

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT REEVES,
Plaintiff-Appellant,

Supreme Court No. 168969

v.

Court of Appeal Nos. 367444, 367447

COUNTY OF WAYNE, ET AL.,
Defendants-Appellees.

Wayne County CC No. 23-003148-CZ

ORAL ARGUMENT REQUESTED

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Plaintiff-Appellant's Reply in Support of Application for Leave to Appeal

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Introduction

In his application, Robert asks this Court to answer the question expressly reserved in *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022): Can municipal and individual government officials—like the State—be liable for money damages when they violate the Michigan Constitution?

None of the parties here dispute that this reserved question is vitally important to answer, both so that victims of constitutional violations know their remedies, and so that governments can plan for liability accordingly (Part I).

Instead, in their Answer, Defendants initially reject that the question presented is open at all. They misread this Court’s jurisprudence as “unequivocally reject[ing]” liability for non-state government actors committing state constitutional torts “for over 35 years.” Answer at 6. Then, in two paragraphs, they argue that such liability is unnecessary because plaintiffs *might* have a § 1983 remedy.

These arguments are wrong. First, not only did *Bauserman* reserve this question of liability; its holding and rationale strongly suggest the Court of Appeals got the answer wrong (Part II). Second, 42 USC 1983—a *federal* cause of action for *federal* constitutional rights—should not determine a *state* right of action under *Michigan’s* Constitution (Part III). This Court should grant Robert’s application and answer that the Michigan Constitution provides redress for “*all* constitutional violations,” *Bauserman*, 509 Mich at 707, caused by *all* government actors.

Argument

I. **Defendants do not contest the importance of addressing whether all government actors may be liable for money damages when they violate the Michigan Constitution.**

Defendants' Answer does not contest that the question presented involves "a legal principle of major significance to the state's jurisprudence" or an issue of "significant public interest." MCR 7.305(B)(2), (3).

However this Court comes out on the merits, its answer is important. It is important to the public, who deserve to know if their state constitutional rights are enforceable against municipalities and individual government officials or mere "words on paper." *Bauserman*, 509 Mich at 693. It is important to local government defendants, who should understand their exposure to liability (and adopt measures to mitigate that liability). It is important to Michigan's lower courts (and federal courts hearing state-law claims), which now regularly confront *Bauserman* claims against local governments and officials. See Application at 21 n 2 (citing recent state and federal decisions on the question). It is important to the Legislature, which should know whether it needs to craft a statutory remedy where a judicial one does not exist. And it is important to this Court to ensure that the lower courts' application of *Bauserman* is consistent with what it intended in that landmark decision.

II. ***Bauserman* expressly reserved the question presented and strongly suggested that the answer is contrary to the Court of Appeals' decision.**

Turning to the merits, Defendants first assert that this Court has "unequivocally rejected" liability for municipalities and individual government officials "for over 35 years." See Answer at 6. In support of this bold claim, they rely on pre-*Bauserman* caselaw and reframe the question presented as whether this Court should "depart" from its "unambiguous" jurisprudence. *Id.* at 5-6.

Robert is not asking this Court to depart from its jurisprudence. He is asking this Court to follow its 2022 landmark decision in *Bauserman*. As Defendants acknowledge,

that case marked a significant shift in this Court’s jurisprudence and “finally define[d]” what had been an “amorphous and noncommittal ‘appropriate case’” standard for recognizing a damages remedy under the Michigan Constitution. Answer at 9, quoting *Smith v Dep’t of Pub Health*, 428 Mich 540, 544; 410 NW2d 540 (1987). Specifically, the Court categorically held that money damages *are* available “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.” *Bauserman*, 509 Mich at 706. Neither exception applies here. See Application at 24-25.

In a footnote, and in response to Justice VIVIANO’s dissent, the Court “decline[d] to address” if its holding applies equally to municipal and individual government actors. *Id.* at 708 n 13. The Court reasoned that the defendant in *Bauserman* was a state agency, so answering this question “would be dictum.” *Id.* Contrary to Defendants’ contention, the Court did not “specifically declin[e] to extend a monetary remedy” to municipal and individual government actors. Answer at 9. Instead, it left the issue for a case that squarely presented the question—which this one does.

Now that this Court is presented with a case involving a county and its officials, it should answer this reserved question. And it does not need to look further than the reasoning in *Bauserman* itself to do so. There, the Court explained that the Court’s “inherent judicial authority,” “the separation of powers,” and “the language of the Constitution itself” demand a remedy for “*all* constitutional violations, not just those that [it] think[s] are wise or justified.” 509 Mich at 706-08. That is, the Court has a constitutional duty to redress all violations of the Michigan Constitution, not “pick and choose” which to remedy based on policy considerations. *Id.* at 704.

