STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

ROBERT REEVES,

Plaintiff-Appellant,

v

COUNTY OF WAYNE, ET AL.,

Defendants-Appellees,

Supreme Court No. 168969

Court of Appeals No. 367444 & 367447

Wayne County CC No.: 23-003148-CZ

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, THE NATIONAL LAWYERS GUILD, MICHIGAN-DETROIT CHAPTER, AND CIVIL RIGHTS CORPS

Philip Mayor (P81691)
Syeda F. Davidson (P72801)
Bonsitu Kitaba-Gaviglio (P78822)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
313.578.6803
pmayor@aclumich.org
sdavidson@aclumich.org
bkitaba@aclumich.org

Amanda M. Ghannam (P83065)
Cooperating Attorney
American Civil Liberties Union Fund of Michigan
645 Griswold St. Suite 4100
Detroit, MI 48226
313.788.7446
amanda@michiganworkerlaw.com

Sara Habbo (P77852)
Elizabeth Jacob (P86981)
John F. Royal (P27800)
National Lawyers Guild, Michigan-Detroit Chapter
P.O. Box 311458
Detroit, MI 48231
313.925.2626
Habbo.sara@gmail.com
secretary@michigannlg.org
Jfroyal2000@gmail.com

Jeremy D. Cutting
Civil Rights Corps
1601 Connecticut Ave. NW, Suite 800
Washington, DC 20009
202.681.2721
cody@civilrightscorps.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are civil rights advocacy organizations that are involved in a wide range of civil rights litigation and advocacy on behalf of victims of unconstitutional governmental activities.

The American Civil Liberties Union Fund of Michigan (the "ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over one million members dedicated to protecting constitutional rights. The ACLU has long been committed to supporting and participating in litigation that seeks to protect the constitutional rights of Michigan citizens, including the rights of those who are deprived of due process under the law. The ACLU regularly files amicus curiae briefs on constitutional questions pending before this and other courts. See, e.g., Amicus Curiae Brief of the American Civil Liberties Union of Michigan, NAACP Legal Defense & Education Fund, and NAACP Michigan State Conference, *People v Armstrong*, ___ Mich___; ___ NW3d___; Docket No. 165233 (amicus challenging search of motor vehicle based solely on the smell of marijuana); Amicus Curiae Brief of the American Civil Liberties Union of Michigan, American Civil Liberties Union, and Michigan Association for Justice, *Mich Immigrant Rights Ctr v Whitmer*, Michigan Supreme Court Docket Nos. 167300, 167301 (October 8, 2024); Amicus Curiae Brief of the American Civil Liberties Union of Michigan, et al., *S.L. v Swanson*, Michigan Court of Appeals Docket No. 374111 (July 31, 2025) (amicus challenging ban on in-person family visits by children and parents of incarcerated people). The ACLU has particular expertise litigating 42 USC 1983 civil rights claims against state and local governments, and issues relating to remedies for constitutional violations and governmental immunity. See, e.g., *Johnson v Vanderkooi*, 509 Mich 524; 983 NW2d 779 (2022) (counsel challenging warrantless

[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.

fingerprinting during *Terry* stops); *Carpenter v United States*, 585 US 296; 138 S Ct 2206; 201 L Ed 2d 507 (2018) (counsel challenging warrantless acquisition of cell phone location information); *Blackwell v Inkster*, 596 F Supp 3d 906 (ED Mich, 2022) (counsel in first amendment challenge to public speech on government's social media page) ; *Barry v Lyon*, 834 F 3d 706 (CA 6, 2016) (counsel in challenge to termination of food assistance benefits because of criminal charges); *ACLU v Livingston County*, 796 F3d 636 (CA 6, 2015) (counsel in challenge to jail policy requiring mail to be on standard four-by-six postcards).

The National Lawyers Guild, Michigan-Detroit Chapter (the "NLG"), is the Michigan-based chapter of a national nonpartisan organization whose membership consists of lawyers, law students, legal workers, and jailhouse lawyers. The NLG was founded in 1937 as the first racially integrated bar association in the United States. In 1945, the NLG was one of the nongovernmental organizations selected by the United States government to officially represent the American people at the founding of the United Nations in 1945. NLG Lawyers helped draft the Universal Declaration of Human Rights and founded one of the first UN-accredited human rights NGOs in 1948, the International Association of Democratic Lawyers (IADL). The NLG Michigan-Detroit Chapter has long been committed to supporting and protecting the rights of those who have been underrepresented and under-protected under the law, including the rights of workers, the unemployed and those who are deprived due process of law. The NLG regularly files amicus curiae briefs on significant constitutional and political questions pending before this court and other courts.

Of particular relevance here, the ACLU and NLG submitted an amicus brief in *Bauserman v Unemployment Insurance Agency*, 509 Mich 673; 983 NW2d 855 (2022), the case that is most centrally at issue in this appeal.

Civil Rights Corps ("CRC") is a national civil rights non-profit legal organization dedicated to challenging systemic injustice in the American legal system. CRC works with individuals directly impacted by the legal system, their families and communities, activists, organizers, judges, and government officials to create a legal system that promotes equality and freedom. As part of that mission, CRC has worked extensively to secure Michiganders' state constitutional rights and to ensure accountability for government actors who violate those rights, including by filing multiple class action lawsuits in Michigan's state courts seeking damages for such violations.

QUESTIONS PRESENTED

In *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022), this Court held that the Michigan Constitution's separation of powers principles require that money damages be available as a presumptive remedy when the State violates Michiganders' rights under the Michigan Constitution. State and local governments in Michigan have no authority other than that which the State and the Michigan Constitution delegate to them. Does *Bauserman*'s logic require the presumptive availability of damages to remedy violations of the Michigan Constitution by local governments as well?

The Court of Appeals answered: **No.**

Plaintiff-Appellant answers: **Yes.**

Defendant-Appellees answer: **No.**

Amici answer: **Yes.**

INTRODUCTION

Until recently, Michigan law has been unsettled on a core question: When is the government liable for the harms caused when it or its agents violate the rights guaranteed by the Michigan Constitution? Just a few terms ago, this Court finally settled that question as to the State, holding that a cause of action for damages is presumptively available when state officials commit such violations. This result, the Court held, was inherent in the judicial function and therefore flowed from separation of powers principles embedded in the Michigan Constitution. "[T]his Court retains the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution. That includes recognizing causes of action seeking money damages." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 687; 983 NW2d 855 (2022). This case presents a follow-up question left open in *Bauserman*: Do the same principles that apply when *the State* violates rights protected by the Michigan Constitution apply when *a local government* commits the exact same violation? This Court should answer yes.

The Court of Appeals decision distinguishing between these two circumstances is mistaken. The principles announced in *Bauserman* are fundamental separation of powers principles, which apply with equal force to constitutional violations committed by local governments bound, of course, by the same constitutional constraints as the State. Under Michigan's constitutional structure, all local governmental power is simply power that has been delegated to it by the State. And there is little logic to holding the State liable when the Governor, or her cabinet member, or a Michigan State Police officer violates a Michigander's rights, while allowing a mayor, local zoning official, or police officer to evade liability for the exact same violation.

The only logic that has been invoked to possibly support such a facially counterintuitive result is the existence of 42 USC 1983—a *federal* statute providing for damages against localities

for violations of *federal* constitutional rights, but which is not available against the State because of the State's Eleventh Amendment-based sovereign immunity. But any argument that section 1983 means localities cannot be held liable under the *Michigan* Constitution for violating rights protected by *that* document falls apart under scrutiny for numerous reasons. First, in many instances, the Michigan Constitution is more protective of Michiganders' rights than the federal Constitution, and in such cases section 1983 could never provide relief. Second, no sensible understanding of federalism would make the answer to the question of when *Michigan's* Constitution demands a remedy for violations of *Michigan* constitutional rights dependent upon the *federal* Congress's decision of when and whether to allow a remedy for violations of *federal* rights. And even if such a proposition made sense as a matter of separation of powers and federalism, section 1983 is a deeply flawed and insufficient remedy because the twin doctrines of qualified immunity and *Monell* liability deny a remedy to countless civil rights litigants.

