	0	0	0	0	1,563	-295
EDUCATION	33	14	0	0	47	51	0	0	0	0	51	-4
ENVIRONMENT, GREAT LAKES & ENERGY	119	11	1	1	132	82	0	0	0	0	82	50
EXECUTIVE OFFICE	21	0	0	0	21	19	0	0	0	0	19	2
INSURANCE AND FINANCIAL SERV	45	1	0	0	46	32	0	0	0	0	32	14
LABOR & ECONOMIC OPPORTUNITY	273	20	4	0	297	330	3	0	0	0	333	-36
LICENSING AND REGULATORY AFF	119	18	0	0	137	137	0	0	0	0	137	0
MDHHS - COMMUNITY HEALTH	439	10	0	3	452	464	0	0	0	0	464	-12
MDHHS - HUMAN SERVICES	1,092	17	7	7	1,123	1,011	9	0	0	0	1,020	103
MILITARY & VETERAN AFFAIRS	136	8	1	0	145	132	1	0	0	0	133	12
NATURAL RESOURCES	120	1,600	215	0	1,935	1,514	229	0	0	0	1,743	192
STATE	191	0	0	0	191	117	0	0	0	0	117	74
STATE POLICE	224	21	0	0	245	232	0	0	0	0	232	13
TECHNOLOGY, MANAGEMENT & BUDGET	224	32	0	1	257	202	0	0	0	0	202	55
TRANSPORTATION	373	201	19	0	593	506	21	0	0	0	527	66
TREASURY	122	37	0	0	159	152	0	2	0	0	154	5
STATEWIDE TOTALS:	**4,935**	**2,040**	**247**	**15**	**7,237**	**6,679**	**263**	**3**	**0**	**0**	**6,945**	**292**

Comments: This report reflects active classified employees who were full-time, part-time, permanent-intermittent, limited-term, seasonal, noncareer, or on workers' compensation for hires, rehires and returns. This report reflects waived rights, departure, and retirement for separations.

Source: Michigan Civil Service Commission HWF35

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(*Id.*)

The turnover by department for fiscal years 2017 through 2021–22 shows high rates in areas where recruitment can be especially difficult. (Workforce Report at 3-28; Data provided by the Civil Service Commission.) For example, the turnover

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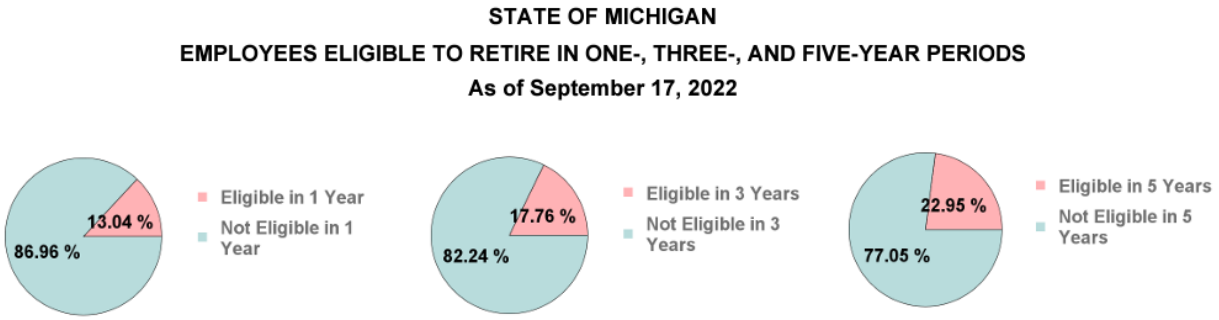
[5] Forty-Third Annual Workforce Report, Fiscal Year 2021–22, Michigan Civil Service Commission, Table 3-2, p 3–24 ("Workforce Report"). Available at https://www.michigan.gov/mdcs/-/media/Project/Websites/mdcs/workforce/21-22/43rd_AWFR_Complete.pdf.

rate for Corrections Officers has steadily increased from 10.79% in 2017–2018 to 21% in 2021–2022. (Data provided by the Civil Service Commission.) Similarly, the turnover rate for registered nurses has increased from 23.38% in 2017–2018 to 32.32% in 2020–2021. (Data provided by the Civil Service Commission.)