Applying this reasoning, the Michigan Constitution should be just as enforceable against municipalities and individual government officials as against state agencies. Even Justice VIVIANO, who dissented in *Bauserman*, recognized: “[I]f the damages remedy is

truly just an interpretation of the Constitution, the opinion cites no language or principle that would limit the remedy to claims against the state.” *Id.* at 736 n 36 (VIVIANO, J., dissenting). Put simply, if the Court must provide a remedy for “all constitutional violations,” *Id.* at 707 (majority opinion), it must provide a remedy against all government actors who violate the Michigan Constitution.

Rather than appreciate *Bauserman* as a landmark decision that staked out a firm new rule of broad constitutional remedies, Defendants strain to harmonize it with this Court’s earlier decisions in *Smith v Pub Dep’t of Health* and *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). Answer at 7-8. But prior to *Bauserman*, the Court’s jurisprudence was hopelessly fractured about whether and when constitutional damages remedies were available. See Application at 9-11 (chronicling this Court’s pre-*Bauserman* jurisprudence). In fact, **none** of the pre-*Bauserman* cases—*Smith*, *Jones*, and *Mays v Governor*, 506 Mich 157, 215; 954 NW2d 139 (2020)—produced a majority opinion rejecting money damages under the Michigan Constitution for **any** government actor, let alone municipal or individual government actors. See *Bauserman*, 509 Mich at 688-91 (reviewing the Court’s jurisprudence and concluding that it had “not previously found consensus”). Instead, these three cases produced twelve conflicting opinions.

Bauserman resolved the confusion and “part[ed] ways” with these opinions to the extent they applied an old and indeterminate test for determining the availability of money damages—the five-factor test from Justice BOYLE’S partial concurrence in *Smith*. 509 Mich at 705-06.¹ Therefore, to the extent that Defendants rely on this fractured, prior caselaw to argue about the “propriety” of a damages remedy against local government actors, *id.* at 706-07, it was superseded by *Bauserman*, which instead laid out a clear rule

¹ Defendants mischaracterize Justice BOYLE’S partial concurrence in *Smith* as the majority opinion. See Answer at 7-8. In *Smith*, four justices (in a memorandum opinion) merely agreed that money damages are an available remedy for state constitutional torts in “appropriate cases.” 428 Mich at 544. They did not say why.

of liability that strongly suggests that non-state government actors should be held accountable exactly as state actors.

* * *

Robert does not ask this Court to depart from its jurisprudence. He asks this Court to follow *Bauserman*, which reserved the question about liability for local government actors while strongly suggesting an answer at odds with the lower courts' rulings below.

III. This Court should not outsource enforcement of Michigan constitutional rights to the vagaries of federal law.

Apart from their overreliance on pre-*Bauserman* jurisprudence, Defendants devote two paragraphs to the argument that Robert does not need a remedy for his state constitutional rights because he *might* have a § 1983 claim for his federal rights. See Answer at 9-10.

But a *federal* cause of action for *federal* constitutional rights does not (and should not) determine a *state* right of action under *Michigan's* Constitution. Under separation of powers principles, it is this Court's exclusive duty to say what the Michigan Constitution means. *Bauserman*, 501 Mich at 687. And under federalism principles, this Court exercises its duty independent of federal constitutional rights and remedies.

This Court should not deny Robert relief because he *might* ultimately have a § 1983 remedy. Section 1983 is neither relevant nor adequate to protect his Michigan constitutional rights (Subpart A). At minimum, if this Court believes § 1983 can *sometimes* be "as protective" of state constitutional rights as a *Bauserman* remedy, 501 Mich at 705, the lower courts erred by deciding that question at the pleading stage long before we can know that § 1983 *will* be equally protective (Subpart B).

A. Section 1983 is an irrelevant and inadequate procedural vehicle for vindicating Michigan constitutional rights.

Section 1983 is irrelevant to the question presented. A federal cause of action for violations of the *federal* Constitution does not (and should not) determine state rights of

action under *Michigan's* Constitution. Only this Court—not the United States Congress nor United States Supreme Court—interprets the Michigan Constitution and redresses violations of it. See *Bauserman*, 509 Mich at 692; see also *id.* at 697-98 (“This Court is ultimately responsible for enforcing our state’s Constitution, and remedies are how we do that.”), quoting *Mays v Governor*, 506 Mich 157, 215; 954 NW2d 139 (2020) (MCCORMACK, C.J., concurring); *Mays*, 506 Mich at 211 (BERNSTEIN, J., concurring) (“[T]his Court is the only institution that determines what our state’s Constitution means[.]”).

This is important because the Michigan Constitution is different from the federal Constitution. It has a distinct structure, distinct history, and distinct provisions. E.g., Const 1963, art 1, § 6 (providing a right to keep and bear arms explicitly “for the defense of himself”); *id.* § 28 (providing a right to reproductive freedom). This Court has examined these differences and afforded greater protection to state constitutional rights than federal ones. See *Woodland v Mich Citizens Lobby*, 423 Mich 188, 202 n 14, 206 n 22; 378 NW2d 337 (1985) (listing cases in which the Court interpreted the Michigan Constitution as more protective of a constitutional right); *AFT Mich v Michigan*, 497 Mich 197, 213 n 6; 866 NW2d 782 (2015) (same). Relevant to this case, the Court recognizes that the Michigan Constitution may be more protective of the right to free speech. See *Woodland*, 423 Mich at 202; *People v Neumayer*, 405 Mich 341, 364; 275 NW2d 230 (1979).²

Even where the language of the Michigan Constitution and the federal Constitution are similar, this Court does not follow the United States Supreme Court in lockstep. E.g., *Mays*, 506 Mich at 211 (BERNSTEIN, J., concurring) (“In interpreting our Constitution, we are not bound by the United States Supreme Court’s interpretation of

² Defendants fault Robert for not comprehensively addressing how Michigan’s free-speech right is in fact more expansive than its federal analogue. See Answer at 10; Application at 15-16. But this Application concerns only the antecedent question of whether he has a right of action for money damages against Defendants at all under the Michigan Constitution. The details of whether Michigan’s Constitution provides different protections and greater remedies than the First Amendment is a question to be answered on remand with the benefit of discovery and a more complete record. See Application at 23 (listing this question and others for consideration on remand).

the United States Constitution, even where the language is identical.”), quoting *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). The United States Supreme Court is not infallible, and this Court should not outsource its exclusive duty to give meaning to the Michigan Constitution. See *People v Pagano*, 507 Mich 26, 38-39; 967 NW2d 590 (2021) (VIVIANO, J., concurring) (“While looking at United States Supreme Court caselaw interpreting analogous federal constitutional provisions might be—and often is—helpful, we cannot delegate our duty to interpret our Constitution to the United States Supreme Court.”), citing in part Sutton, *51 Imperfect Solutions: State Constitutions and the Making of American Constitutional Law* (New York: Oxford Univ Press 2018), p 18; see also *Mays*, 506 Mich at 218-19 (MCCORMACK, C.J., concurring) (citing Judge Sutton’s book and validating that Michigan courts can “forge their own paths” separate from § 1983 jurisprudence).

Other state high courts that provide for a right of action under their own constitutions agree that they should give independent force to their constitutional remedies without regard to § 1983. E.g., *Zullo v State*, 209 Vt 298, 325; 2019 VT 1; 205 A3d 466 (2019) (“[Section] 1983 generally ‘creates no impediment to judicial recognition of a damages remedy’ under the state constitution, as the civil rights statute is limited to violations of federal law, and the state constitution may protect broader interests than those under the federal constitution.”), quoting *In re Town Hwy No 20*, 191 Vt 231, 263 n 6; 2012 VT 17; 45 A3d 54 (2012); *Espina v Jackson*, 442 Md 311, 345; 112 A3d 442 (2015) (“[Section] 1983 ha[s] no bearing on this case because Petitioners elected to bring their claims under state law in state court[.]”); *Widgeon v E Shore Hosp Ctr*, 300 Md 520, 535; 479 A2d 921 (1984) (explaining that the availability of a § 1983 remedy “is not a persuasive basis” to refuse to recognize a remedy under Maryland’s Constitution); *Binette v Sabo*, 244 Conn 23, 44 n 18; 710 A2d 688 (1998) (“§ 1983 creates no impediment to judicial recognition of a damages remedy under article first, §§ 7 and 9 . . . because § 1983 provides a remedy for violations of *federal law*[.]”).

Section 1983 is inadequate. Even if a § 1983 remedy could be considered as a *Bauserman* substitute—which it should not be—it would still not be *adequate* in the way *Bauserman* requires, for two reasons.

First, under *Bauserman*, an “adequate” alternative must be a remedy provided by the *State*, not the *federal* government. *Bauserman*, 509 Mich at 681, 687 (specifying that an alternative remedy is one from the state Legislature or “another branch of [Michigan] government”). After all, just as a *Bauserman* claim comes directly “from this Court’s inherent judicial authority and the language of the Constitution itself,” *id.* at 706, so too do the limitations to such a claim. And though the Michigan Constitution provides the state Legislature with the authority to provide remedies—sometimes, the exclusive authority, see *id.* at 703—nowhere in its text does it subordinate its rights and correlative remedies to federal ones.

