STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE CERTIFIED QUESTION (MIDWEST INSTITUTE OF HEALTH)	Supreme Court No. 161492

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Brief in Opposition to Governor Gretchen Whitmer's Motion to Bifurcate Briefing Under MCR 7.308 Asking For Initial Briefing on Whether This Court Should Accept the Certified Questions

Introduction

Governor Whitmer's proposed two-step briefing process should be rejected. Under the Governor's proposal, the parties would not brief the merits of the certified questions until after

the Court determined whether to accept and answer the certified questions. But that gets it backwards. For good reason, MCR 7.308 contemplates that the parties will brief the merits before the Court determines whether to accept and answer the certified questions. The Governor's proposal would require this Court to determine whether to accept the certified questions without reviewing the parties' arguments on the merits and without being fully apprised of the potential implications of a decision on the merits. The far better course is the one contemplated by MCR 7.308: namely, for this Court to have all relevant information before it—including the parties' briefing on the merits—before determining whether to accept the certified questions.

Further, Governor Whitmer's motion appears to be seeking an opportunity to apprise this Court of alleged infirmities in the federal-court litigation, such as the Governor's assertion that the federal lawsuit is moot. But that line of argument misses the point. The federal court has rejected the Governor's arguments, and the Governor cannot collaterally attack the federal court's determinations here. As a result, unless this Court accepts and answers the certified questions in this case, the federal district court is poised to answer them on the merits itself. The primary consideration with respect to this Court's resolution of the certified questions is not whether this Court agrees with any of the federal court's procedural rulings. Instead, the question is whether this Court believes it is appropriate for this Court to answer the certified questions itself, or whether it is willing to allow the federal district court to rule upon their merits instead.

In short, the Governor's proposal introduces an inefficient, preliminary round of briefing that would not provide the Court with the full information that the Court needs in order to make a determination about whether to answer the certified questions. The Governor's motion should be denied, and the Court should enter an order directing briefing on the merits.

Argument

Every relevant consideration counsels against granting the Governor's motion.

I. The Governor's proposed two-step process is inefficient and would deprive this Court of the information that it needs in order to decide whether to answer the certified questions.

MCR 7.308(A)(3) contemplates that the parties will submit briefs on the merits of the questions that are certified. This approach ensures that the Court is apprised of the merits of the certified questions before the Court makes the determination whether to accept and answer the questions.

Under the Governor's proposal, by contrast, this Court would need to make the determination whether to accept and answer the certified questions without even reviewing the merits of the certified questions. Making the decision without reviewing the merits would be premature, because the Court would not be fully apprised of the merits of the questions that it was deciding either to accept or decline. The Governor's suggested approach also contradicts this Court's historical practice. For example, in *In re Certified Question from United States Court of Appeals for Ninth Circuit (Deacon v Pandora Media, Inc)*, 499 Mich 477; 885 NW2d 628 (2016), this Court did not determine whether to accept and answer the certified questions until after holding oral argument on the questions. *Id*. at 480.

The far better course is for the parties to provide the Court with all the information necessary to make its decision about whether to accept the certified questions—including the parties' positions on the merits—before the Court decides to accept or decline them.

To the extent that judicial economy and efficiency are pertinent considerations, they likewise counsel in favor of a single round of briefs rather than multiple rounds. Two rounds of briefing in this matter would be much less efficient than one round of briefing would be.

II. If this Court declines to answer the certified questions on the merits, then the federal court is poised to do so.

At bottom, the Governor appears to be seeking an opportunity to argue that—even though it is undisputed that the certified questions are vitally important—this particular case is not an appropriate vehicle in which to answer them. But the Governor's assertions in this Court about alleged infirmities in the federal-court action are irrelevant, because the federal court has already assessed these arguments—and rejected them. In other words, if this Court accepts the Governor's argument that this Court should not answer the certified questions, then the district court is poised to answer them on the merits itself.

For example, the Governor's motion suggests that the federal lawsuit is moot or is otherwise non-justiciable. But the federal district court rejected that argument. (**Exhibit 1**, WD Mich Opinion Dated June 16, 2020, at 6). The Governor also observes that it asked the federal district court to abstain from answering the state-law questions. The district court rejected that request, too, determining to certify them to this Court instead. (*Id.*). The Governor also suggests that the federal-court claims are barred by the Eleventh Amendment. But the district court has rejected that assertion, as well. (**Exhibit 2**, WD Mich Order Denying Motion for Reconsideration, at 7). Finally, the Governor observes that she (though not the Attorney General) has filed an appeal of the federal court's order denying the Governor's motion to reconsider its determination to certify the state-law questions to this Court. But the Governor fails to point out that such an order is an unappealable interlocutory order, such that the Sixth Circuit lacks jurisdiction over the appeal. *See Brown v Argosy Gaming Co, LP*, 360 F3d 703, 705–06 (CA 7, 2004) (order certifying questions to the state supreme court is not an appealable interlocutory order); *Nemours Found v Manganaro Corp*, 878 F2d 98, 100 (CA 3, 1989) (same).