Compounding the problem is the absence of a state pension plan, which was removed in 1997 for new employees and which has made recruitment and retention more challenging for the State. And many civil servants who have the benefit of that pension plan are entering retirement age. The Civil Service Commission projects that 22.9% of the state workforce is eligible to retire over the next five years:



Year	Applications
2017	352,748
2018	365,924
2019	358,881
2020	166,124
2021	247,017
2022	232,183

Although the reasons for separating from state service vary, the vast majority of these separations represent the loss of significant institutional knowledge. And the cost of hiring and training new employees is substantial. Additionally, recruitment of workers to fill vacancies has become increasingly more difficult. Civil Service data shows that, often, applicant numbers are down, even where the need has increased or remained steady. For example, the number of applicants for all types of nurse positions has decreased from 1119 in 2017 to just 718 in 2022. (Data provided by the Civil Service Commission.) Applicants for attorney positions in the Department of Attorney General show a similar decrease—from 1120 in 2017 to just 613 in 2022. (*Id.*) And those figures are not anomalies. Across state government there has been a roughly one-third drop off in total applications received over the last five years, as this Civil Service Commission table shows:[6]

[6] While a COVID-19-related hiring freeze for many agencies during 2020 understandably reduced applications for that year, numbers have remained

All in all, the numbers depict a difficult picture for the recruitment and retention of state workers. And our State and its agencies need qualified and dedicated workers to carry out their necessary functions. As this Court has recognized, "[u]nlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency." *Ross*, 420 Mich at 618–619 (citation omitted). Those who "furnish services" to the State and its people should not be discouraged from state service due to the stressors and rigors of litigation. Removing the automatic right of appeal and automatic stay for appellate consideration of denials of immunity would do so, and this proposal should be rejected.

III. The State has responsibly used its privilege of asserting the automatic right of appeal.

The Department has gathered data in an attempt to provide the Court with a picture of its assertion of immunity and its appeal of denials of immunity. The following statistics are based on a best-efforts, manual, internal review of cases handled by attorneys within the Department of Attorney General. Due to reorganization within the Department, the time periods for available data vary. The data is offered on a division-by-division basis, which reflect the various subject matter and clients of Department attorneys.

The main takeaways are that the State is not simply asserting or appealing immunity in every case, and that when the State does assert immunity, it is largely successful:

- The Environment, Natural Resources, and Agriculture Division successfully asserted immunity in 71% of cases that reached finality. (2018–2022.)

- The Transportation Division was successful in 79% of the cases in which immunity was asserted. In front of the Court of Appeals, that success rate was over 87%. (2018–2022.)

- The State Operations Division successfully asserted immunity in the Court of Claims in 62% of its cases. For those in which it was denied immunity in the Court of Claims, it appealed in only 42% of that subset. (2020–2022.)

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significant lower in other years as well. Michigan uses the NEOGOV system to solicit applications for executive-branch positions in the state classified civil service.

- The Health, Education, and Family Services Division was successful in its assertion of immunity in 64% of its cases. (2018–2022.)

- Since 2017, the Civil Rights, Employment, and Elections Division asserted immunity in eight cases. It was ultimately successful in 100% of those cases. In seven of them, the State won in the trial court; in the lone case in which it lost on immunity grounds in the trial court, it prevailed on appeal. (2017–2022)

- The Labor Division was successful in six of the nine cases that have reached finality in which it asserted immunity. (2018–current.)

This data generally shows that the State and its client agencies and employees (1) have been selective in their assertion of immunity in the first instance, and (2) have been judicious in their decisions whether to appeal a denial of immunity. While there is a smattering of immunity-based appeals that were not successful, the overarching takeaway is that the Department of Attorney General is not simply preparing a claim of appeal as soon as an adverse decision is received from a trial court; the Department selectively utilizes its clients' automatic right of appeal for denial of immunity.

IV. Responses to questions and concerns from members of the judiciary

In her opinion concurring with this Court's order publishing ADM 2021-35 for comment, Justice CAVANAGH presented several questions. This letter will address several of those questions.

A. Whether, in the absence of MCR 7.202(6)(a)(v) and MCR 7.209(E)(7), the ability to file an application for leave to appeal (and a motion to stay trial court proceedings pending appeal) adequately protects a governmental entity's interest in the swift dismissal of claims barred by governmental immunity.

The prospect of relying on an application for leave to appeal a denial of governmental immunity (and a stay of proceedings in the trial court) will not adequately effectuate the State's interest in governmental immunity.

