

STATE OF MICHIGAN
IN THE SUPREME COURT

(K.F. KELLY, P.J., AND O'BRIEN AND ACKERMAN, JJ.)

ROBERT REEVES,

Plaintiff-Appellant,

v.

MSC No. 168969

COA Nos. 367444, 367447

Wayne Circuit Court No. 23-003148-CZ

COUNTY OF WAYNE, et al,

Defendants-Appellees.

**Amicus Curiae Brief of the Michigan Association for
Justice**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES3

INTEREST OF AMICUS CURIAE..... 5

INTRODUCTION6

ARGUMENT 7

 I. The Court of Appeals erred in relying on *Jones v Powell*. 7

 II. Section 1983 is not an adequate alternative remedy to vindicate violations of the Michigan Constitution.....10

 A. *Bauserman* requires an alternative remedy come from “another branch” of Michigan government, rendering Section 1983 irrelevant 11

 B. Regardless, Section 1983 is an inadequate alternative remedy..... 16

CONCLUSION.....18

CERTIFICATE OF COMPLIANCE19

INDEX OF AUTHORITIES

Cases

<i>Bauserman v Unemployment Ins Agency</i> , 509 Mich 673; 983 NW2d 855 (2022).....	passim
<i>Browder v Albuquerque</i> , 787 F3d 1076 (CA 10, 2015).....	13
<i>Electro-Tech, Inc v H F Campbell Co</i> , 433 Mich 57; 445 NW2d 61 (1989).....	17
<i>Harlow v Fitzgerald</i> , 457 US 800 (1982)	16
<i>Jones v Powell</i> , 462 Mich 329; 612 NW2d 423 (2000).....	6, 7, 8, 9, 10
<i>Jones v Powell</i> , 227 Mich App 662; 577 NW2d 130 (1998)	7
<i>McDowell v State Highway Comm’r</i> , 365 Mich 268; 112 NW2d 491 (1961).....	17
<i>Monell v New York City Dep’t of Social Servs</i> , 436 US 658 (1978)	16
<i>Myers v Genesee Cnty Auditor</i> , 375 Mich 1; 133 NW2d 190 (1965).....	17
<i>People v Stovall</i> , 510 Mich 301; 987 NW2d 85 (2022).....	15
<i>Pierson v Ray</i> , 386 US 547 (1967)	16
<i>Pittman v Taylor</i> , 398 Mich 41; 247 NW2d 512 (1976).....	17
<i>Reeves v Cnty of Wayne</i> , __ Mich App __; __ NW3d __ (2025).....	7, 9
<i>Smith v Dep’t of Pub Health</i> , 428 Mich 540; 410 NW2d 749 (1987).....	6, 7, 8, 9, 10
<i>Thom v State Hwy Comm’r</i> , 376 Mich 608; 138 NW2d 322 (1965).....	17
<i>Williams v Detroit</i> , 364 Mich 231; 111 NW2d 1 (1961).....	17

Constitutional Provisions

Const 1963, art 1 § 1114

Statutes

Ark Code § 16-123-105(C).....13

42 USC 1983..... passim

Other Authorities

Friesen,
The Emergence of State Constitutional Law: Recovering Damages for State Bills of Rights Claims, 63 Tex L Rev 1269 (1985)17

Gilden,
State Constitutionalism in the 21st Century: Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence, 115 Penn St L Rev 877 (2011).....16, 17

51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation,
103 Judicature 35, 45 (2019).....15

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of roughly 1,500 attorneys, MAJ recognizes an obligation to assist this Court on important issues of law that would affect the administration of justice in Michigan. MAJ believes that the issues raised here by Plaintiff Robert Reeves will substantially impact the rights of those injured in Michigan. Accordingly, MAJ files this amicus curiae brief to encourage the Court to grant leave to appeal and help decide the questions presented in this case.¹

¹ Neither party nor their counsel authored this brief in whole or in part. Nor did they contribute monetarily to its authorship. MCR 7.212(H)(4).

INTRODUCTION

Three years ago, this Court held that in certain cases plaintiffs could allege constitutional-tort claims against the state and recover monetary damages. *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022). In a footnote, the Court declined to address whether that holding extended to municipal governments and individual actors in what would have been dictum. *Id.* at 708 n 13. This case squarely presents that question. The Court should grant leave and hold that the same monetary-damages remedy is available to plaintiffs when municipal governments and actors violate our Constitution.

There's no discernable reason why that shouldn't be the case, though the Court of Appeals held otherwise in a published opinion. In the court's view, *Bauserman* was quite limited: it merely "reaffirmed" two of this Court's previous decisions—*Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), and *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). And even if *Bauserman* did apply, the court held, Mr. Reeves could vindicate his state constitutional rights by suing Defendants under a federal statute (42 USC 1983), for violations of his federal constitutional rights. The fact that he could go sue Defendants for something else, somewhere else was good enough.

That outcome is puzzling. For one thing, *Jones* relied on a portion of *Smith* that this Court expressly parted ways with in *Bauserman*. So *Jones* should have been completely irrelevant to the court's analysis. More suspect, though, is the court's reliance on Section 1983 as an alternative remedy to vindicate Mr. Reeves's *Michigan* constitutional rights. Whatever is going on in Congress or the federal courts shouldn't matter at all when it comes to Mr. Reeves's rights under the *Michigan* Constitution. It is, after all, this Court—not a federal court interpreting a similarly-worded provision of the federal constitution—that has the authority and responsibility to tell Michiganders what our Constitution means. We are our own sovereign, with a distinct interest in breathing life into our own Constitution. The Court should grant leave to make that clear.

ARGUMENT

The Court of Appeals made two distinct errors below. First, the court determined that Mr. Reeves’s constitutional-tort claim is foreclosed by this Court’s decision in *Jones v Powell*, 462 Mich 329; 612 NW2d 424 (2000). Second, the Court held that even if *Bauserman* extended to municipalities, Mr. Reeves has “a potential avenue for relief under 42 USC 1983”—an avenue that precludes his state constitutional-tort claim. *Reeves v Cnty of Wayne*, __ Mich App __, __; __ NW3d __ (2025); slip op at 10.

Both of those decisions were wrong. *Bauserman* abrogated *Jones*’s central holding, and Section 1983 is not the “adequate alternative remedy” that *Bauserman* had mind. The Court should therefore grant leave to appeal and reverse the Court of Appeals.

I. The Court of Appeals erred in relying on *Jones v Powell*.

This Court has held that “[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.” *Bauserman*, 509 Mich at 693, quoting *Smith*, 428 Mich at 544. The question here is whether that remedy extends to local governments and their officials as well. It does indeed. But the Court of Appeals held otherwise, relying primarily on this Court’s decision in *Jones v Powell*. That was an error that this Court should grant leave to correct.

A. The *Jones* plaintiff sued the City of Detroit and individual police officers after the officers forced themselves inside the plaintiff’s home to search for a fleeing suspect they mistakenly believed was inside. 462 Mich at 331-332. She alleged, among other things, constitutional-tort claims under the Michigan Constitution. *Id.* A jury awarded her damages, but the Court of Appeals reversed, explaining that *Smith* created only “a narrow remedy against the state *where none otherwise would have existed.*” *Jones v Powell*, 227 Mich App 662, 671; 577 NW2d 130 (1998) (emphasis added). Because the plaintiff could sue the city and its officers under Section 1983 for violations of the federal constitution, the plaintiff had an available remedy, foreclosing her state constitutional-tort claims. *Id.* at 671-672.

This Court upheld that ruling, holding that “*Smith* provides no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee.” *Jones*, 462 Mich at 335. *Smith*, the Court made clear, “only recognized a narrow remedy against the state on the basis of the *unavailability of any other remedy*,” a concern that’s “inapplicable in actions against a municipality or an individual defendant.” *Id.* at 337 (emphasis added). Section 1983 and common-law tort claims provide recourse against local governments and their officials, so the Court determined that *Smith* precluded the plaintiff’s Michigan constitutional claims. *Id.*

B. So *Jones* is clearly premised on *Smith*. There’s no need to discuss here the tortured history of *Smith*’s fractured outcome and Justice Boyle’s partial concurrence. This Court already did so in *Bauserman*, as has Mr. Reeves. See *Bauserman*, 509 Mich at 688-691; (Reeves Br. pp 8-13). For our purposes we need only consider this: Justice Boyle’s partial concurrence in *Smith* set forth several factors to be used to determine “an appropriate case” to recognize a damages remedy arising from a violation of the Michigan Constitution. *Bauserman*, 509 Mich at 689-690. Those factors were the following:

(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. [*Id.* (citation omitted).]

In *Bauserman*, this Court “part[ed] ways with Justice Boyle as to how to determine an ‘appropriate case.’” *Id.* at 706. The Court held instead that “a cause of action exists 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 [the Court] consider[s] adequate.” *Id.*

So Justice Boyle’s five factors were distilled to two. And *Bauserman*’s second factor tweaked Justice Boyle’s fourth factor—or at least the way *Jones* read Justice Boyle’s fourth factor: Justice Boyle’s “availability of another remedy” factor became “the availability of another *adequate* remedy.” *Jones*, relying on Justice Boyle’s *Smith* concurrence, is premised on the notion that another remedy must be *completely unavailable* for a court to recognize a damages remedy. *Bauserman* rejected that view—an alternative remedy might be available, but it may inadequately vindicate a Michigan constitutional right, in which case a plaintiff could still pursue a state constitutional-tort claim for monetary damages.

Jones is therefore predicated on a proposition that is no longer good law. The relevant inquiry is no longer whether an alternative remedy exists at all, but is instead whether an alternative remedy adequately vindicates violations of Michiganders’ rights under the *Michigan* Constitution.

C. The Court of Appeals failed to recognize this. It instead based its holding almost entirely on *Jones*’s “clear holding.” *Reeves*, __ Mich App at __; slip op at 9. And it was undeterred by *Bauserman*, determining that “*Bauserman* reaffirmed the limited scope of *Smith* and did not disturb the clear bar set by *Jones*.” *Id.* at 10. That assertion was oddly premised on the following footnote in *Bauserman*:

Justice VIVIANO mentions liability for cities and villages as well as individuals who operate public utilities. But our holding is that the *state* is liable for harms it commits in violation of the Constitution; whether other entities, such as municipal governments or individual government actors, can be liable for constitutional torts is not before us, and we decline to address that question in what would be dictum. [*Id.*, quoting *Bauserman*, 509 Mich at 708 n 13.]

Declining to reach an issue in obiter dictum is not a holding. That footnote “reaffirm[s]” nothing; it plainly leaves the question for another day. So the footnote is only relevant to the extent that this Court made clear that it would consider the question presented here in another case. This should be that case.

Regardless, when the Court of Appeals did finally address *Bauserman* (as an alternative holding, it seems), the court failed to adhere to *Bauserman*'s new two-factor test. It held that “[e]ven if a future decision were to extend *Bauserman* to local governments, its reasoning would still require the absence of alternative remedies.” *Id.* at 10. The court was thus clearly in *Smith* and *Jones* territory; it said nothing about the alternative remedy’s adequacy. It instead determined that Mr. Reeves “has a *potential* avenue for relief” under Section 1983. *Id.* (emphasis added). And in the court’s view, the mere fact that “alternative remedies are available” warranted dismissal of Mr. Reeves’s state constitutional-tort claims. *Id.*

Again, that decision was wrong. The court’s error is straightforward and syllogistic: (1) *Jones* relied on a portion of *Smith*; (2) *Bauserman* modified that portion of *Smith*; (3) so the court erred in relying on *Jones* and failed to give effect to the analysis demanded by *Bauserman*. This analytical error alone, in a published opinion no less, is reason enough for this Court to grant leave to consider the issues raised in Mr. Reeves’s application. The Court should do so.

II. Section 1983 is not an adequate alternative remedy to vindicate violations of the Michigan Constitution.

After the Court of Appeals’ analytical errors are cast off, the relevant question here becomes whether Section 1983 can serve as an alternative remedy sufficient to preclude Mr. Reeves’s state constitutional-tort claims. It cannot for two reasons. First, *Bauserman*, along with basic principles of federalism and comity, demands that an “alternative remedy” come from another branch of Michigan’s government, not the federal government—rendering Section 1983 irrelevant. Second, even if an alternative remedy can come from the federal government, Section 1983 is inadequate to vindicate Michiganders’ state constitutional rights.

A. *Bauserman* requires an alternative remedy to come from “another branch” of Michigan government, rendering Section 1983 irrelevant.

1. As stated above, the *Bauserman* Court held that monetary damages are an available remedy for state constitutional torts “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 [the Court] consider[s] adequate.” 509 Mich at 706.

The Court of Appeals seemingly determined the second circumstance applies here. That alternative remedy, the Court held, is a *federal* constitutional-tort claim, brought under a *federal* statute (Section 1983), alleging that Mr. Reeves’s rights under the *federal* Constitution were violated.

Bauserman provides little support for that holding. It instead makes clear that a plaintiff’s adequate alternative remedy must come from “another branch” of Michigan’s government, not the federal government. Indeed, *Bauserman*’s adequate-alterative-remedy discussion focuses almost exclusively on the ways in which the *Michigan* Legislature can remedy constitutional violations:

- “If the **Legislature** has already provided an adequate mechanism to remedy a constitutional tort, this Court is not required to duplicate the effort.” 509 Mich at 705 (emphasis added).
- “However, we emphasize that the **Legislature’s** alternative 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. To be adequate, the legislative remedy should be at least as protective of constitutional rights as a judicially recognized remedy would be.” *Id.* (emphasis added).

- “This Court bears the authority and ultimate responsibility to enforce our state’s Constitution and to ensure that rights have remedies. When the language of the Constitution itself does not delegate that responsibility to another branch of government and when the **Legislature** has not enacted an adequate alternate remedy for the constitutional violation, we will recognize and enforce a monetary-damages remedy.” *Id.* at 711 (emphasis added).
- “Our Court maintains primacy in interpreting the Constitution. However, when the Constitution vests the **Legislature** with this authority and responsibility, our authority is proportionately lessened. Further, while the **Legislature** cannot trump the Constitution itself, the **Legislature** may implement a remedial scheme that provides a means of vindicating the constitutional right at a level equal to a remedy this Court could afford. In those circumstances, we would be unlikely to duplicate the **Legislature’s** efforts.” *Id.* at 687 (emphasis added).
- “In addition, the **Legislature** has not enacted a statutory remedy that adequately compensates a plaintiff for violation of this due-process right, so the second exception is likewise not present.” *Id.* at 710 (emphasis added).

2. This focus on the Michigan Legislature makes sense. The entire thrust of *Bauserman* is that our Constitution requires the judiciary to recognize and redress constitutional violations when no other branch of government has stepped up and done so. That requirement, the Court noted, stems from our Constitution’s Separation of Powers clause, *id.* at 687—a clause concerned with the division of powers within *Michigan* government, not with principles of federalism or comity. So Congress or the federal courts shouldn’t factor into the equation at all.

Any other result would be problematic. It is, after all, this Court that “has not only the authority, but also the primary responsibility of interpreting and enforcing our Constitution.” *Id.* at 692. “And if the rights guaranteed in our Constitution are to be enforceable, then enforcement must fall to [this Court],” *id.* at 693, not the federal courts, by way of a federal statute or constitutional provision. Otherwise

Michigan stands as unequal sovereign, governed by a constitution subservient to its federal counterpart.

That shouldn't be the case. There's simply no principled reason for this Court to cede its authority and responsibility to interpret the Michigan Constitution to federal courts interpreting the federal constitution. For one thing, it seems federal judges—even Supreme Court justices—welcome such a concession. See *Mays v Governor of Mich*, 506 Mich 157, 219; 954 NW2d 139 (2020) (McCormack, C.J., concurring), quoting *Browder v Albuquerque*, 787 F3d 1076, 1084 (CA 10, 2015) (Gorsuch, J., concurring) (“Often, after all, there’s no need to turn federal courts into common law courts and image a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that’s been battle tested through centuries.”). It makes little sense to rope in federal judges as unwitting participants in Michigan constitutional interpretation. But if Section 1983 can provide plaintiffs an adequate alternative remedy for state constitutional-tort claims, that’s the end result: Any time a panel of the Sixth Circuit interprets a federal constitutional provision with a Michigan counterpart, the panel is effectively interpreting the Michigan Constitution, too.

And another thing: nothing in Michigan law, unlike the law of other states, requires acquiescence to the federal branches. Arkansas’s Civil Rights Act of 1993, for example, expressly instructs courts to consult federal Section 1983 jurisprudence when construing a provision of the Arkansas constitution. Ark Code § 16-123-105(C) (“When construing this section, a court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and Civil Rights Act of 1871 shall have persuasive authority only.”). Michigan has no similar statute, rendering a reliance on federal remedies particularly unavailing.

3. Punting to the federal government is also undemocratic. Michigan citizens elect judges and justices. The citizens themselves choose who they feel is up to the task of interpreting our Constitution and vindicating their constitutional rights. Members of the Legislature

are of course also elected, as is the governor. If a branch of government outside of Michigan (like the federal judiciary) can remedy violations of the Michigan Constitution—by adjudicating Section 1983 actions brought for violations of the federal constitution, for example—Michigan voters’ choices at the ballot box will be greatly mitigated.

Consider this case as an example. Mr. Reeves alleges that Defendants violated his state constitutional rights to free expression and to petition the government for redress—rights also guaranteed by the federal constitution. If this Court refuses to adjudicate his state constitutional-tort claims because he can seek relief in federal court under Section 1983, the Court will relinquish the foremost task with which voters have entrusted it to carry out: interpreting and enforcing *our* Constitution. It’s the justices of this Court beholden to Michigan voters—not the judges in Michigan’s federal district courts or on the Sixth Circuit, who are instead appointed by the President of the United States.

4. One final point. It’s worth considering that there will be times when this Court just outright disagrees with a federal court’s interpretation of a constitutional provision—even provisions with language nearly identical to a Michigan constitutional provision. For example, this Court may have different views on what constitutes an “unreasonable search[] and seizure[],” Const 1963, art 1 § 11, than a Sixth Circuit panel interpreting identical language in the Fourth Amendment. Why should this Court roll over and say the federal court’s interpretation is good enough? Again, this Court has the “authority” and “primary responsibility” of interpreting and enforcing our Constitution. *Bauserman*, 509 Mich at 692. Ceding interpretive authority to federal courts, however, not only minimizes Michigan’s role as a separate sovereign, but also fails to take seriously methods of constitutional interpretation. Chief Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit has written and spoken about this at length:

So when the U.S. Supreme Court uses state court decisions as a basis for a federal ruling, the U.S. Supreme Court justices that use them are probably going to be justices that embrace a similar method of interpretation. A state court originalist decision is going to be appealing to a Justice

Scalia, while a state court living-constitutionalist decision would be more appealing to a Justice Brennan. Keep in mind one other possibility. If the U.S. Supreme Court decision is originalist, and the state court happens to have a majority of living constitutionalists, the state court should not lockstep. That makes no sense. The state court's method of interpretation denies the possibility of looking at it the same way the U.S. Supreme Court did.

And the opposite's true. If you have a living-constitutionalist U.S. Supreme Court decision and you're a state court judge getting the same issue under the state guarantee—it makes no sense that you would presume the U.S. Supreme Court [is] right if you are an originalist. You should presume the opposite if you take methods of interpretation seriously. [*51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation*, 103 *Judicature* 35, 45 (2019).]

This Court has grappled with these interpretative differences before. See, e.g., *People v Stovall*, 510 Mich 301, 323-332; 987 NW2d 85 (2022) (McCormack, C.J., concurring); *id.* at 338 n 24 (Zahra, J., dissenting). And in so doing, it has signaled that methods of constitutional interpretation are something it ought to take seriously—especially given the starkly different outcomes dueling interpretive methods can produce. *Id.* at 327 (McCormack, C.J., concurring) (“I write here mainly to address Justice Zahra’s claim about methodology because it feels important enough to warrant transparent discussion of the stakes.”); *id.* at 338 n 24 (Zahra, J., dissenting) (“Chief Justice McCormack’s freewheeling approach to constitutional interpretation is simply not sound.”). This Court should develop its own constitutional jurisprudence, using the interpretive method it sees fit to do so. But if an adequate alternative remedy is found to lie in Section 1983 and the federal courts, the Court will effectively be estopped from doing exactly that.

* * *

In sum, allowing a *Bauserman* alternative remedy to come from a branch of government outside Michigan implicitly allows another sovereign to determine the meaning of the Michigan Constitution. And it condones the method by which the non-Michigan branch arrives at its interpretation. Both of those outcomes are repugnant to basic principles of federalism and comity.

B. Regardless, Section 1983 is an inadequate alternative remedy.

Even if the Court determined that *Bauserman* permits an alternative remedy to come from a branch a government outside of Michigan, the remedy would still need to be “adequate.” Section 1983 fails that test.

In 1871, Congress passed the Civil Rights Act, which includes Section 1983. The section authorizes a cause of action for damages against persons acting under the color of state or local law who violate the federal constitution. 42 USC 1983. “The unqualified language and legislative history of Section 1983 suggest that the statute would furnish a generous remedy to victims of governmental misconduct.” Gilden, *State Constitutionalism in the 21st Century: Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence*, 115 Penn St L Rev 877, 888 (2011). But in large part, that hasn’t been the case.

The U.S. Supreme Court’s Section 1983 jurisprudence is largely defined by varying degrees of immunity afforded to governmental actors. Individual state and local officers sued under Section 1983 may assert either absolute or qualified immunity from liability for damages. See *Pierson v Ray*, 386 US 547, 553-554 (1967). Officials protected by qualified immunity alone can still escape liability so long as their constitutional violation wasn’t “clearly established.” *Harlow v Fitzgerald*, 457 US 800, 817-819 (1982). And municipalities cannot be held vicariously liable for the acts for their agents—plaintiffs instead must show the agent’s unconstitutional act represents a municipal “policy” or “custom.” *Monell v New York City Dep’t of Social Servs*, 436 US 658 (1978); see also *Bauserman*, 509 Mich at 707-708.

Those decisions were derived almost entirely from the intent of the 1871 Congress to incorporate and preserve common-law immunities available under state law in 1871. Gilden, *supra* at 890-894; Friesen, *The Emergence of State Constitutional Law: Recovering Damages for State Bills of Rights Claims*, 63 Tex L Rev 1269, 1273 (1985) (“These decisions often find in the ‘silence of Congress’ a legislative intent to preserve the immunities commonly available under state law in 1871, the year section 1983 was originally enacted.”).

But the perceived intent behind a 150-year-old federal statute has nothing at all to do with the scope of immunity available under the Michigan Constitution. Indeed, this Court has already abolished common-law sovereign and governmental immunity. See *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961); *McDowell v State Highway Comm’r*, 365 Mich 268; 112 NW2d 491 (1961); *Myers v Genesee Cnty Auditor*, 375 Mich 1; 133 NW2d 190 (1965); *Pittman v Taylor*, 398 Mich 41; 247 NW2d 512 (1976). And again, state common-law immunity has largely served as the justification for the immunities available under Section 1983. More to the point, though, this Court has outright said that immunity isn’t an available defense for constitutional violations, at least in the context of constitutional-takings claims:

To permit the State to assert the defense of governmental immunity in such circumstances would be utterly to vitiate the constitutional provision providing for just compensation for the taking of private property for public use, for it would mean that the owner of property alleged to have been taken without compensation would be left without judicial recourse. [*Thom v State Hwy Comm’r*, 376 Mich 608, 628; 138 NW2d 322 (1965).]

See also *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989) (“Since the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability.”).

In *Bauserman*, this Court signaled that an alternative remedy 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” to be considered “adequate.” *Bauserman*, 509 Mich at 705. A Section 1983 remedy—complete with its varying immunity defenses—simply cannot be deemed “at least as protective” of Michigan constitutional rights as a state constitutional-tort claim. The immunities that exist in federal law run directly counter to the ways in which this Court has handled sovereign and governmental immunity in claims involving our Constitution. Section 1983 is therefore an inadequate alternative remedy to vindicate Mr. Reeves’s constitutional rights. This Court should grant leave and make that clear.

CONCLUSION

Based on the arguments set forth above, and for the reasons set forth in Mr. Reeves’s application for leave to appeal, the Michigan Association for Justice respectfully requests that the Court grant leave to appeal to consider the important issues raised in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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