In any event, the primary consideration is not whether this Court disagrees with any of the federal court's rulings on these procedural matters. The Governor cannot collaterally attack the federal court's rulings on those issues in this Court. Instead, the primary consideration is whether this Court prefers to answer the certified questions itself or is willing to defer to the federal district court's determination of them.

Conclusion

The Governor's motion should be denied, and this Court should enter a briefing schedule on the merits of the certified questions.

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Dated: June 29, 2020

By /s/ James R. Peterson

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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, et al., Plaintiffs,	)	No. 1:20-cv-414
-v-	)	Honorable Paul L. Maloney
GRETCHEN WHITMER, et al., Defendants.	)	

OPINION

This case presents extremely important issues of Michigan state law. The issues presented here, however, have never been considered by the Michigan Court of Appeals or the Michigan Supreme Court. This Court notified the parties that it was considering certifying two questions to the Michigan Supreme Court on May 28, 2020 (*See* ECF No. 23). The Court held a hearing on June 10, 2020 and heard argument on the issue. For the reasons to be explained, the Court will certify the following questions to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq.*, or the Emergency Management Act, MCL § 30.401, *et seq.*, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

As a preliminary matter, Defendants argue that certification is not proper at this juncture because Plaintiffs' claims are completely moot. The Court disagrees. Certainly, the primary relief Plaintiffs requested – the repeal of EO 2020-17 – has occurred. However, the

remainder of the relief Plaintiffs request may still be granted to them. Throughout the complaint, Plaintiffs challenge the "Stay at Home" orders issued by Governor Whitmer.[1] In Count I, Plaintiffs allege that the Stay at Home orders are unlawful exercises of authority under state law; in Count II, Plaintiffs allege that the Stay at Home orders are unenforceable because they are based on impermissible delegations of legislative authority. Thus, the question of the Stay at Home orders' legality lingers as long as the Stay at Home orders remain in place.

Moreover, while Plaintiffs have been allowed to reopen their healthcare businesses to some degree, EO 2020-114 places 15 new workplace safety requirements on healthcare facilities, including limiting the number of appointments Plaintiffs can schedule daily. While Plaintiffs did volunteer to put in place some protective practices (*see, e.g.*, Complaint at ¶ 32), they did not volunteer to operate at a limited capacity. The Governor is still placing restrictions on Plaintiffs and as above, the Plaintiffs have challenged the validity of the executive orders propagating those restrictions. Given the continued restrictions on Plaintiffs' ability to operate and the ongoing challenge to the validity of the Stay at Home executive orders, the Court finds that the case is not moot at this time.

The process of certification is governed by two court rules: Local Civil Rule 83.1 and Michigan Court Rule 7.208. Local Civil Rule 83.1 provides:

> Certification of issues to state courts - Upon motion or after a hearing ordered by the judge sua sponte, the court may certify an issue for decision to the highest court of the state whose law governs any issue, claim or defense in the case. An order of certification shall be accompanied by written findings that: (a) the issue certified is an unsettled issue of state law; (b) the issue certified will

[1] At the time the Complaint was filed, Plaintiffs challenged EO 2020-77. That order has since been rescinded and replaced multiple times. At the time of writing, the operative "Stay at Home" order is EO 2020-115.

> likely affect the outcome of the federal suit; and (c) certification of the issue will not cause undue delay or prejudice. The order shall also include citation to authority authorizing the state court involved to resolve certified questions. In all such cases, the order of certification shall stay federal proceedings for a fixed time, which shall be subsequently enlarged only upon a showing that such additional time is required to obtain a state court decision. In cases certified to the Michigan Supreme Court, in addition to the findings required by this rule, the court must approve a statement of facts to be transmitted to the Michigan Supreme Court by the parties as an appendix to briefs filed therein.

W.D. Mich. L. Civ. R. 83.1. The relevant portion of the Michigan Court Rule provides:

> (a) When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.
> (b) A certificate may be prepared by stipulation or at the certifying court's direction, and must contain
> (i) the case title;
> (ii) a factual statement; and
> (iii) the question to be answered.
> The presiding judge must sign it, and the clerk of the federal, other state, or tribal court must certify it.