As explained, one of the main features of governmental immunity is that it is an immunity *from suit*, not simply immunity *from liability*. Thus, there is substantial harm to government agencies and actors should they be required to first convince an appellate court that their entitlement to immunity warrants review before moving to the process of briefing on the merits. Moreover, the filing of a claim of appeal comes with an automatic stay of the case below. Adopting ADM 2021-35 would have two related but distinct consequences. First, requiring the State to first convince the Court of Appeals that it has presented a worthwhile question through the application process burdens the State and its counsel. The attorneys must prepare, and often the Solicitor General Bureau will review, the application papers. Second, the lack of a stay in the trial court could subject the State to discovery that, if the State prevails in its immunity-based appeal, should never have occurred. The possibility of sunk costs—costs paid for by Michigan taxpayers—only increases. And the mammoth burdens of modern discovery are well known.

While the ready retort is to simply seek a stay, that only portends more taxpayer dollars for motion practice and to litigate an appeal should the trial court refuse to grant a stay. So, whether or not a stay is granted, the costs to taxpayers *for every case* involving a proper appellate assertion of governmental immunity will increase. And more importantly, requiring the State to submit applications places the immunity that is provided by law in the discretion of the particular panel that reviews the application. Such a result is contrary to the Legislature's intent as plainly expressed in the text of MCL 691.1407(1).

B. Whether MCR 7.202(6)(a)(v) has been easy for the courts or litigants to apply, or if courts and litigants have been required to expend significant resources litigating whether a particular order falls within the scope of this rule.

Justice CAVANAGH's concurrence raises two cases where appellate scrutiny has been appropriate to determine the bounds of MCR 7.202(6)(a)(v). (12/21/22 Order, p 4 n 4 (CAVANAGH, J., concurring).) But the fact that there are a few isolated exceptions only proves the general understanding that the rule is clear for the vast majority of cases. While the margins of MCR 7.202(6)(a)(v) have recently been subject to litigation in a small handful of cases, it is the State's experience that this rule has largely been clear in theory and in operation for over 20 years.

C. Whether governmental entities have used these rules for gamesmanship to delay and drive up costs for plaintiffs or to secure a different Court of Claims judge after an appeal has concluded.[7]

The State is the largest and most frequent user of the automatic appeal provision, and it does not view the provision as a means to delay proceedings, nor is delay of proceedings beneficial to state agencies. Again, as the data above shows, the State asserts immunity in good faith and selectively uses the automatic right to appeal to vindicate its assertion of immunity on appeal. The State is of course not successful in every case, but there is no indication of any trend where the State is filing plainly meritless appeals with an eye toward delay. As set forth in greater detail above, protracted litigation is by and large *un*desirable, as it increases the negative impact to the agency and its affected employees. And in this scenario, protracted litigation often does not help plaintiffs either; the automatic appeal rule allows plaintiffs to avoid investing time and money into litigating a case that will ultimately be dismissed based on immunity.

For those rare cases in which the assertion of governmental immunity is plainly meritless and is appealed, the prevailing party already has options to secure speedy relief. They can file a motion to dismiss if "the appeal was not filed or pursued in conformity with the rules." MCR 7.211(C)(2)(b). This mechanism would be an expedient one, because, where a claim of appeal is premised on a denial of governmental immunity, a challenge to that characterization could be raised in a motion to dismiss "any time before it is placed on a session calendar." MCR 7.211(C).

Plaintiffs could also file a motion to affirm, which requires a showing that "it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission." MCR 7.211(C)(3). The motion may be filed after the appellant's brief has been filed, which is typically due 56 days after the

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[7] Judges SHAPIRO and GLEICHER raised similar concerns in their comments on this Court's earlier proposed definition of governmental entity. (10/3/22 Comment Ltr in response to Proposed Amendments to MCR 7.202 and 7.215.)

It should be noted that, in considering that same proposal, Judge SWARTZLE authored a letter "on behalf of the Court [of Appeals]" that recognized that "[t]he ability to provide limited appellate review at this juncture in a case is efficient and expeditious to ensure litigation costs, paid for by Michigan taxpayers, are necessary." (9/29/22 Ltr, Re: Proposed Amendments to MCR 7.202 and 7.215.)

claim of appeal is filed. MCR 7.212(A)(1)(a)(*iii*). Thus, resolution of any "unsubstantial" appeals may be had relatively quickly.[8]

Regarding the suggestion that appeals may be taken to bypass a particular Court of Claims judge, not only does the State not engage in such gamesmanship, but it would also be foolhardy to attempt such maneuvers given their inherent risk.