For all of these reasons, this Court's prior decision in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000)—which relied upon logic from a non-majority opinion in an earlier case that this Court expressly disavowed in *Bauserman*—cannot (and does not) dictate the answer to the question presented in this application. However, the interaction of *Jones* and *Bauserman* has caused confusion in courts seeking to apply *Bauserman*. The result is unsettled law and the repeated denial of relief to civil rights litigants who are the victims of constitutional violations by local governments. This Court should therefore grant the application to resolve this issue once and for all, and ultimately hold that the Michigan Constitution protects Michiganders equally, regardless of which level of state government violates their fundamental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Amici generally adopt Plaintiff-Appellants' recitation of the alleged facts. By way of quick summary, Plaintiff-Appellant Robert Reeves is one of many residents of Wayne County who have had their car or other property seized by Wayne County's longstanding and extremely aggressive civil forfeiture practices—even though he was never charged with a crime prior to his filing of a lawsuit relating to such seizures. Compl, ¶¶ 26-28. Mr. Reeves (and several others) filed a federal lawsuit challenging Wayne County's civil forfeiture scheme, and, very shortly thereafter, he was arrested and charged with crimes by Wayne County prosecutors. *Id.* The charges were subsequently dismissed for lack of probable cause, but prosecutors brought them again, with similar results. *Id.*, ¶¶ 49-51. To this day, no valid criminal charges have been brought against Mr. Reeves, but he did lose his job as a result of his arrests. *Id.*, ¶ 77.

Mr. Reeves then brought this lawsuit in Wayne County Circuit Court. *Id.*, ¶¶ 78-114. It alleges that the meritless criminal prosecutions against him were brought at the instigation of Defendant Stella, an assistant corporation counsel for Wayne County, who was defending the federal civil rights action and sought to improve the county's defenses to that suit by having Mr. Reeves prosecuted. *Id.* Mr. Reeves alleges that Defendants violated both his state and federal constitutional rights through their campaign against him, and asserted state tort claims for malicious prosecution and abuse of process. *Id.* The trial court denied in part and granted in part a motion for summary disposition filed by Defendants. Plaintiff-Appellant's Application for Leave to Appeal at 6, Ex 2, Jul 6, 2023 Tr at 36. As relevant here, the trial court dismissed the state constitutional claims on the grounds that no cause of action for damages exists under the Michigan Constitution to bring such claims against a local government. *Id.*

On appeal, the Michigan Court of Appeals agreed that no cause of action for damages exists under the Michigan Constitution against local governments. *Reeves v County of Wayne*, __ Mich

App __; __ NW2d __ (2025) (Docket Nos. 367444 & 367447); 2025 WL 1635273. But the Court of Appeals' conclusion was based entirely upon this Court's per curiam decision affirming the Court of Appeals in lieu of granting the application in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). In *Jones*, this Court did indeed reach such a conclusion. But it did so under the "narrow" five-factor test assessing the availability of damages to remedy violations of the Michigan Constitution that was announced in a plurality opinion in a prior case. See *Jones*, 462 Mich at 337, discussing *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987) (plurality opinion of BOYLE, J.). However, *Jones* has been superseded by this Court's recent landmark *Bauserman* decision in which the Court expressly "part[ed] ways" with the narrow *Smith* plurality test. *Bauserman*, 509 Mich at 706. Nonetheless, the Court of Appeals in the instant case relied on *Jones* to reject a cause of action for damages against local governments under the Michigan Constitution.

Bauserman held that a cause of action for damages is presumptively available against the State whenever the State itself (or any of its agents or employees) violates the rights of Michiganders that are protected by the Michigan Constitution. See *id.* As the case before it did not involve a municipality, it reserved for a future date the question of whether its holding applied with equal force to local governments that commit violations of the Michigan Constitution. *Id.* at 708 n 13. Rather than treating the local government question as an open one post-*Bauserman*, the Court of Appeals treated it as being resolved by *Jones*, despite *Jones*'s own reliance upon a non-majority position in *Smith* that was disavowed in relevant part by the *Bauserman* majority.

This appeal followed, presenting this Court with the opportunity to address the question left open in the *Bauserman* footnote.

ARGUMENT

I. Bauserman's Logic Applies with Equal Force Whether the State or Local Governments Commit Violations of the Michigan Constitution.

A. Michigan separation of powers principles require a presumptive cause of action for damages to redress violations of the Michigan Constitution.

"The recognition and redress of constitutional violations are quintessentially judicial functions, required of us by the Separation of Powers Clause." *Bauserman*, 509 Mich at 687. Thus spake this Court just a few terms ago in its landmark *Bauserman* decision.

Bauserman held that there is presumptively an implied cause of action available under the Michigan Constitution for Michiganders to seek damages against state actors who commit constitutional violations, unless one of two "specific circumstances" apply. The existence of this presumptive cause of action flows from the fact that "[a] 'major function' of the judiciary is to 'guarantee' the rights promised in our Constitution." *Id.* at 693, quoting 2 Official Record, Constitutional Convention 1961, p 2196. If the Michigan judiciary fails to enforce the rights guaranteed by the Michigan Constitution, it would render these rights mere "words on paper." *Id.* In so holding, *Bauserman* relied upon a number of principles that are applicable to this case. At its core, this case poses the simple question of whether the same principles that allow Michiganders to seek relief against the *State* also allow them to seek relief against *local governments* when those governments violate the rights guaranteed by the Michigan Constitution. Notably, none of these considerations could logically apply to *State* violations of the Michigan Constitution without applying with equal force to to *local government* violations of the same fundamental rights.

First, *Bauserman* emphasized that the *judiciary*, not any other branch of government, bears the primary responsibility for protecting the rights guaranteed by the Michigan Constitution. "It would be ironic indeed if the enforcement of individual rights and liberties . . . were dependent on

legislative action for enforcement." *Id.* at 702 (citation and quotation marks omitted). Thus, on one hand, this Court will not "duplicate the Legislature's efforts" if it has "provide[d] a means of vindicating . . . constitutional right[s] at a level equal to a remedy this Court could afford." *Id.* at 687. But on the other hand, to merit such restraint from the judiciary, any remedy provided by the Legislature must "be at least as protective of a particular constitutional right as a judicially recognized cause of action and must include any remedy necessary to address the harm caused." *Id.* at 704-705. That is because it is "not within the purview of the Legislature" (or of courts) to "pick and choose which harms the state should be liable for and to what extent." *Id.* Rather, "those choices are contained within the Constitution" itself. *Id.*

Second, and relatedly, *Bauserman* explained that the Michigan Constitution, and centuries of Anglo-American jurisprudence, specifically guarantee the availability of *damages* for violations of the Michigan Constitution. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 697, quoting *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388, 395; 91 S Ct 1999; 29 L Ed 619 (1971). Thus it is "unremarkable . . . that damages are an available remedy for the state's constitutional violations." *Id.* Indeed, this Court quoted with approval the Maryland Court of Appeals' analysis demonstrating that violations of fundamental rights have been understood to be remediable through damages actions since the days of the Magna Carta. See *id.* at 692 n 2, quoting *Widgeon v Eastern Shore Hosp Ctr*, 300 Md 520, 525–527; 479 A2d 921 (1984) (discussing foundational cases such as *Wilkes v Wood*, 98 Eng Rep 489; Lofft's 1 (1763); *Huckle v Money*, 95 Eng Rep 768; 2 Wils 205 (1763); and *Entick v Carrington*, 19 How St Tr 1029 (1765)[2].) This history shows that

[2] *Entick* has been described as "perhaps the most important of all constitutional law cases to be found in the law reports of England; for it gave security under the law *to all* who may be injured by the torts of government servants." Wade, *Liability in Tort of the Central Government of the*

there is "no need to imply a new right of action because, under the common law, there already exist[ed] an action for damages to remedy violations of constitutional rights" and that common law tradition carried into the colonies. *Bauserman*, 509 Mich at 694, quoting *Widgeon*, 300 Md at 535.

Third, the sacred obligation of Michigan courts to protect Michiganders against constitutional violations applies to *all* violations of the rights enshrined in Michigan's Declaration of Rights. "[T]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by *anyone* who might be invested under the Constitution with the powers of the State." *Id.* at 702 (emphasis added), quoting *Corum v Univ of North Carolina*, 330 NC 761, 783; 413 SE2d 276 (1992). Indeed, the "very essence of civil liberty certainly consists in the right of *every individual* to claim the protection of the laws, *whenever* he receives an injury." *Bauserman*, 509 Mich at 697 (emphasis added), quoting *Bivens*, 403 US at 397 (in turn quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803)).

Fourth, the presumptive availability of damages to remedy violations of the Michigan Constitution is a matter of separation of powers inherent in Michigan's constitution and political structure—not the federal government's. This Court explained that its decision flowed from the fact that under core federalism principles, Michigan's courts retain "all judicial power not ceded to the federal government." *Bauserman*, 509 Mich at 701. Accordingly, *Bauserman*'s reliance on certain federal authorities such as *Bivens* was based on the fact that such authority provided a persuasive and "eloquent explanation of the judiciary's duty to enforce constitutional guarantees."

United Kingdom, 29 NYU L Rev 1416, 1416–1417 (1954) (emphasis added). This Court has agreed, recognizing *Entick* as "one of the landmarks of English Liberty." *People v Marxhausen*, 204 Mich 559, 565; 171 NW 557 (1919), quoting *Boyd v United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886).

Bauserman, 509 Mich at 698. But this Court's holding was firmly rooted in the *Michigan* Constitution and not bound by or reliant on any federal authority. *Id.*

Furthermore, *Bauserman* specifically explained that its holding was not limited by non-preemptive federal legislation. The majority specifically rejected prior caselaw to the extent it limited the State's liability for damages for constitutional violations to situations where state officials had acted pursuant to a state custom or practice, rather than also extending *respondeat superior* liability to the State for constitutional violations by its agents and employees. See *id.* at 707–708. Prior cases suggesting such a limitation had been based on the United States Supreme Court's interpretation of certain language in the Civil Rights Act of 1871 and by policy concerns. *Id.*, discussing 42 USC 1983. But "we are not in a position to vindicate those policy concerns by incorporating the same reasoning into damages remedies under the Michigan Constitution." *Bauserman*, 509 Mich at 708.

B. All power exercised by local governments is state power, so there can be no principled distinction between constitutional violations committed by the State and those committed by localities.

It is blackletter law that all power exercised by local governments is, ultimately, state power that has been delegated to them pursuant to the Michigan Constitution. "[A]s this Court has repeatedly stated, local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution or state statutes or which are necessarily implied therefrom." *Hanselman v Killeen*, 419 Mich 168, 187; 351 NW2d 544 (1984).[3] In this regard, Michigan's constitutional structure reflects "Dillon's Rule," that all local

[3] See generally Const 1963, art 7 (establishing local governments); see, e.g., *id.* at art 7, § 21 ("The legislature shall provide by general laws for the incorporation of cities and villages"); § 27 ("[T]he legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties, and jurisdictions as the legislature shall provide."); § 2 (providing for the adoption

power is delegated state power. See *Home Owners' Loan Corp v City of Detroit*, 292 Mich 511, 515; 290 NW 888 (1940), citing 1 Dillon, Municipal Corporations, 5th Ed., § 237.

Thus, when a local government violates the constitutional rights of Michiganders, it acts from the same ultimate font of power as the state government does, i.e., the "political power . . . inherent in the people" that is delegated to state government for the people's "equal benefit, security, and protection." Const, 1963 art 1, § 1. That delegation of power is in turn limited by the Michigan Constitution, and in particular its Declaration of Rights, which "poses restrictions on the state for the protection of Michigan citizens, and if the state harms its citizens in violation of those prohibitions, that is what creates liability." *Bauserman*, 509 Mich at 700. As a result, Michigan's judiciary has an "obligation to protect the fundamental rights of individuals [that] is as old as the State." *Id.* at 694–695, quoting *Corum*, 330 NC at 783; see also *Sharp v City of Lansing*, 464 Mich 792, 802; 629 NW 2d 873 (2001) (explaining that the judiciary "has the legitimate authority, in the exercise of the well-established *duty* of judicial review, to evaluate governmental action to determine if it is consistent" with the Constitution) (emphasis added).

It makes no sense from a separation of powers perspective that this obligation would be lessened when the entity alleged to violate a constitutional right is a subdivision of the State, exercising powers delegated to it by the State, rather than the State itself or its direct agent. Again: The "very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by *anyone* who might be invested under the Constitution with the powers of the State." *Bauserman*, 509 Mich at 702 (emphasis added), quoting *Corum*, 330 NC at 783.

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of county charters and allowing the Legislature to enact laws that alter the "form" and "powers" of counties).

This common-sense conclusion that local governments must be subject to liability under the Michigan Constitution on the same terms as the state government that created them is also consistent with a number of the cases this Court relied upon in *Bauserman*. For example, *Widgeon*, as noted above, provided critical historical analysis of hoary cases interpreting the Magna Carta itself, some of which form the very earliest landmark assertions of rights-based Anglo-American jurisprudence. It is therefore unsurprising that *Widgeon* also rejected the notion that section 1983 provides any valid reason to deny the existence of a damages cause of action against local governments under the Maryland constitution. 300 Md at 535. That position has been repeatedly re-affirmed in subsequent Maryland cases naming local defendants. See, e.g., *Prince George's County v Longtin*, 419 Md 450, 493; 19 A3d 859 (2011). Similarly, *Corum*'s principles were applied without issue against a local government in *Craig ex rel Craig v New Hanover Co Bd of Ed*, 363 NC 334, 339–340; 678 SE2d 351 (2009).[4] And a number of other cases relied upon by the *Bauserman* majority involved municipal defendants themselves. See, e.g., *Dorwart v Caraway*, 312 Mont 1, 16; 58 P3d 128 (2002) (local sheriffs' deputies); *Newell v City of Elgin*, 34 Ill App 3d 719; 340 NE2d 344 (1976) (municipality); *Binette v Sabo*, 244 Conn 23; 710 A2d 688 (1998) (local police officers). These cases not only demonstrate the logic of applying a constitutional cause of action for damages against local governments; but also demonstrate the

[4] Following a dramatic partisan election in which several justices of the North Carolina Supreme Court changed in 2022, and immediately began to reverse a number of decisions, see, e.g., Pardue & Watkins, *North Carolina Supreme Court Reverses Itself In Two Election Law Cases Decided Months Prior*, Federal Society Docket Watch (October 18, 2023), <https://fedsoc.org/scdw/north-carolina-supreme-court-reverses-itself-in-two-election-law-cases-decided-months-prior>, that Court issued a more restrictive interpretation of the *Corum* cause of action, see *Washington v Cline*, 385 NC 824, 830; 898 SE2d 667 (2024), but even that decision did not categorically deny access to a state constitutional claim for damages when the constitutional tortfeasor is a local government.

need for such a cause of action, as local governments are often the ones interacting most directly with people and, accordingly, taking actions that can violate people's state constitutional rights.

Thus, a holding that local governments are subject to a cause of action for damages under the Michigan Constitution on the same terms as the State itself is not only consistent with, but compelled by, *Bauserman*'s separation of powers logic. Because the Court of Appeals' published decision to the contrary will impact countless cases, effectively immunize local governments from liability, and undermine core separation of powers principles, this Court should grant the application and, ultimately, reverse.

II. The Existence of a Federal Remedy for Violations of Federal Constitutional Rights Committed by Localities Provides No Principled Reason to Limit Localities' Liability for Violating Constitutional Rights Protected by the Michigan Constitution.

A. Denying the existence of a cause of action for damages under the Michigan Constitution because Congress has created a cause of action for federal constitutional violations inverts well-established federalism principles.

The Court of Appeals decision below holds that because the United States Congress created a cause of action (42 USC 1983) to sue local governmental actors for *federal* constitutional violations, this should mean that there is no cause of action under the *Michigan* Constitution against local governmental actors for violations of the *Michigan* Constitution. That conclusion inverts basic principles of federalism and logic.[5]

As detailed above, *Bauserman* applied separation of powers principles based upon the *Michigan* Constitution, and determined the respective responsibilities of *Michigan*'s courts and the *Michigan* legislature for remedying constitutional violations. 509 Mich at 702 (explaining that the

[5] Additionally, for the reasons stated in Section II. B., *infra*, Section 1983 is not an adequate substitute for a cause of action for damages under the Michigan Constitution -- even setting aside the federalism concerns.

Court is interpreting what "[o]ur constitution provides for a separation of powers generally, and specifically in Const 1963, art 3, § 2"). *Bauserman* then explains that there are "instances in which the [1963] Constitution specifically tasks the [Michigan] Legislature with implementing the rights it affords." *Id.* at 703. And in those instances, this Court defers to the Legislature's choices. But "in the absence of such a specific delegation" the duty of enforcing the Michigan Constitution "is the core of our function as the judicial branch." *Id.*

Further, it is well established that it is "*this Court's* obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was ordained and established.'" *People v Tanner*, 496 Mich 199, 222; 853 NW2d 653 (2014) (cleaned up). Michigan courts "need not, and cannot, defer to the United States Supreme Court in giving meaning" to the Michigan Constitution. *Id.* at 221-222. See *Sitz v Dep't of State Police*, 443 Mich 744, 763-764; 506 NW2d 209 (1993) ("We are obligated to interpret our own organic instrument of government.").

If Michigan courts cannot defer to the federal *judiciary* in interpreting the Michigan Constitution, certainly they should not defer to the federal *Congress* in doing so. While Congress has the authority to preempt state law, it lacks any authority to *interpret* state laws or constitutions. See, e.g., *City of Boerne v Flores*, 521 US 507, 527; 117 S Ct 2157; 138 L Ed 2d 624 (1997) (recognizing the foundational principle that Congress cannot legislate in "area[s] reserved by the [United States] Constitution to the States"). Allowing Congress to interpret state constitutions would undermine the core idea of federalism, i.e., that states are separate sovereigns subject only to the federal power of preemption. Indeed, Congress cannot even interpret the *United States* Constitution, as this is a job reserved for the judiciary. See *id.* at 529.

State constitutions "are a font of individual liberties" such that without "the independent protective force of state law . . . the full realization of our liberties cannot be guaranteed." Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 491 (1977). The sovereignty reflected in state constitutions "is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v United States*, 564 US 211, 221; 131 S Ct 2355; 180 L Ed 2d 269 (2011), quoting *New York v United States*, 505 US 144, 181; 112 S Ct 2408; 120 L Ed 2d 120 (1992). States are "no more subject, within their respective spheres, to the general authority than the general authority is subject to them within its own sphere." *Alden v Maine*, 527 US 706, 714; 119 S Ct 2240; 144 L Ed 2d 636 (1999), quoting The Federalist No 39 (Rossiter, ed 1961), p 245. The "limited and enumerated powers granted to the Legislative . . . . Branch[] of the National Government, moreover, underscore[s] the vital role reserved to the States by the constitutional design." *Alden*, 527 US at 713. Even in determining when Congress has exercised the authority it *does* have to pre-empt state law, there is a strong presumption that it has not done so. Rather, courts "start with the assumption that the historic[al] police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v Sante Fe Elevator Corp*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947).

The notion that federal legislation, absent Congress's exercise of its preemptive authority, could limit a state court's obligation to interpret its own constitution is so antithetical to basic premises of federalism, there is little caselaw directly on point. However, analogous principles make the point clearly enough. For example, this Court has held that Michigan's Legislature cannot delegate away its authority to legislate to federal executive or legislative actors. See *Colony Town Club v Mich Unemployment Compensation Comm*, 301 Mich 107, 113-114; 3 NW2d 28

(1942). Under this principle, a "reference statute," i.e., one that gives a federal actor the final say on the meaning of Michigan law, is unconstitutional. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 16-17; 658 NW2d 127 (2003). If the Legislature cannot delegate away its lawmaking authority to the federal legislative branch, surely Michigan's courts cannot either.

Similarly, this Court has rejected the idea that federal legislation was meant to oust Michigan criminal law. See *People v Hegedus*, 432 Mich 598, 619; 443 NW 2d 127 (1989). In *Hegedus*, Michigan prosecutors brought criminal charges against an employer for involuntary manslaughter relating to the death of a worker in his employ. This Court rejected the notion that the Occupational Safety and Health Act ("OSH Act") prohibited criminally punishing employers whose conduct also violated the OSH Act under state criminal law, even though the OSH Act "comprehensive[ly]" regulated workplace safety and provided (lesser) federal criminal penalties for some violations of the Act. *Id*. Here, by analogy, Congress's enactment of a federal cause of action to vindicate federal rights (an act that in no way purports to preempt any state or local law) cannot possibly limit this Court's "recognition and redress of constitutional violations" which is "required . . . by the [Michigan] Separation of Powers Clause." *Bauserman*, 509 Mich at 687.

The Court of Appeals, believing itself bound by *Jones*, nonetheless reached the opposite conclusion on the grounds that section 1983 provides an adequate alternative cause of action to victims of unconstitutional actions by local government. As discussed in the next section, 1983 does not in fact provide a sufficient alternative to a cause of action under the state Constitution, even for cases in which the state and federal Constitutions provide equivalent guarantees. But even if it did, this reasoning becomes downright nonsensical when the Michigan Constitution provides different or greater protections than the federal Constitution.

That occurs with regularity. Numerous provisions of the Michigan Constitution, and its Declaration of Rights in particular, depart from federal constitutional protections. Some Michigan rights have no direct federal analog whatsoever. See, e.g., Const 1963, art 1, § 17 (guaranteeing a right to "fair and just treatment in the course of legislative and executive investigations and hearings"); *id.*, art 1, § 21 (prohibiting imprisonment for debt founded on contract); *id.*, art 1, § 24 (guaranteeing various rights to crime victims); *id.*, art 1, § 28 (guaranteeing a fundamental right to reproductive freedom). Many others bear some similarity to federal constitutional guarantees but have been interpreted to be more rights-protective. For example, just one year after the ratification of the Fourteenth Amendment, and eighty-five years before *Brown v Board of Education*, the Michigan Supreme Court "outlawed racial segregation in public schools." *People v Bullock*, 440 Mich 15, 28 n 9; 485 NW2d 866 (1992), citing *People ex rel Workman v Detroit Bd of Ed*, 18 Mich 400, 408-410 (1869). Michigan courts have also extended broader protections against excessive sentencing under the state's "cruel or unusual punishment" clause both to juveniles and adults[6];

[6] Compare e.g., *Bullock*, 440 Mich at 37 (holding that a mandatory life without parole for possession of 650 or more grams of cocaine was so "grossly disproportionate" as to be "cruel or unusual [punishment]"), with *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (holding that the same sentence was permissible under federal law). See also *People v Stovall*, 510 Mich 301, 322; 987 NW2d 85 (2022) (holding that a "parolable life sentence for a defendant who commits second-degree murder while a juvenile" violates Article 1, § 16); *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022) (striking down mandatory life without parole sentences for 18-year-olds); *People v Taylor*, __ Mich __; __ NW2d __ (2025) (Docket Nos. 166428 & 166654); 2025 WL 1085247 (striking down mandatory life without parole sentences for 19- and 20-year-olds).

have afforded greater protections with respect to unreasonable search and seizure[7]; and have guaranteed "distinctive due process protections" under our due process clause.[8]

To hold that no cause of action for damages against local governmental actors lies under *Bauserman* would be to deny a damages remedy to anyone whose uniquely Michigan rights were violated by a local government while allowing for such liability against state defendants. But it makes no sense to say, for example, that a plaintiff who was unlawfully searched at a sobriety checkpoint can sue for damages if the checkpoint was manned by the Michigan State Police but not if it was manned by the Detroit Police Department. The Constitution draws no distinction between states' and localities' obligation to obey it. For both levels of government, the "Constitution poses restrictions" and if the government "harms its citizens in violation of those prohibitions, that is what creates liability" for damages. *Bauserman*, 509 Mich 700. To distinguish between the two on any grounds other than the Michigan Constitution itself would require reliance on policy arguments. But "weighing policy considerations to pick and choose which harms" the government "should be liable for and to what extent is not within [the judiciary's] purview." *Id.* at 704. Rather, "those choices are contained within the Constitution." *Id*.

Nor would it make sense to hold that a plaintiff can proceed directly under the Michigan Constitution in suing a local government for damages if and only if they allege a state constitutional

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[7] Compare, e.g., *Sitz*, 443 Mich at 744 (holding sobriety checkpoints violate article 1, § 11 of the Michigan Constitution), with *Michigan Dep't of State Police v Sitz*, 496 US 444; 110 S Ct 2481; 110 L Ed 2d 412 (1990) (holding such checkpoints permissible under the Fourth Amendment).

[8] *AFT Michigan v Michigan*, 497 Mich 197, 245 n 28; 866 NW2d 782 (2015), *citing Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7; 351 NW2d 831 (1984). Compare, e.g., *In re Hudson*, 483 Mich 928, 939; 763 NW2d 618 (2009) (CORRIGAN, J, concurring) (recognizing that Michigan courts have held that the Michigan Constitution guarantees a right to counsel in termination of parental rights hearings), with *Lassiter v Dep't of Social Servs*, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (holding no such right exists under the federal due process clause).

violation that does not *also* violate the federal constitution. This is so for several reasons. First, as the next section explains, section 1983 regularly leaves the victims of egregious unconstitutional local acts without a remedy. Second, such a rule would create a bizarre situation whereby a court considering a case in which a plaintiff asserts a Michigan constitutional claim would first have to rule on the merits of a federal constitutional claim *that is not even before the court* in order to determine if the plaintiff has a cause of action and may proceed with their state claim. Thus, state courts would counterintuitively be required to address federal issues *first*, and state issues *second* as a matter of course. Third, such a rule would inhibit the development of Michigan constitutional law in Michigan's courts. Anyone with a claim that *might* sound under both the state and federal constitutions would need to bring their federal claim in addition to their state law claim or risk a court concluding that their state constitutional claim cannot proceed because they also state a federal claim. In turn, by essentially being forced to allege a federal constitutional claim, Michigan civil rights plaintiffs suing Michigan defendants in Michigan courts, will face the possibility of removal at the whim of the defendants (see 28 USC 1441) —thus denying plaintiffs a state forum and resulting in Michigan's federal courts often being the only adjudicator of concurrent state constitutional claims. Such a result not only makes little sense, but would make a mockery of Michigan courts' own sovereignty and obligation to interpret our own Constitution for themselves. Because the Court of Appeals decision below creates such upside-down results, this Court should grant the application and, ultimately, reverse.

B. Section 1983 has repeatedly been construed in ways that deny relief to the victims of constitutional violations and is not an adequate substitute for Bauserman liability.

As explained above, it makes little sense of *Bauserman*'s separation of powers reasoning for *Congress*, rather than the Michigan *Legislature*, to be the "[]other branch of government" that

can "provide[] a remedy [this Court may] consider adequate" to remedy violations of the Michigan Constitution. 509 Mich at 687. But even if Congress could do so in principle, it plainly did not do so in 1971 by enacting 42 USC 1983. That is because section 1983 subjects civil rights plaintiffs raising damages claims to a dilemma that plainly is not adequate to replace the straightforward damages presumptively guaranteed by *Bauserman*. On one hand, a section 1983 plaintiff can sue the officer who violated their rights in that officer's personal capacity, in which case the officer can invoke the doctrine of qualified immunity as a defense. At least as interpreted by the United States Supreme Court, this misguided doctrine was impliedly included in section 1983, and it renders a vast range of constitutional wrongdoing by individual officers non-compensable. On the other hand, a section 1983 plaintiff can sue the municipality.[9] But section 1983 has been interpreted to provide local government liability only when an alleged constitutional violation can be shown to be the result of a municipal "policy or practice." This holding—which is explicitly contrary to *Bauserman*'s holding—immunizes municipalities from *respondeat superior* liability for the wrongdoing of their officers and closes the courthouse doors to an immense range of civil rights plaintiffs.

1. Qualified immunity bars countless section 1983 claims, rendering section 1983 an inadequate substitute for Bauserman liability.

Under the doctrine of qualified immunity, a section 1983 claim alleging unconstitutional action by an individual officer must be dismissed unless the officer's alleged conduct "violated a . . . constitutional right" *and* the "unlawfulness of the conduct was clearly established at the time." *District of Columbia v Wesby*, 583 US 48, 62-63; 138 S Ct 577; 199 L Ed 2d 453 (2018) (quotation

[9] For purposes of a section 1983 damages claim, suing an officer in their official capacity is identical to suing the municipality itself directly. See, e.g., *Monell v Dep't of Social Servs of New York*, 436 US 658, 690 n 55; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

marks and citation omitted). This high standard cannot be met even if "then-existing precedent" "suggest[s]" that the officer acted unlawfully. *Id.* at 63. Rather, "precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* Furthermore, courts cannot rely on general constitutional principles at a "high level of generality" to find that a plaintiff survives qualified immunity; rather, plaintiffs must point to a specific case or cases that "clearly prohibit the officer's conduct in the particular circumstances before him" with "a high degree of specificity." *Id.* (quotation marks and citation omitted). The Court makes no secret that this standard, by design, protects "all but the plainly incompetent or those who knowingly violate the law." *Kisela v Hughes*, 584 US 100, 104; 138 S Ct 1148; 200 L Ed 2d 449 (2018), quoting *White v Pauly*, 580 US 73, 79; 137 S Ct 548; 196 L Ed 2d 463 (2017). Thus, qualified immunity is often granted based on "minute factual distinctions" between prior cases and a case at bar. *Crawford v Tilley*, 15 F4th 752, 765 (CA 6, 2021). Furthermore, "[o]nce the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Binay v Bettendorf*, 601 F3d 640, 647 (CA 6, 2010). Compounding these barriers to justice, the US Supreme Court recently expanded the doctrine not only to apply to situations where officers might be *factually* mistaken about whether their actions violated the constitution but also where officers made a mistake of law. See *Heien v North Carolina*, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014).

The doctrine of qualified immunity is not based in the text of section 1983, but rather on a series of Supreme Court decisions from the second half of the 20th century that applied and then "rapidly expanded" and "transform[ed]" certain common law doctrines of immunity that existed when section 1983 was enacted. Baude, *Is Qualified Immunity Unlawful?*, 106 Calif L Rev 45, 53 (2018). See *id.* at 51–77 (carefully documenting the rise of the doctrine and the fallacies

underlying it). Members of the Supreme Court with extremely different interpretive methodologies have denounced the doctrine, at least as deployed today, as being untethered from sound legal interpretation and having dangerous consequences. See, e.g., *Ziglar v Abbasi*, 582 US 120, 159; 137 S Ct 1843; 198 L Ed 2d 290 (2017) (noting that the Court's qualified immunity "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act" and instead requires courts to make "freewheeling policy choices") (Thomas, J., concurring in part and concurring in the judgment) (internal citations and quotation marks omitted)); *Kisela*, 584 US at 121 (SOTOMAYOR, J., dissenting), citing *Is Qualified Immunity Unlawful?*, 106 Calif L Rev at 82 and Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich L Rev 1219, 1244-1250 (2015). One federal judge, after surveying the rise of qualified immunity jurisprudence, has concluded that "[i]t is difficult to see qualified immunity's creation as anything other than a backlash to the Civil Rights Movement." *Green v Thomas*, 734 F Supp 3d 532, 545 (SD Miss, 2024).[10]

The implications of this cramped and deeply flawed doctrine for civil rights litigants are predictable. "The result is that a purportedly 'qualified' immunity becomes an absolute shield for unjustified killings, serious bodily harms, and other grave constitutional violations." *NS v Kansas*

[10] Recent scholarship reveals a fatal flaw in the foundation of qualified immunity doctrine. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif L Rev 201 (2023). As that work explains, Congress embedded a "notwithstanding clause" in the original text of 42 USC § 1983, which explicitly displaced common-law defenses, including qualified immunity. The clause was omitted in the first codification of federal law three years later, but that omission was not meant to have any effect on the statute's displacement of such defenses. Jaicomo & Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv JL & Pub Pol'y __ (2026) (forthcoming), available at https://ssrn.com/abstract=5124275. This work refutes the United States Supreme Court's presumption that qualified immunity belongs in Section 1983.

City Bd of Police Comm'rs, __ US __; 143 S Ct 2422, 2424; 216 L Ed 2d 1268 (2023) (SOTOMAYOR, J., dissenting from the denial of certiorari). The doctrine has "transform[ed] . . . into an absolute shield for law enforcement officers, gutting the deterrent effect" of constitutional protections. *Kisela*, 584 US at 121 (SOTOMAYOR, J., dissenting). This is confirmed by studies of qualified immunity show that most cases "come out the same way—by finding immunity for the officials." *Is Qualified Immunity Unlawful?*, 106 Calif L Rev at 82 (surveying United States Supreme Court decisions). See also Chung et al, *Shielded*, Reuters (May 8, 2020) <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (accessed October 21, 2025); see generally Chemerinsky, *Against Sovereign Immunity*, 53 Stan L Rev 1201 (2001) (arguing that the doctrine of sovereign immunity, when applied to constitutional wrongs, is contrary to core principles of constitutional democracy).

The doctrine also creates a vicious cycle that "inhibits the development of the law" because "a court may grant qualified immunity based on the clearly established prong without ever resolving the merits of plaintiffs' claims meaning that "'important constitutional questions go unanswered precisely because those questions are unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books.'" *Lombardo v City of St Louis*, 600 US __; 143 S Ct 2419, 2421; 216 L Ed 2d 1266 (2023) (Sotomayor, J., dissenting from the denial of certiorari), quoting *Zadeh v Robinson*, 902 F3d 483, 499 (CA5, 2018) (Willett, J., concurring dubitante).

Countless cases illustrate the phenomenon of qualified immunity's application to "cringeworthy fact patterns." *Boerste v Ellis Towing, LLC*, 607 F Supp 3d 721, 744 (WD Ky, 2022) (granting immunity to an officer who ordered a tow truck driver to drive away knowing that an intoxicated person sat on the top of the car, causing significant head injuries). For example, the

Sixth Circuit has granted qualified immunity to officers who tasered a suspect, who subsequently died, "even though [they] . . . were suspected of innocuous crimes, posed little risk of escape and had not yet physically harmed anybody." *Hagans v Franklin Co Sheriff's Office*, 695 F3d 505, 511 (CA 6, 2012). One federal district court assembled a nightmare list of cases where qualified immunity has insulated egregious conduct from liability, and the list bears quoting at length:

- Courts let correctional officers hold a person for six days in a frigid cell, covered in other persons' feces and forced to sleep naked in sewage, because it was only clearly established "that prisoners couldn't be housed in cells teeming with human waste for *months* on end." *Taylor v Stevens*, 946 F3d 211, 222 (CA 5, 2019) (emphasis added).

- Courts let police officers steal $225,000 in cash and rare coins. *Jessop v City of Fresno*, 936 F3d 937, 940 (CA 9, 2019). Although that was "morally wrong," the officers "did not have clear notice that it violated the Fourth Amendment." *Id.* at 942.

- Courts let correctional officers spray *some* chemical agent in a person's face "for no reason at all," because it was only clearly established that guards could not use "the *full* can of spray." *McCoy v Alamu*, 950 F3d 226, 232-233 (CA 5, 2020).

- Courts let police officers who were *inside* a car kill a person who didn't warrant lethal force. The law clearly established only that an officer could not shoot a person from *outside* a car. *Stewart v City of Euclid*, 970 F3d 667, 675 (CA 6, 2020).

- A court let five police officers shoot a man 22 times as he lay motionless on the ground, after tasing him four times, kicking him, and placing him in a chokehold. *Estate of Jones v City of Martinsburg*, 961 F3d 661, 663-664 (CA 4, 2020). It was not clearly established that officers could not shoot a motionless person who possessed a knife. *Estate of Jones v City of Martinsburg*, unpublished opinion of the United States District Court for the Northern District of West Virginia, issued Sept 7, 2018 (Case No. 3:13-CV-68); 2018 WL 4289325, p 5.

- Courts let a correctional officer watch a suicidal detainee strangle himself to death with a telephone cord, after officials placed him in the cell, with the cord, knowing he was unstable and had repeatedly attempted suicide. *Cope v Cogdill*, 3 F4th 198, 202-203 (CA 5, 2021). It was not clearly established that correctional officers who watch a person attempt suicide had to "call for emergency medical assistance." *Id.* at 209.

- And a court let a deputy sheriff shoot a 10-year-old child (from 18 inches away) while the deputy repeatedly tried to shoot a non-threatening family dog. *Corbitt v Vickers*, 929 F3d 1304, 1308 (CA 11, 2019). "No prior decision 'clearly established' that act as unconstitutional." *Id.* at 1315. [*Green*, 734 F Supp 3d at 546-547.]

Simply to recount this list demonstrates that Section 1983, at least as interpreted and applied by federal courts, cannot possibly be an "adequate substitute" for liability under Michigan's own Constitution under *Bauserman*. Even if separation of powers principles somehow allowed *Congress* to fulfill the role that *Bauserman* suggested that the Michigan *Legislature* can play—i.e., of providing a potentially adequate damages remedy that is "at least as protective of constitutional rights as a judicially recognized remedy would be," 509 Mich at 705—Section 1983 certainly is not such a protective remedy.

Indeed, this Court essentially said as much in disavowing much of the analysis in JUSTICE BOYLE's *Smith* plurality. In particular, one prong of JUSTICE BOYLE's test would have "declined to recognize a claim for damages [under the Michigan Constitution] where the existence and clarity of the constitutional violation at issue is unclear and where the degree of specificity of the constitutional protection is unclear." *Bauserman*, 509 Mich at 706. But the *Bauserman* Court expressly disavowed reliance upon that factor in determining when damages are available under the Michigan Constitution. See *id.* By making clear that a cause of action for damages under the Michigan Constitution can proceed despite such lack of constitutional clarity in advance, this Court has already made clear that the limits qualified immunity pose render any remedy that incorporates

such immunity inconsistent with our constitution's separation of powers principles. Because the Court of Appeals decision essentially incorporates such limits in any state constitutional cause of action for damages against a locality, this court should grant the application to address this critical issue and, ultimately, reverse.

2. Monell's "policy or practice" requirement presents a major barrier to liability against localities and thus prevents section 1983 from being an adequate substitute for Bauserman liability.

Federal civil rights plaintiffs bringing damages claims under section 1983 can avoid the Charybdis of qualified immunity only by sailing into the Scylla of the Supreme Court's *Monell* doctrine. In *Monell*, the Court interpreted the text of section 1983 to provide for a cause of action against local governments, but further determined that the text permitted such claims only when the plaintiff can show that a local official is acting pursuant to a governmental "policy or custom."[11] 436 US at 694. "[I]n other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory." *Id.* at 691. This, predictably, means that many victims of unconstitutional conduct, often barred from obtaining relief against the individual officer who harmed them by qualified immunity, also cannot obtain relief from the employing municipality.

[11] This was so because in *Monell,* the Court's "analysis of the legislative history of the Civil Rights Act of 1871 compel[led] the conclusion that Congress *did* intend municipalities and other local government units to be included among those *persons* to whom section 1983 applies." *Monell*, 436 US 658 at 690 (emphasis added). Section 1983 subjects "every person" who, under color of law, causes a deprivation of another's rights to liability. No provision of the Michigan Constitution's Declaration of Rights imposes liability on "persons" in the same way. Instead, our Constitution provides for a more affirmative view of Michiganders' fundamental rights. For example, instead of stating that a person who, under color of law, causes another person to be deprived of their right to freedom of speech shall be subject to liability, Article 1, §5 provides that "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." This is another reason why section 1983 cannot be an "adequate" remedy for violations of the Michigan Constitution.

Subsequent United States Supreme Court cases have interpreted *Monell*'s policy and practice requirement in stringent fashion. The Court has gone on to explain that "even heightened negligence will not suffice" to render a local government liable under *Monell*. *Bd of Co Comm'rs of Bryan Co v Brown*, 520 US 397, 407; 117 S Ct 1382; 137 L Ed 2d 626 (1997). For example, in *Brown*, the government was not liable where a deputy sheriff, without justification, used an "arm bar" technique to fling a driver from a car, causing severe injuries requiring significant surgical treatment. 520 US at 400-401. That was so even though the deputy was a family member of the sheriff (the policymaker for the county), and even though he was hired despite a criminal record that included assault and battery, resisting arrest, and public drunkenness. *Id.* at 402, 408. See also, e.g., *City of St Louis v Praprotnik*, 485 US 112, 128-129; 108 S Ct 915; 99 L Ed 2d 107 (1988) (municipal employee who alleged he was terminated for protected speech could not survive *Monell* because the government "enacted no ordinance designed to retaliate against respondent or similarly situated employees" and could not "prove that such retaliation was ever directed against anyone other than himself"). Recently, the Court went so far as to deny *Monell* liability in a case where a district attorney's office completely failed to train its prosecutors on their *Brady* obligations. See *Connick v Thompson*, 563 US 51; 131 S Ct 1350; 179 L Ed 2d 417 (2011). This was so even though the lack of training led to the plaintiff being wrongfully convicted and serving 18 years in prison (14 of them on death row), *id.* at 54 and even though "Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in [the same] office" in the decade prior to the plaintiff's wrongful conviction, *id.* at 62.

Predictably, federal courts here in the Sixth Circuit have followed suit, repeatedly dismissing claims on *Monell* grounds, even when the plaintiffs alleged significant violations of their civil rights. See, e.g., *Hall v Navarre*, 118 F4th 749, 753 (CA 6, 2024) (municipality could

not be held liable, despite order from police chief "to engage" civil rights protesters who were not observing dispersal orders, when officer, in response to the chief's order "rushed a group of protesters, tackling [the plaintiff] as he was standing on the sidewalk," "dragging [him] to the curb," and causing "a closed-head injury and two broken bones in his hand"); *Brown v Cuyahoga Co*, 517 Fed Appx 431, 436 (CA 6, 2013) (no *Monell* liability where a prisoner alleged that the corrections officers at the jail where he was held were well known to have "'blanket parties,' a euphemistic term for the beating of prisoners," because the prisoner could not show the county "maintained an affirmative *policy* to beat prisoners" (emphasis added)). Or to take a particularly egregious example, "an 86-year old African-American woman [who] lives in Louisville's West End" could not sue the same Louisville Metro Police Department that murdered Breonna Taylor when, without a warrant or probable cause, they allegedly "raided her home while she was in bed [and] forced her, shoeless and wearing only her undergarments, out of her home and into public view." *Sistrunk v City of Hillview*, 545 F Supp 3d 493, 497 (WD Ky, 2021). These cases are but the tip of the iceberg of justice denied in federal courts around the country on a daily basis because of the difficulty of satisfying the *Monell* standard.

Again, simply to recount the results of cases like this should demonstrate that section 1983, at least as interpreted and applied via *Monell* and its progeny, cannot possibly be an "adequate substitute" for liability under Michigan's own constitution under *Bauserman*. But this Court needn't rely only on the "shock value" of the types of claims *Monell* excludes because this Court addressed this exact question in *Bauserman*. As discussed above, *Bauserman* specifically eschewed several elements of the test that Michigan courts previously relied upon in deciding when a damages remedy was available under the Michigan Constitution. That prior test was derived from JUSTICE BOYLE'S plurality opinion in *Smith v Dep't of Pub Health*, 428 Mich 540;

410 NW2d 749 (1987), which expressly drew upon *Monell* to limit liability for the State to instances in which a state employee acted pursuant to a state policy or practice. See *Smith*, 428 Mich at 642-643; see also *Bauserman*, 509 Mich at 708.

Bauserman squarely "disagree[d]" with Justice Boyle's approach on this issue. 509 Mich at 707. "Whatever the merit of the policy concerns considered by Congress in adopting [section 1983] and considered by the Supreme Court in deciding the standard of liability under that statute, we are not in a position to vindicate those policy concerns by incorporating the same reasoning into damages remedies under Michigan's Constitution." *Id.* at 708. In light of this holding, it is now settled law in Michigan that that there is a direct cause of action under the Constitution for damages against the State on a *respondeat superior* theory of liability when a State employee or agent violates a Michigander's rights under the Michigan Constitution.[12]

Treating section 1983 as an "adequate" alternative when it comes to *municipal* liability for violations of the Michigan Constitution would create numerous anomalies. Most fundamentally,

[12] The rule this Court adopted in *Bauserman* allowing for respondeat superior liability is far more consistent with Anglo-American jurisprudence than the *Monell* rule is. That is evident as far back as the "landmark" English case *Entick*. *Marxhausen*, 204 Mich at 565. There, one issue concerned whether the Secretary of State had wrongfully authorized a warrant for entry into the plaintiff's home—arguably a matter of official policy. But a second issue concerned whether the King's messengers, who simply executed the warrant, violated the plaintiff's right by failing to bring a constable with them as required by the warrant itself. Since the warrant itself said that a constable had to be present, the violation perpetrated by the messengers clearly was *not* a result of unlawful state policy. Yet in affirming the award of damages to the plaintiff, *Entick* specifically held that the messengers could not avoid trespass liability for exceeding the scope of the warrant. See *Entick*, 19 How St Tr 1029 (1765) (Lord Chief Justice Camden's resolution of the "third question"), available at <http://users.soc.umn.edu/~samaha/cases/entick_v_carrington.html> (accessed October 21, 2025). In other words, the principle that damages should be available to compensate the victims of unconstitutional conduct committed by overzealous officers even when they are *not* implementing official policy or custom is older than our republic, let alone this state. See also Wurman, *Qualified Immunity and Statutory Construction*, 37 Seattle U L Rev 939, 963 (2014) (analyzing Blackstone and other sources and concluding that common law liability was available for excessive force claims where individual officers were found guilty of "exceeding [their] authority").

it would mean that the State is (inexplicably) exposed to greater liability than its political subdivisions when sued in state court. The State would (rightly) be liable if a SWAT officer employed by the MSP unlawfully raided the home of an 86-year old woman like the one in *Sistrunk* and left her in her front yard in her underwear. But Grand Rapids would (wrongly) evade liability if one of *its* SWAT officers engaged in the exact same conduct. Furthermore, this counterintuitive result would result not because of any policy judgment (however ill-conceived) by any co-equal branch of Michigan's government, but because of a policy decision *Congress* made in 1871, less than 50 years after Michigan became a state, and prior to the drafting of the latest two versions of the Michigan Constitution. Such a result defies both logic and the separation of powers principles of *Bauserman*. Because the Court of Appeals decision would embed such (il)logic in Michigan law and leave countless civil rights victims without a realistic remedy, this Court should grant the application to consider this important issue and, ultimately, reverse.

III. Jones v Powell Does Not Justify, and Certainly Did Not Compel, the Court of Appeals' Cramped Reading of Bauserman.

As described above, *Bauserman* is a landmark decision, and one that specifically disavows much of the reasoning of JUSTICE BOYLE's plurality decision in *Smith*. Nonetheless, the Court of Appeals disposed of Plaintiff's argument that *Bauserman*'s logic extends to local governments in a terse three paragraphs that grappled with almost none of the points made above. Instead, the Court of Appeals relied entirely on *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000)—a decision that was based almost entirely on the *Smith* plurality that *Bauserman* expressly disavowed. *Jones* cannot bear the weight placed upon it by the Court of Appeals and, in any event, was effectively overruled by *Bauserman*. The need to address his confusion further emphasizes why this Court should grant the application to provide clear guidance to lower courts and federal courts grappling with these questions of Michigan constitutional law.

In *Smith*, this Court held that a cause of action for damages was sometimes available under the Michigan Constitution in an "appropriate case." 428 Mich at 544. Although there was no majority opinion in *Smith*, historically courts in Michigan have "repeatedly" relied upon JUSTICE BOYLE's plurality opinion to determine the limited circumstances in which such a cause of action would be found to exist. *Bauserman*, 509 Mich at 690 (describing the state of the law prior to *Bauserman*). As relevant here, JUSTICE BOYLE's opinion involved a five-factor test that looked at "(1) the existence and clarity of the constitutional violation itself; (2) the degree of specificity of the constitutional protection; (3) support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provision; (4) the availability of another remedy; and (5) various other factors militating for or against a judicially inferred damages remedy." *Bauserman*, 509 Mich at 689-690, quoting *Mays v Governor*, 506 Mich 157, 196; 954 NW2d 139 (2020) (plurality opinion by BERNSTEIN, J) (summarizing *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part)).

The *Bauserman* Court made clear that "we part ways with JUSTICE BOYLE as to how to determine an 'appropriate case'"—expressly eschewing the *Smith* plurality test. 509 Mich at 705-706. In place of the restrictive five-factor test, this Court indicated that a cause of action for damages is generally available under the Michigan Constitution "except in two specific circumstances: (1) when the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue or (2) when another branch of government has provided a remedy that we consider adequate." *Id.* at 706. The first exception articulated in *Bauserman* plainly does not apply here. As to the second exception, it *somewhat* tracks the fourth *Smith* plurality factor but goes much further. Under the *Smith* plurality, "the availability of another remedy" weighed against finding a damages cause of action under the Michigan Constitution

without specific reference to the adequacy of that remedy. *Smith*, 428 Mich at 651. By contrast, under *Bauserman*, the test is much more stringent: the alternative remedy must be "adequate" and be provided by "another branch" of government. And as this Court further explained "[t]o be adequate, the legislative remedy should be at least as protective of constitutional rights as a judicially recognizable remedy would be." *Id.* at 705.

The continued relevance of *Jones* must be understood in light of this express rejection of the *Smith* plurality test. *Jones* was a brief per curiam opinion affirming in lieu of granting appeal. Approximately half of the opinion involved quoting the Court of Appeals below with approval. In particular, *Jones* agreed with the Court of Appeals that *Smith* "only recognized a *narrow* remedy against the state on the basis of the unavailability of *any* other remedy," *Jones*, 462 Mich at 337 (emphasis added). It also relied on the fact that "[a] plaintiff may sue a municipality in federal or state court under 42 USC 1983 to redress a violation of a federal constitutional right," *id.*, citing *Monell*, 436 US at 690 n 54.

Jones's analysis plainly cannot be dispositive of the question presented here for a number of reasons. First, *Jones* is entirely premised on the *Smith* plurality test, which this Court specifically disavowed in *Bauserman*. Indeed, *Jones* characterized the *Smith* test as a "narrow" one—which plainly is not how the *Bauserman* Court understood its decision. Rather, *Bauserman* held that unless either of the two exceptions apply, the Court's "inherent judicial authority requires us to afford a remedy for *all* constitutional violations, not just those that we think are wise or justified." 509 US at 707.

Second, *Jones* did not consider, let alone even mention, the fact that many violations of the Michigan Constitution may not even be violations of the federal constitution, see *supra*, pp 13-15.

Leaving such violations entirely without a damages remedy is inconsistent with the language from *Bauserman* that was just quoted.

Third, *Bauserman* provided that an alternative remedy must be provided by another "branch" of government. That language would be most naturally understood to mean that the remedy be provided by the executive or legislative branch of Michigan's government. Those are the "branches" that are co-equal with this Court in Michigan's constitutional structure. By contract, the federal government is a different *level* of government—with its own three equivalent branches.

Fourth, as noted above, the *Smith* plurality disfavored a damages remedy whenever *any* other remedy might be available, whereas *Bauserman* insists that any alternative remedy be "adequate," i.e., "at least as protective of constitutional rights as a judicially recognizable remedy would be." *Bauserman*, 509 Mich at 705. *Jones* did not purport to engage in an adequacy analysis, and in particular did not consider the arguments made above about the severe limitations on obtaining relief under section 1983 that *Monell* and qualified immunity imposes.

For all of these reasons, *Jones* certainly should not bind either this Court nor any other court. However, the fact remains that the question continues to confuse lower Michigan courts as well as federal trial courts — all of whom are, perhaps understandably, loathe to pronounce a decision of this Court superseded. Accordingly, review by this Court is essential so that *Jones* can definitively be put to rest.

CONCLUSION

The Michigan Constitution demands the same thing that justice demands: that the government compensate Michiganders when it violates the rights protected in that same constitution. And there would be nothing just in compensating Michiganders when the State itself

violates their rights, but not when their local governments—which are ultimately just instrumentalities of the State—do the same thing. No amount of legal complexity can or should muddy this simple symmetry. But because that is exactly what the lower courts decision does here, this Court should grant the application and, ultimately, reverse and ensure that justice is allowed to prevail in Michigan when any level of state government violates people's fundamental rights.

Respectfully submitted,

/s/ Philip Mayor

Philip Mayor (P81691)
Syeda F. Davidson (P72801)
Bonsitu Kitaba-Gaviglio (P78822)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
313.578.6803
pmayor@aclumich.org
sdavidson@aclumich.org
bkitaba@aclumich.org

Sara Habbo (P77852)
Elizabeth Jacob (P86981)
John F. Royal (P27800)
National Lawyers Guild, Michigan-Detroit Chapter
P.O. Box 311458
Detroit, MI 48231
313.925.2626
Habbo.sara@gmail.com
secretary@michigannlg.org
Jfroyal2000@gmail.com

Amanda M. Ghannam (P83065)
Cooperating Attorney
American Civil Liberties Union Fund of Michigan
645 Griswold St. Suite 4100
Detroit, MI 48226
313.788.7446
amanda@michiganworkerlaw.com

Jeremy D. Cutting
Civil Rights Corps
1601 Connecticut Ave. NW, Suite 800
Washington, DC 20009
202.681.2721
cody@civilrightscorps.org

Counsel for Amici Curiae

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WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICI'S TAX EXEMPT STATUS

This brief contains 10,685 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of three organizations, all of which are tax exempt organizations under section 501(c)(3) of the Internal Revenue Code. MCR 7.312(H)(2)(f).

/s/ Philip Mayor
Philip Mayor (P81691)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org