M.C.R. 7.308(A)(2).

Certifying an issue to a state supreme court is appropriate "when the question is new and state law is unsettled." *Sherwood v. Tennessee Valley Authority*, 925 F. Supp. 2d 906, 916 (quoting *Pennington v. State Farm Mutual Auto. Ins. Co.*, 553 F.3d 447, 449-50 (6th Cir. 2009)). Moreover, submitting uncertain questions of state law to a state's highest court "acknowledges that court's status as the final arbiter on matters of state law and avoids the potential for 'friction-generating error' which exists whenever a federal court construes a state law in the absence of any direction from the state courts." *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir, 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

In the Court's judgment, the three requirements for certification set out in Local Rule 83.1 are met. The parties do not dispute that the issues to be certified are unsettled questions of state law, nor does any party argue that certification would cause undue delay or prejudice. The parties disagree about whether the issues to be certified will likely affect the outcome of this suit.

The issues to be certified are, essentially, Counts I and II of the complaint. The parties acknowledge that if Plaintiffs do succeed on either Count I or Count II, the Court need not evaluate the remainder of Plaintiffs' claims (which are all constitutional claims). Defendants Whitmer and Gordon argue that it is unlikely that the case will be completely resolved on the state law issues, because for Plaintiffs to succeed on Counts I and II, a Court would have to find that Governor Whitmer's COVID-19 related executive orders issued since April 30, 2020 violate the EPA, the EPGA, *and* the Michigan Constitution. In these Defendants' eyes, the likelihood of Plaintiffs winning on all three grounds is slim, so the Court will eventually be required to address the federal constitutional claims anyway.

What these Defendants have failed to consider is the doctrine of constitutional avoidance. The Court is required to consider issues of state law that may resolve a case before reaching questions of constitutional law because the Court must avoid evaluating purely hypothetical constitutional questions. *See Torres v. Precision Industries, Inc.*, 938 F.3d 752, 756-57 (6th Cir. 2019). Put differently, even if Plaintiffs' chance of succeeding on Count I or Count II is slim, a victory on either count would relieve the Court from evaluating the remainder of the complaint and the constitutional claims presented therein. This requires the Court to consider the questions presented in Count I and Count II before reaching any

other claims. Put differently, the state law issues are not only likely to affect the outcome of the suit; they are certainly going to affect the outcome because they must be decided before an outcome will be reached.

Having determined that this Court must interpret Michigan statutes that have never before been interpreted by the Michigan Courts, the Court is guided by the Supreme Court's instruction to employ certification. If the "unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem,' " the Supreme Court has held that district courts should utilize the certification process. *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)). Therefore, the Court finds that certification is appropriate and that all three requirements for certification set out in the Local Rule are met.

Finally, the Court emphasizes the considerations of comity and federalism, which caution federal courts from "needlessly addressing questions of state law and deciding state-law issues of first impression." *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp 2d 878, 895 (W.D. Mich. 2001). The "last word" on interpretations of state law belongs with the State Supreme Court, not the federal district court. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941). Thus, rather than interpret a novel question of state law for the first time – particularly a question of state law that might affect every citizen in the state of Michigan – this Court turns to the ultimate authority on what Michigan law is: the Michigan Supreme Court. Additionally, the guidance sought today prevents this Court from overstepping its role, eliminates the risk that this Court interprets the relevant state law

differently than the Michigan Supreme Court might, and eliminates the risk of conflicting federal and state decisions.

In sum: this case has not been rendered moot. The factors for certification set out in Local Rule 83.1 are met. And the principle of federalism virtually requires this Court to certify these questions to the Michigan Supreme Court. Therefore, the Court will enter an order certifying the two identified questions of law to the Michigan Supreme Court and hold this case in abeyance until that court reaches a decision on the matter.

An order will be entered consistent with this opinion.

IT IS SO ORDERED.

Date: June 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, et al., Plaintiffs,	)	No. 1:20-cv-414
-v-	)	Honorable Paul L. Maloney
GRETCHEN WHITMER, et al., Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

This matter is before the Court on Defendants' motion for reconsideration (ECF No. 38). Plaintiffs oppose the motion (ECF No. 40). For the reasons to be explained, the Court will deny the motion.

A motion for reconsideration may be granted when the moving party demonstrates a "palpable defect" by which the Court and parties have been misled and a showing that a different disposition of the case must result from the correction of the mistake. W.D. Mich. LCivR 7.4(a). The decision to grant or deny a motion for reconsideration under this Local Rule is within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 691 (6th Cir. 2012) (citation omitted).