To begin, as a matter of practice, in my nearly 18 years in the Department of Attorney General, including my seven years in the Solicitor General Bureau, which oversees the Department's appellate practice, I cannot recall a single conversation about whether to take an appeal to hopefully yield a different judge should the case return to the trial court. That is, quite simply, not how we operate as civil servants.

Even if the State did consider such tactics, evaluating that avenue would quickly dispel the idea that it would gain any strategic advantage. The Court of Claims rotates its judges every two years, so the State would be operating on pure guesswork if it decided to appeal based on some attempt to yield a different judge. Indeed, without any foreknowledge of which judges will even serve on the Court of Claims two years down the road, the matter could well end up in front of a judge perceived to be "less favorable."

And assuming this phantom concern was a real one for state defendants, there are other remedies for plaintiffs who perceive that a particular claim of immunity is improper. As discussed above, the opposing party could file motions to dismiss or to affirm. A more structural fix would be to lengthen the tenure of Court of Claims judges. If a run-of-the-mill claim of appeal can theoretically be used by a maneuvering party to get a different judge, then that speaks to the short length of terms those judges serve. If continuity of judges in Court of Claims actions is of concern, adoption of ADM 2021-35 is a poor solution.

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[8] Relatedly, a party may move for sanctions on the ground that the appeal is vexatious, i.e., "without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." MCR 7.211(C)(8); MCR 7.216(C)(1)(a). But again, there is no evidence to suggest that the State has previously filed such appeals.

D. Whether, if there are inefficiencies with the current process, there are any amendments this Court could adopt, short of a complete elimination of these provisions, that would mitigate these problems while continuing to advance the interests underlying these provisions.

Again, other than isolated cases, the State does not believe there are inefficiencies created by the current rules. But if this Court perceives that they exist, remedies designed to mitigate any such inefficiencies should be considered over outright elimination of the provisions. Specific remedies would depend on the perceived problem. For example, if this Court believes that the automatic appeal provision prejudices plaintiffs by delaying resolution of their case, the Court can choose to "fast track" these appeals of right—either in every governmental immunity case or on a case-by-case basis as needed. If this Court thinks the State is forum-shopping in the Court of Claims, it could create a rule whereby the case returns to the same trial judge after appeal, even if the judge is no longer serving on the Court of Claims.

To address any concerns that governmental entities are engaging in gamesmanship and taking frivolous appeals of qualified immunity simply to delay or harass, this Court can adopt a process by which trial courts can communicate these concerns to the appellate courts, similar to the federal courts' procedure, adopted by a number of federal circuits, whereby a district court certifies to the Court of Appeals that a qualified immunity appeal is frivolous. See *Behrens v Pelletier*, 516 US 299, 310–311 (1996) (explaining that this "practice . . . enables the district court to retain jurisdiction pending summary disposition of the appeal and thereby minimizes disruption of ongoing proceedings").

E. Whether other jurisdictions provide preferential rights of appellate review for denials of governmental immunity.

More than half of the states—27 of them and the District of Columbia—provide for an interlocutory appeal by right for orders denying immunity. See attached chart. While many of these states have adopted the federal courts' collateral order doctrine, others have statutes or court rules expressly permitting an appeal of right from an order denying immunity, see, e.g., Ark R App P 2(a)(10), and Va Code Ann § 8.01-675.5.

As touched on above, the federal courts recognize the collateral-order doctrine, which allows interlocutory appeals in a limited group of cases. All manner of governmental immunity falls within this "narrow exception" to the requirement that appeals await a final judgment on the merits. 28 USC 1291; *Firestone Tire & Rubber Co v Risjord*, 449 US 368, 374 (1981). These include immediate appeals

from denials of Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth v Metcalf & Eddy, Inc*, 506 US 139, 144 (1993), absolute immunity,[9] *Nixon v Fitzgerald,* 457 US 731, 742 (1982), and qualified immunity, *Mitchell,* 472 US at 511.

Michigan should continue to recognize the value and import of the automatic appeal and stay provision for denials of governmental immunity.

F. Whether allowing governmental entities that have been denied immunity to " 'jump to the head' of the appellate line has unnecessarily delayed justice in many cases."[10]

A few points merit emphasis. First, as demonstrated above, the State is not in the business of taking facially meritless appeals; it is unclear what the support is for this being a pattern warranting rule change. Second, removing the automatic right of appeal would, in many cases, only *extend* the time that the case sits in the appellate courts. The preparation, submission, and disposition of an application for leave to appeal is a lengthy process in itself, one that only adds several months on to the time to resolve an appeal by right. Further, in cases where the government does not agree to a settle a claim from which it is immune, challenging the denial of immunity after a trial on the merits would lengthen the appellate life of such cases even further.

Adding the application process at the front end of an appeal could, in some circumstances, properly result in a denial of leave for failure to demonstrate even a close question on immunity grounds. But cases that present close calls—not uncommon since questions of immunity are reviewed de novo and the State has a track record of judiciously appealing denials of immunity—will only languish *longer* in the courts. Moreover, this additional round of briefing is also inefficient for plaintiffs and for the Court, which will be rendering two separate, successive decisions.

There are other rule change alternatives that would be better tailored to the concern that immunity-based claims of appeal take too long. Again, the Court could choose to adopt a rule that fast-tracks all claims of appeal premised on an erroneous denial of governmental immunity. Such a process would either return the case to

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[9] Absolute immunity encompasses the immunity "afforded the President, . . . judges, prosecutors, witnesses, and officials performing 'quasi-judicial' functions." *Mitchell*, 472 US at 520 (citations omitted).

[10] Judges SHAPIRO and GLEICHER have asserted this concern. (10/3/22 Comment Ltr in response to Proposed Amendments to MCR 7.202 and 7.215.)

the trial court on an expedited basis or would usher the end of the case without sacrificing the value that such claims of appeal serve for governmental actors and entities. State entities and actors would be more than willing to brief a case on an expedited basis; in prosecuting an appeal on the basis of immunity, the State seeks not to delay, but to vindicate this basic defense.

In sum, the proposed amendments to MCR 7.202 and 7.209 are unnecessary and ill-advised. The Department of Attorney General would welcome continued dialogue on this important issue.

Sincerely,

Ann M. Sherman

Ann M. Sherman
Solicitor General

AMS:hlg
Attachment

STATE SURVEY

State	Appeal by Right Allowed	Source of Right	Citation
Alabama	No	N/A	*Ex Parte County Dep't of Human Resources*, 674 So 2d 1277, 1280 (Ala, 1996)
Alaska	No	N/A	*Kerttula v Abood*, 686 P2d 1197, 1201 (Alas, 1984)
Arizona	Yes	Caselaw	*Darragh v Superior Court In & For County of Maricopa*, 183 Ariz 79, 80; 900 P2d 1215 (1995)
Arkansas	Yes	Court Rule	Ark R App P 2(a)(10)
California	No	N/A	*Samuel v Stevedoring Servs of Am*, 24 Cal App 4th 414, 417–418 (1994)
Colorado	Yes	Caselaw	*Furlong v Gardner*, 956 P2d 545, 551–552 (Colo, 1998)
Connecticut	Yes	Caselaw	*Halladay v Comm'r of Correction*, 340 Conn 52, 62–63; 262 A3d 823 (2021)
Delaware	Yes	Caselaw	*Baxter v State*, unpublished opinion of the Superior Court of Delaware, issued May 13, 2004 (Docket No. 03C-01-096MMJ), at 3; 2004 WL 1195387
District of Columbia	Yes	Caselaw	*Washington Metro Area Transit Auth v Nash-Flegler*, 272 A3d 1171, 1178–1180 (DC, 2022)
Florida	Yes	Caselaw	*Tucker v Resha*, 648 So 2d 1187, 1189–1190 (Fla, 1994)
Georgia	No	N/A	*Rivera v Washington*, 298 Ga 770, 773; 784 SE2d 775 (2016)
Hawaii	Yes	Caselaw	*Greer v Baker*, 137 Hawai'i 249, 253–254; 369 P3d 832 (2016)

STATE SURVEY

State	Appeal by Right Allowed	Source of Right	Citation
Idaho	No	N/A	*Johnson v Fankell*, 520 US 911, 921 (1997)
Illinois	No	N/A	*Pizzato's Inc v City of Berwyn*, 168 Ill App 3d 796, 798; 523 NE2d 51 (1988)
Indiana	No	N/A	*Littleton v State*, 954 NE2d 1070, 1075 (Ind, 2011)
Iowa	Yes	Statute	Iowa Code Ann § 669.14A(4)
Kansas	Yes	Caselaw	*Estate of Belden v Brown County*, 46 Kan App 2d 247, 255; 261 P3d 943 (2011)
Kentucky	Yes	Caselaw	*Baker v Fields*, 543 SW3d 575, 577–578 (Ky, 2018)
Louisiana	No	N/A	*Breaux v State*, 314 So2d 449, 456 (La, 1975)
Maine	Yes	Caselaw	*Andrews v Dep't of Environmental Protection*, 1998 ME 198; 716 A2d 212 (1998)
Maryland	No	N/A	*Dawkins v Baltimore City Police Dep't*, 376 MD 53, 65; 827 A2d 115 (2003)
Massachusetts	Yes	Caselaw	*Breault v Chairman of Bd of Fire Comm'rs of Springfield*, 401 Mass 26, 31; 513 NE2d 1277 (1987)
Michigan	Yes	Court Rule	MCR 7.202(6)(v)
Minnesota	Yes	Caselaw	*Cruz-Guzman v State*, 916 NW2d 1, 7 (Minn, 2018)
Mississippi	No	N/A	*Hinds County v Perkins*, 64 So3d 982, 986–988 (Miss, 2011)

STATE SURVEY

State	Appeal by Right Allowed	Source of Right	Citation
Missouri	No	N/A	*Kelly v Boone County*, 646 SW3d 739, 743 (Mo, 2022)
Montana	No	N/A	*Matter of Litigation Relating to the Riot of Sept 22, 1991*, 283 Mont 277, 284; 939 P2d 1013 (1997)
Nebraska	Yes	Statute	Neb Rev St § 25-1902(1)(d)
Nevada	No	N/A	*State Taxicab Auth v Greenspun*, 109 Nev 1022, 1025; 826 P2d 423 (1993)
New Hampshire	Yes	Caselaw	*Richardson v Chevrefils*, 131 NH 227, 231; 552 A2d 89 (1988)
New Jersey	No	N/A	*Harris v City of Newark*, 250 NJ 294, 311; 271 A3d 1250 (2022)
New Mexico	Yes	Caselaw	*Chavez v Bd of County Comm'rs of Curry County*, 130 NM 753, 758; 31 P3d 1027 (2001)
New York	Yes	Statute	N.Y.C.P.L.R. 5701(a)
North Carolina	Yes	Caselaw	*Lannan v Bd of Governor of Univ of NC*, 879 SE2d 290, 298 (NC, 2022)
North Dakota	No	N/A	*Klindtworth v Burkett*, 477 NW2d 176, 181–183 (ND, 1991)
Ohio	Yes	Statute	Ohio Rev. Code Ann. § 2744.02(C)
Oklahoma	Yes	Caselaw	*McLin v Trimble*, 795 P2d 1035, 1038 (Okla, 1990)
Oregon	No	N/A	N/A

STATE SURVEY

State	Appeal by Right Allowed	Source of Right	Citation
Pennsylvania	Yes	Caselaw	*Brooks v Ewing Cole, Inc*, 259 A3d 359, 373–375 (2021)
Rhode Island	No	N/A	*Halloran v State*, 729 A2d 709, 711 (RI, 1999)
South Carolina	No	N/A	*State v Isaac*, 405 SC 177, 183; 747 SE2d 677 (2013)
South Dakota	No	N/A	SD Codified Law § 15-26A-3
Tennessee	No	N/A	Tenn R App P 9(a)
Texas	Yes	Statute	Tex Civ Prac & Remedies Code § 51.014(6)
Utah	No	N/A	*State v Lopez*, 474 P3d 949, 958 (Utah, 1995)
Vermont	No	N/A	*In re JG*, 160 Vt 250, 253; 627 A2d 362 (1993)
Virginia	Yes	Statute	Va Code Ann § 8.01-675.5(B)
Washington	No	Caselaw	*Walden v City of Seattle*, 77 Wash App 784, 787, 789; 892 P2d 745 (1995)
West Virginia	Yes	Caselaw	*Robinson v Pack*, 223 WVA 828, 831–833; 679 SE2d 660 (2009)
Wisconsin	Yes	Caselaw	*Arneson v Jezwinski*, 206 Wis 2d 217, 227; 556 NW2d 721 (1996)
Wyoming	Yes	Caselaw	*Park County v Cooney*, 845 P2d 346, 349 (Wyo, 1992)
Total	**28**		