Second, for an alternative remedy to replace a *Bauserman* cause of action, it must be “at least as protective of [Michigan] constitutional rights as a judicially recognized remedy.” *Id.* at 705. See also *id.* at 687 (describing the state legislative remedy as “equal to,” or a “duplicate” of, a judicially recognized remedy).

Section 1983 is not. And Defendants do not meaningfully dispute that. For instance, they do not contest that § 1983 imports federal common-law doctrines severely restricting First Amendment retaliation claims, see Application at 15-17, or that § 1983 is impeded by a raft of federal immunities and procedural hurdles, see *id.* at 18. But this Court can afford greater protection to state constitutional rights and is not restrained by the same procedural hurdles. E.g., *Bauserman*, 509 Mich at 707-08 (declining to import the *Monell* policy-or-custom requirement into Michigan constitutional remedies); see also Application at 18-20.

Indeed, Defendants’ litigating position in this case has been that § 1983 will provide no remedy at all, much less an adequate alternative to a *Bauserman* remedy. They have consistently asserted that uniquely federal-law doctrines doom Robert’s claims,

including qualified immunity, the *Monell* policy-or-custom requirement, and federal probable-cause bars for retaliatory prosecution claims. See Defs. Br. on Appeal at 17-20. Defendants’ invocation of the myriad special barriers presented by § 1983 just proves it is no substitute for a *Bauserman* remedy.

B. At minimum, whether § 1983 is an adequate remedy should not be decided at the pleading stage.

Even if this Court were to treat a federal remedy as a potential substitute for a state remedy—which it should not—the Court should nevertheless hold that the lower courts erred here by deciding that question prematurely, at the pleading stage.

For one, it is too early to know whether Robert’s § 1983 claims will provide him the same remedies that a *Bauserman* claim would, or whether the federal doctrines—like those Defendants have asserted—will doom his federal claims. In *Mays*, for instance, the plurality recognized that determining the availability of state constitutional monetary damages before discovery was “premature.” 506 Mich at 196 & n 13. Other states with constitutional damages remedies agree. See, e.g., *Corum v Univ of NC Through Bd of Governors*, 330 NC 761, 789; 413 SE2d 276 (1992) (permitting both § 1983 claims and state constitutional claim to go forward in part because “[p]laintiff is not required to elect now, at summary judgment, among his remedies”); *Widgeon*, 300 Md at 535 (refusing to dismiss state constitutional claim where a § 1983 claim was available and reasoning that “where several remedies are requested, an election is not required prior to final judgment”).

Relatedly, rejecting *Bauserman* claims against municipalities and individual government officials at the pleading stage (because they *might* be liable under § 1983) stifles the independent development of Michigan constitutional law. Most Michiganders’ interactions with the government—positive and negative—occur through local officials. Cf. *Brown v State*, 89 NY2d 172, 192; 674 NE2d 1129 (1996) (“[I]t is on the local level that most law enforcement functions are performed and the greatest danger of official misconduct exists.”). If local officials are effectively immune from retrospective remedies

for violating the Michigan Constitution, then Michigan's courts will have far fewer opportunities to elaborate what the state constitution means. For example, in Robert's case, the lower courts (erroneously) ruled he had no *Bauserman* remedy at the outset, before he could fully argue that Michigan provides more expansive free-speech rights and remedies than does federal law.

With these principles in mind, the Court of Appeals was premature in rejecting Robert's *Bauserman* claim because he "has a *potential* avenue for relief under 42 USC 1983, *assuming* he can properly plead and prove his claims." Application, **Exhibit 1** at 10 (emphasis added). Similarly, Defendants are wrong to conclude that Robert lacks a remedy because he "pursue[d]" state and federal constitutional claims (regardless of whether the remedy is, in fact, adequate). Answer at 6. To borrow an analogy: If a basketball player needs one point and has two free throw shots, he should take both shots. Sutton, *51 Imperfect Solutions: State Constitutions and the Making of American Constitutional Law*, p 7. At minimum, it is premature to disallow one shot (a state remedy) before we have a better sense of whether the other shot (a federal remedy) will score. See *id.* at 7-8.

Conclusion

This Court should grant Robert's application.

Date: November 14, 2025

Respectfully submitted,

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Plaintiff-Appellant's Reply in Support of Application for Leave to Appeal complies with the word limit in MCR 7.305(E)(3) because it contains 3,197 words, as determined by Microsoft Word, excluding tables, indexes, and appendixes.

Certificate of Service

I hereby certify that on November 14, 2025, I caused the foregoing to be electronically filed through that Court's Mi-FILE System, which will send notification of such filing to all parties of record.

/s/ Christian Lansinger