A motion for reconsideration is not an opportunity to present new arguments that could have been presented before the court issued its ruling, but an opportunity for the court to reconsider those arguments already presented. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *see also Evanston Ins.*, 683 F.3d at 692 (reviewing the district court's application of the palpable defect standard and upholding the

denial of the motion for reconsideration because the arguments advanced in the motion were not raised during the prior proceedings). Nor is a motion for reconsideration a second opportunity for a party to present "new explanations, legal theories, or proofs." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001). This rule can only be overlooked "in exceptional cases," or when the rule would produce a "plain miscarriage of justice." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)).

Despite submitting briefs and presenting oral argument on the issue of whether to certify questions to the Michigan Supreme Court, no Defendant has raised the issue of Eleventh Amendment immunity as a bar to certification until the present motion for reconsideration. Thus, the Court would normally not consider the issue: the time to raise this argument has passed. *See Evanston Ins.*, 683 F.3d at 692; *Jinks*, 250 F.3d at 385.

However, the Court recognizes that "Eleventh Amendment issues are jurisdictional in nature." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). Once the Eleventh Amendment has been raised as a jurisdictional defect, the Court must address the issue before moving to the merits of the case. *Id.* Accordingly, the motion for reconsideration presents an "exceptional case" such that the Court will consider it on the motion for reconsideration. *See Scottsdale Ins.*, 513 F.3d at 552.

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). Suits brought against state officials in their official capacity are equivalent to suits against the state itself. *See Kentucky v. Graham*, 473

U.S. 159, 166 (1985); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009). Plaintiffs bring this case against Defendants solely in their official capacities, so the Defendants may be sheltered from suit by the Eleventh Amendment.

The Eleventh Amendment provides broad constitutional immunity to state actors, but the Supreme Court has long recognized an exception for forward-looking injunctive relief: federal courts may enjoin state officials from the future enforcement of state legislation that violates federal law. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). However, the "purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with *state law*." *Ernst v. Rising*, 427 F.3d 351, 368 (2005); *see also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106. It follows that state officials enjoy Eleventh Amendment immunity for all lawsuits that bring state-law claims against state officials in federal court, whether the claims are monetary or injunctive in nature. *Id*; *see also Freeman v. Michigan Department of State*, 808 F.2d 1174, 1179 (6th Cir. 1987).

Plaintiffs do seek prospective injunctive relief: they wish to enjoin Defendants from enforcing the "Stay at Home" executive orders that are still in place in Michigan. But they do so, in part, by requesting that this Court bring Defendants in line with Michigan law, not federal law. In Count I, Plaintiffs request a declaration that all executive orders Governor Whitmer has issued since April 30, 2020 are unlawful exercises of authority under state law. In Count II, Plaintiffs request a declaration that all executive orders Governor Whitmer has issued regarding the pandemic, regardless of timing, are unlawful because she has justified them with two state laws that are unconstitutional delegations of legislative authority under the Michigan constitution. In these two Counts, Plaintiffs seek to bring Defendants in line

with Michigan law and the Michigan constitution. Plaintiffs have brought two state-law claims against state officials in federal court. Accordingly, Defendants may be entitled to Eleventh Amendment immunity on Counts I and II.

But the Eleventh Amendment does simply not provide an exit ticket on Defendants, to be shown at any time during litigation. States may waive their Eleventh Amendment immunity by their conduct in federal court. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 618 (2002). The waiver doctrine prevents states from selectively invoking immunity "to achieve unfair tactical advantages." *Id.* at 621. Evaluating whether the state has waived its Eleventh Amendment immunity is a case-specific analysis, focused on the whole of the state's conduct in the litigation.

The Sixth Circuit has held that Eleventh Immunity was waived when the state "engaged in extensive discovery and then invited the district court to enter judgment on the merits. It was only after judgment was adverse to the State that it revealed that it had its fingers crossed behind its metaphorical back the whole time." *Ku v. State of Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003). That conduct – appearing without objection and defending the case on the merits – was sufficient to waive the state's defense of Eleventh Amendment immunity, and Tennessee could not raise it post-judgment. *Id.* Similarly, the Ninth Circuit has held that Eleventh Amendment immunity is waived where a state files an answer, moves for summary judgment, presents oral argument on the merits of the case, hears the Court's preliminary (adverse) findings, and then moves to dismiss on immunity grounds. *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002). Again, that conduct was "clearly a tactical decision," and allowing the state "to assert sovereign immunity after listening to a court's substantive

comments on the merits of a case would give the state an unfair advantage when litigating suits." *Id.*

While the Court appreciates that this case is barely a month old, Defendants' statements and actions evidence an intent to waive their Eleventh Amendment immunity. In the face of Plaintiffs' motion for a preliminary injunction, the Defendants filed a combined 107 pages of briefing. Defendants Whitmer and Gordon raised multiple abstention doctrines, but in the alternative, presented arguments on the merits of Counts I and II (*See* ECF No. 20 at § III.B). There is no mention of Eleventh Amendment immunity. Defendant Nessel argued that the case was moot, but in the alternative, addressed the merits of Counts I and II (*See* ECF No. 15 at § I.B.1). She makes no mention of Eleventh Amendment immunity.

In early June, the Defendants filed lengthy motions to dismiss. Again, Defendants Whitmer and Gordon make multiple arguments that this Court should not adjudicate the case, including abstention, ripeness, mootness, standing, and issues with supplemental jurisdiction (ECF No. 35-1). However, this motion contains only a passing reference to the Eleventh Amendment to state that Plaintiffs are not entitled to money damages (*Id.* at § I.A). And again, the motion makes arguments on the merits of Counts I and II (*Id.* at § III.A). Defendant Nessel presents a similar motion to dismiss, arguing that there are several reasons why this Court should not adjudicate the case, but like the other Defendants, makes only a passing reference to the Eleventh Amendment as it relates to money damages (ECF No. 27 at § IV.B).

At the Court's invitation, all parties filed briefs regarding the certification of issues of state law to the Michigan Supreme Court. In their opposition to certification, Defendants Whitmer and Gordon argued that the case was moot or non-justiciable but did so without invoking the Eleventh Amendment (ECF No. 33). Similarly, Defendant Nessel argued that the case was moot, or that the case should be held in abeyance, but did not invoke Eleventh Amendment immunity (ECF No. 34). When the Court heard argument on the certification issue, Defendants appeared without objection. They made several arguments against certification and offered several options to the Court: dismiss Counts I and II with prejudice because they were moot, not yet ripe, or Plaintiffs lacked standing; dismiss Counts I and II without prejudice to allow Plaintiffs to file those claims in Michigan Courts; hold Counts I and II in abeyance pending resolution of the issues in the Michigan Courts; or hold the entire case in abeyance pending the same. At no time during the hearing did any Defendant claim they were entitled to Eleventh Amendment immunity on Counts I and II. At the close of the hearing, the Court indicated that it would certify the questions presented in Counts I and II to the Michigan Supreme Court and that a written opinion would issue. The following day, Defendants brought this motion for reconsideration, raising Eleventh Amendment immunity for the first time.

As in *Ku* and *Bliemester*, the Defendants have waited until after they received an unfavorable decision from the Court to raise the Eleventh Amendment as a defense. By the Court's count, the Defendants have put forth at least seven different arguments as to why this Court does not have jurisdiction over, or should not exercise its jurisdiction to hear, Counts I and II. Defendants have also repeatedly put forth alternative arguments on the merits of

Counts I and II. And perhaps most telling, Defendants have repeatedly asked this Court to postpone the exercise of its jurisdiction over Counts I and II until the Michigan Courts can resolve the question. At that point, they say, the Court can proceed to adjudicate this case. But when the Court attempted to do just that by certifying questions of law to the Michigan Supreme Court, Defendants suddenly invoked Eleventh Amendment Immunity.

Unlike *Ku* and *Bliemester*, this case has not lingered on the Court's docket for months, nor has it proceeded through discovery or extensive motion practice. However, given the rapidly changing circumstances that underpin this case, as well as the gravity of the issues presented, the case has progressed quickly and voluminously.[1]

Given the totality of the circumstances, the Court finds that Defendants have waived their Eleventh Amendment immunity. Despite filing multiple briefs urging the Court not to hear Counts I and II, Defendants did not assert the Eleventh Amendment until after receiving an apparently unfavorable decision on June 10, 2020. At that point, they decided they wanted out and invoked the Eleventh Amendment. Defendants selectively, belatedly invoked Eleventh Amendment immunity to "achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. Therefore, the Court finds that defendants have waived their Eleventh Amendment immunity. Accordingly,

[1] In 30 days, the parties have filed over 2,000 pages of briefing and exhibits.

IT IS HEREBY ORDERED that Defendants' motion for reconsideration (ECF No. 38) is **DENIED**.

IT IS SO ORDERED.

Date: June 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge