

**STATE OF MICHIGAN
IN THE SUPREME COURT**

ROBERT REEVES,
Plaintiff-Appellant,

Supreme Court No. _____

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 Application for Leave to Appeal

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Introduction and Statement of Grounds for Application

In *Bauserman v Unemployment Ins Agency*, this Court held that money 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 we consider adequate.” 509 Mich 673, 706; 983 NW2d 855 (2022). Pointing to its “inherent judicial authority,” “separation of powers,” and “the language of the Constitution itself,” the Court explained that it must provide an adequate remedy for “all constitutional violations, not just those that [it] think[s] are wise or justified.” *Id.* at 706-07.

Nevertheless, the Court of Appeals below affirmed the dismissal of Plaintiff-Appellant Robert Reeves’s state constitutional claims against Wayne County and two individual officials without invoking either exception listed by this Court in *Bauserman*. The Court of Appeals’ opinion did not reference either the Michigan Constitution’s text or a remedy provided by the Michigan Legislature. Instead, it reasoned that Robert could not claim a violation of his state constitutional rights because 42 USC 1983—a *federal* cause of action for *federal* constitutional rights—may provide him some relief.

This is wrong. Because a *Bauserman* claim derives from a court’s judicial authority as a state common-law court, the alleged availability of a federal remedy for federal constitutional rights is irrelevant. Basic principles of federalism demand that this Court exercise its independent obligation to enforce the rights and correlative remedies within the Michigan Constitution.

Absent this Court’s intervention, the enforceability of the 1963 Michigan Constitution hinges on the identity of the government actor. That is, according to the Court of Appeals’ reasoning, the State is accountable for violations of state constitutional rights because it is immune from Section 1983 liability under the Eleventh Amendment. Conversely, municipal and individual government actors are categorically

unaccountable under the Michigan Constitution because a plaintiff *might* be able to obtain some relief (complete or incomplete) under the federal Constitution.

Whether some or all government actors may be liable for money damages when they violate Michigan constitutional rights is “a legal principle of major significance to the state’s jurisprudence” and an issue of “significant public interest.” MCR 7.305(B)(2), (3). Further, the Court of Appeals’ decision, which failed to apply the two specific *Bauserman* exceptions, is “clearly erroneous and will cause material injustice.” MCR 7.305(B)(5). This Court should grant this application for leave to appeal to reaffirm that the availability of relief for violations of rights ensured by the Michigan Constitution does not hinge on the identity of the government actor who committed the violation.

Statement Identifying Judgment

Plaintiff-Appellant Robert Reeves seeks leave to appeal the Court of Appeals’ opinion in *Reeves v Wayne Co*, Court of Appeals Docket Nos. 367444 and 367447, attached as **Exhibit 1**. The judgment, issued on June 9, 2025, affirmed the circuit court’s dismissal of plaintiff’s claims against Wayne County and its employees for monetary relief under the 1963 Michigan Constitution. It further: (1) affirmed the circuit court’s dismissal of plaintiff’s claims for injunctive relief under the Michigan Constitution, (2) reversed the circuit court’s denial of governmental immunity to Wayne County for Robert’s intentional tort claims, (3) reversed the circuit court’s grant of prosecutorial immunity to Defendant Dennis Doherty, and (4) remanded the case for further proceedings. The Court of Appeals denied Defendants’ motion for reconsideration on July 16, 2025.

Statement of Question Presented

1. In *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 692; 983 NW2d 855 (2022), the Court held that money damages are an available remedy when the State violates Michigan constitutional rights. Is this remedy available when the government actor is a municipality or individual official?

The Court of Appeals answers, "No."

The Circuit Court answers, "No."

Plaintiff-Appellant answers, "Yes."

Defendants-Appellees answer, "No."

Statement of Facts and Proceedings

Plaintiff-Appellant Robert Reeves has filed two cases against Wayne County and its officials. The first one is a federal putative class-action lawsuit challenging the constitutionality of Wayne County's rapacious vehicle forfeiture scheme. Robert alleges that the day after he filed this first lawsuit, Defendants began a two-year retaliatory campaign to punish him for challenging their official actions, get him to drop his federal lawsuit, and defend the county's forfeiture program through baseless criminal prosecutions. In the present second suit, Robert seeks to hold Defendants accountable for violating both his federal and state constitutional rights through this course of retaliation.

A. Robert files a federal lawsuit regarding the County's vehicle forfeiture scheme.

In July 2019, Robert Reeves drove to a job site to meet with an acquaintance, Javone Williams, about a possible opportunity for work. **Exhibit 1** at 2. There, he demonstrated to Javone that he could operate a skid steer. *Id.* Unbeknownst to Robert, however, the skid steer Javone asked him to operate was part of a state police investigation into rental equipment thefts from Home Depot stores. *Id.* After Robert pulled over at a nearby gas station, police detained him for several hours at a local jail, eventually releasing him without his car, two cell phones, and \$2,280 in cash. *Id.*

Despite Robert’s best efforts, Wayne County refused to release his property for months. Compl. ¶ 25. For over six months, the county did not file a forfeiture complaint or give Robert a chance to contest the seizure. *Id.* ¶¶ 2, 24. And though the state police had placed a warrant request to the Wayne County Prosecutor’s Office (“WCPO”) on September 5, 2019, regarding Robert, Javone, and other individuals allegedly involved in the rental equipment thefts, they did not file any criminal charges or prosecute any of the alleged perpetrators. **Exhibit 1** at 2.

On February 4, 2020, Robert joined other plaintiffs in a federal class action lawsuit challenging the constitutionality of the County’s vehicle forfeiture scheme. *Id.* at 2; Compl. ¶¶ 26-27. The lawsuit remains ongoing, with one Sixth Circuit judge characterizing the forfeiture scheme as “a money-making venture . . . most often used to extort money from those who can least afford it.” *Ingram v Wayne Co*, 81 F4th 603, 623 (CA 6, 2023) (THAPAR, J., concurring).

B. Defendants conspire to punish Robert with baseless criminal prosecutions and illegally defend the County’s forfeiture scheme.

The very next day after Robert filed the federal civil rights lawsuit, the WCPO ordered the release of Robert’s car, and Defendant Dennis Doherty, an Assistant Prosecuting Attorney with the WCPO, requested a “clarification” from the new officer-in-charge of the investigation. Compl. ¶¶ 28, 38. Then, and without probable cause, he ordered the officer-in-charge to file a revised warrant request naming only Robert and Javone. *Id.* ¶¶ 39-41, 82; **Exhibit 1** at 2. Robert was arrested on two counts of felony receipt or concealment of stolen property and held in jail over a weekend. **Exhibit 1** at 2; Compl. ¶¶ 34, 43-44.

On February 8, 2021, the 36th District Court dismissed the charges against Robert and Javone for insufficient evidence. **Exhibit 1** at 2. Undeterred, Doherty and the WCPO refiled charges against Robert only (even though Javone faced more serious and more numerous charges in the first prosecution). Compl. ¶¶ 49-51. Again, the 36th District

Court dismissed the charges for insufficient evidence. **Exhibit 1** at 3. Due to these pending charges, Robert lost his job and other work following background checks. Compl. ¶ 77.

During these frivolous prosecutions, Defendant Davidde Stella—Wayne County’s Assistant Corporation Counsel defending the County in the federal lawsuit—leveraged the criminal proceedings to defend the County’s forfeiture scheme. He directed Doherty to pursue both prosecutions against Robert despite the lack of probable cause, *id.* ¶¶ 61-62, and after the charges were filed, Stella used the criminal prosecutions to argue that the federal court must abstain from hearing Robert’s case. *Id.* ¶¶ 6, 57, 59. Both Doherty’s and Stella’s actions are part of the County’s broader policy of punishing Robert for his participation in the federal lawsuit and defending the County’s vehicle forfeiture scheme. *Id.* ¶¶ 7, 63-64, 112-13.¹

C. Robert files this state lawsuit raising claims under both the Michigan Constitution and federal Constitution.

Fearing a third baseless prosecution, and desiring relief for the injuries he suffered from the first two prosecutions, see generally Compl. ¶ 77 (listing past and continuing injuries), Robert filed a second lawsuit against Defendants for their concerted retaliatory efforts to silence him and defend the County’s forfeiture scheme by any means necessary. In addition to a federal retaliation claim under Section 1983, Robert filed a state retaliation claim under the 1963 Michigan Constitution, and state tort claims for malicious

¹ In his complaint and as evidence of a broader County policy, Robert detailed the County’s extensive efforts to forfeit the car of another named plaintiff, Stephanie Wilson. As in Robert’s case, Stella used the County’s efforts in Stephanie’s state court proceedings to prevent the federal court from hearing her case. Compl. ¶ 69. After the Wayne County Circuit Court dismissed her forfeiture case, Stephanie had to attend an additional hearing to enforce the circuit court’s judgment and get her car back. *Id.* ¶¶ 66-67, 70. At the hearing, the judge told the WCPO attorney to “[p]lick [her] battles,” and that her office had “bigger fish to fry than some lady who wants her thousand dollar car back so she can go buy groceries and get her kids around.” *Id.* ¶¶ 71-72. The WCPO attorney replied: “And Your Honor, as we have commented there is a federal case pending as well.” *Id.* ¶ 73. Robert alleges this statement reflects the County’s broader retaliatory policy of punishing members of the federal lawsuit. *Id.* ¶¶ 74-75. Ultimately, the County appealed Stephanie’s forfeiture case all the way up to this Court, which ruled (6-1) that the County lacked statutory authority to forfeit her car. *In re Forfeiture of 2006 Saturn Ion*, 514 Mich 399; 22 NW3d 446 (2024). The Court denied the County’s motion for rehearing. *In re Forfeiture of 2006 Saturn Ion*, 10 NW3d 652 (Mich, 2024).

prosecution and abuse of process. *Id.* ¶¶ 78-114. Defendants moved for summary disposition of all claims under MCR 2.116(C)(7) (immunities granted by law) and MCR 2.116(C)(8) (failure to state a claim).

The Wayne County Circuit Court partially granted and partially denied Defendants' motion. **Exhibit 2**, Transcript of July 6, 2023 Motion Hearing before Judge Susan Hubbard. Relevant here, the court permitted Robert's federal constitutional claim and state tort claims to go forward, but the court dismissed his state constitutional claim. In its reasoning, the Court incorrectly read footnote 13 of *Bauserman* as "stat[ing] that only the state is liable for constitutional violation damages." *Id.* at 36. Based on this footnote—and without reference to *Bauserman's* central holding—the circuit court explained that Robert must seek this Court's review if he wants a remedy against "lower level governmental entities." *Id.* The court also rejected Robert's request for injunctive relief to the extent he asked the court to enjoin future criminal prosecutions or bar further retaliatory action for his participation in the federal lawsuit. *Id.* at 34.

On a consolidated appeal, the Court of Appeals affirmed the circuit court's dismissal of Robert's state constitutional claim. Like the circuit court, the Court of Appeals read footnote 13 of *Bauserman* as "reaffirm[ing]" that claims for money damages under the 1963 Michigan Constitution are categorically unavailable against non-state government actors. **Exhibit 1** at 9-10. Combined with the fact that Robert may ultimately obtain some relief for his federal claim under Section 1983, the court determined Robert lacks any remedy for the violation of his rights under the Michigan Constitution. *Id.* at 10. The Court of Appeals also affirmed the circuit court's dismissal of Robert's "claims for injunctive . . . relief under the Michigan Constitution." *Id.* at 12.

The Court of Appeals denied Defendants' motion for reconsideration on July 16, 2025. Robert timely files this application for leave to appeal under MCR 7.305(C)(5)(b).

Standard of Review

Just as in *Bauserman*, Robert's case involves reviewing a trial court's decision on an MCR 2.116(C)(8) motion for failure to state a claim for monetary damages under the 1963 Michigan Constitution. This review is de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019); see also *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017) (stating that questions of constitutional law are also reviewed de novo).

An MCR 2.116(C)(8) motion "tests the *legal sufficiency* of a claim based on the factual allegations in the complaint," and the Court "must accept all factual allegations as true, deciding the motion on the pleadings alone." *El-Khalil*, 504 Mich at 159-60. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* at 160.

Argument

In *Bauserman v Unemployment Ins Agency*, this Court held that money 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 we consider adequate." 509 Mich 673, 706; 983 NW2d 855 (2022). But because the defendant in *Bauserman* was a state actor, it "decline[d] to address" whether money damages are specifically available against municipalities or individual officials. *Id.* at 708 n 13.

They are. Because a *Bauserman* claim derives from a court's judicial authority as a state common-law court to enforce *state* constitutional rights, the alleged availability of a *federal* remedy for *federal* constitutional rights is irrelevant. And even if Section 1983 were relevant, it is an inadequate remedy for vindicating state constitutional rights.

Whether some or all government actors may be liable for money damages when they violate Michigan constitutional rights is "a legal principle of major significance to

the state's jurisprudence" and an issue of "significant public interest." MCR 7.305(B)(2), (3). Further, the Court of Appeals' decision, which failed to apply the two specific *Bauserman* exceptions, is "clearly erroneous and will cause material injustice." MCR 7.305(B)(5).

I. The availability of money damages for state constitutional torts committed by all government actors is a legal principle of major significance to Michigan jurisprudence.

In *Smith v Dep't of Pub Health*, four justices agreed that money damages are an available remedy for state constitutional torts in "appropriate cases." 428 Mich 540, 544; 410 NW2d 540 (1987). But over the next thirty-five years, the fractured court could not further delineate when damages are available.

Finally, in *Bauserman*, this Court answered that money damages are available unless (1) the Constitution has delegated enforcement to another branch, or (2) another branch already provides an adequate remedy. 509 Mich at 706. Pointing to its "inherent judicial authority," "separation of powers," and "the language of the Constitution itself," the Court explained that it must provide an adequate remedy for "all constitutional violations, not just those that [it] think[s] are wise or justified." *Id.* at 706-07. But in a footnote, the *Bauserman* Court "decline[d] to address" the question presented in this application: Are money damages available when municipalities or individual officials violate state constitutional rights? *Id.* at 708 n 13.

Looking both to this Court's reasoning in *Bauserman* and the caselaw leading up to it, the answer is straightforward: "Yes, the Michigan Constitution is enforceable against all government actors." Both state and non-state government actors alike are subject to the Michigan Constitution's fundamental principles, and both state and non-state actors can violate them. They should be held accountable the same, irrespective of any federal cause of action.

A. The *Bauserman* decision provides a broader monetary remedy than previously recognized in this Court’s fractured jurisprudence.

Bauserman was a critical decision in this Court’s jurisprudence. After years of fractured jurisprudence, the Court confirmed that money damages are an available remedy for state constitutional torts unless (1) the Constitution has delegated enforcement to another branch, or (2) another branch already provides an adequate remedy. *Id.* at 706. Notably, this Court did not provide a third exception for municipal and individual government defendants, nor did it bar recovery when plaintiffs have *any* alternative remedy—state or federal. It merely recognized that the defendant in that case was a state agency, and thus, it “decline[d] to address” the availability of money damages against non-state government actors. *Id.* at 708 n 13.

To appreciate the significance of *Bauserman* to this Court’s jurisprudence, and why it should apply to all government defendants, we must examine the cases that preceded it.

Start with *Smith v Dep’t of Pub Health*. There, a fractured six-Justice court issued a memorandum opinion with no majority reasoning. “Ultimately, four Justices agreed that governmental immunity was not a defense to allegations of constitutional torts and that damages may be recognized in appropriate cases.” *Bauserman*, 509 Mich at 688 (citing *Smith*, 428 Mich at 544). But they disagreed as to why.

Justice Boyle, joined by Justice Michael Cavanagh, concurred in part, basing her reasoning on *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971): the federal analogue to a *Bauserman* claim. *Smith*, 428 Mich at 644-47 (BOYLE, J., concurring in part). She quoted Justice Harlan’s *Bivens* concurrence, in which he stated that “[t]he question then, is, as I see it, whether compensatory relief is ‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.” *Smith*, 428 Mich at 647, quoting *Bivens*, 403 US at 407 (alteration in original). Following Justice Harlan, she proposed a five-factor test:

(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.

Mays v Governor of Mich, 506 Mich 157, 196; 954 NW2d 139 (2020) (plurality opinion), citing *Smith*, 428 Mich at 648-52 (BOYLE, J., concurring in part) (emphasis added). In her reasoning, she explicitly stated that the fourth factor—“the availability of another remedy”—came from federal caselaw. *Smith*, 428 Mich at 651.

Justices Archer and Levin wrote separate opinions agreeing that money damages are available, but without Justice Boyle’s *Bivens*-based limitations. They argued that the Court should not inquire into “whether the alleged constitutional violation occurred by ‘virtue of a governmental custom or policy’ or whether ‘a damage remedy is proper.’” *Id.* at 652 (LEVIN, J., separate opinion). Accord *id.* at 658 (ARCHER, J., dissenting).

Until *Bauserman*, Michigan courts largely applied Justice Boyle’s concurrence. In *Jones v Powell*, this Court rejected state constitutional claims against Detroit and several of its police officers in a brief decision issued in lieu of granting leave to appeal. 462 Mich 329, 337; 612 NW2d 423 (2000). The Court interpreted Justice Boyle’s test as permitting money damages only “on the basis of the unavailability of *any* other remedy.” *Id.* (emphasis added). And because municipalities and individual officials, unlike the State, are not shielded by the Eleventh Amendment, the plaintiffs “may” be able to obtain relief under Section 1983 or state tort claims. *Id.* Thus, the Court read Justice Boyle’s test as categorically exempting municipalities and individual officials from liability under the Michigan Constitution. *Id.*

In her *Jones* concurrence, Justice Kelly, joined by Justice Michael Cavanagh, recognized that *Smith* never “directly address[ed] whether plaintiffs can recover against individuals for violations of rights protected under the Michigan Constitution.” *Id.* at 337-

38. Rather, “*Smith* addresses whether a cause of action for a state constitutional violation is available against the state; it does not hold that an action is available against the state, alone.” *Id.* at 339. She cautioned that such an expansion of *Smith*—or more specifically, Justice Boyle’s concurrence in *Smith*—fails to account for instances in which the Michigan Constitution provides greater protections than the federal Constitution. *Id.*

More recently, in *Mays*, this Court evenly split (3-3) over the availability of money damages against the State for violating plaintiffs’ right to bodily integrity during the Flint water crisis. 506 Mich at 186 (plurality opinion). Writing for the Court, Justice Bernstein stated that Justice Boyle’s fourth factor, “the availability of an alternative remedy,” “is given considerable weight . . . but it is not dispositive.” *Id.* at 197. Ultimately, three Justices agreed that (at least at the motion for summary disposition stage) the ability to sue the State under Section 1983 was not a sufficient alternative remedy because of the state’s “expansive immunity under federal and state law.” *Id.* at 196-200.

Chief Justice McCormack, joined by Justice Megan Cavanagh, concurred separately. *Id.* at 215-16. She emphasized that the fractured *Smith* opinion only recognized that damages may be recognized in “appropriate cases”; it did not say why. *Id.* at 215-16. Specifically, “it is not at all clear that the relevant holding of *Smith* is at all or exclusively based on *Bivens*.” *Id.* at 215. While questioning the Supreme Court’s recent retreat from *Bivens* claims, see *id.* 221 n 5, Chief Justice McCormack explained that “an analogy to *Bivens*” is only one reason to support money damages. *Id.* at 217. Other reasons include the common law, § 874A of the Second Restatement of Torts, and the Court’s inherent judicial power to vindicate constitutional rights. *Id.* at 217, 222. Finally, she foreshadowed: “If and when the appropriate time (and case) comes along, we can debate whether *Smith* was correctly decided and what rationale we would use to justify the conclusion that monetary damages are available (or not) in constitutional-tort actions.” *Id.* at 217.

That time and case was *Bauserman*. See *Bauserman*, 509 Mich at 691 (“Now, we face the question once again.”). There, the Court affirmed *Smith*’s central holding: Money damages are available for state constitutional torts. *Id.* at 705. But it did not adopt Justice Boyle’s *Bivens*-based rationale “at all.” *Id.* at 698. Instead, the Court’s justification for money damages came from its “inherent judicial authority,” “the separation of powers,” and “the language of the Constitution itself.” *Id.* at 706-07. In other words, *Bivens* is “a discussion of the authority, not the authority itself. The plaintiffs’ cause of action is created by our state Constitution, not by any Court.” *Id.* at 698. And unlike the federal courts, this Court “retains all judicial power not ceded to the federal government.” *Id.* at 701.

Because state common-law courts are not restrained by the same “[p]rinciples of federalism and comity” as federal courts, *Mays*, 506 Mich at 218 (MCCORMACK, C.J., concurring), this Court “part[ed] ways” with Justice Boyle’s five-factor test, including its focus on “the unavailability of *any* other remedy.” *Bauserman*, 509 Mich at 705-07; *Jones*, 462 Mich at 337 (emphasis added). In its place, the Court presumed 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.” *Id.* at 706.

These exceptions make sense: If a *Bauserman* claim derives from a court’s judicial authority as a state common-law court and the text of the 1963 Michigan Constitution, any limitations of that authority should come from the Constitution itself. The limitations should not come from the federal courts’ *Bivens* jurisprudence, nor should they be based on the availability of some *federal* remedy, such as Section 1983. Rather, the only alternative remedies that should suffice are *state*-provided remedies that are “at least as protective of constitutional rights as a judicially recognized remedy.” *Id.* at 705. Only in these cases would the judicial remedy be truly duplicative. See *id.*

After *Bauserman*, a plaintiff's state constitutional rights are not dependent on the availability of a Section 1983 remedy. Though this Court never affirmatively stated in *Smith* that municipalities and individual officials are categorically exempt from liability for state constitutional violations, see *Jones*, 462 Mich at 339 (KELLY, J., concurring), it should grant this application to clarify that all government actors—state, municipal, and individual—are subject to the rights and correlative remedies within the Michigan Constitution.

B. A *Bauserman* claim should be equally available against municipalities and individual officials.

In a footnote, the *Bauserman* Court “decline[d] to address” the question presented in this application: Are money damages available when municipalities or individual officials violate state constitutional rights? 509 Mich at 708 n 13. Now that the question is before the Court, it should answer: “Yes, the Michigan Constitution is enforceable against *all* government actors.” And for two reasons: (1) Section 1983—a federal remedy for violations of federal constitutional rights—is irrelevant to state remedies for violations of state constitutional rights, and (2) even if Section 1983 were relevant, the differences between litigating a Section 1983 claim and a *Bauserman* claim make it an inadequate cause of action for obtaining relief.

1. Section 1983 is irrelevant to *Bauserman* claims.

First, Section 1983 is a *federal* cause of action for violations of the *federal* Constitution. It should not determine *state* causes of action under the *state* Constitution. See *Phillips v Youth Dev Program, Inc*, 390 Mass 652, 658 n 4; 459 NE2d 433 (1983) (“It seems uncontroverted that 42 U.S.C. § 1983 does not provide a statutory vehicle for the enforcement of State constitutional rights.”); *Binette v Sabo*, 244 Conn 23, 44 n 18; 710 A2d 688 (1998) (“The federal statutory remedy available under 42 U.S.C. § 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.”). This Court—not the

state Legislature, the United States Congress, nor the United States Supreme Court— maintains the primary responsibility of interpreting and enforcing the Michigan Constitution. *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*, 506 Mich at 215 (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, and it does so independently of the Legislature's action or inaction in a given area.”). This follows basic principles of separation of powers and federalism. See *Bauserman*, 509 Mich at 687 (“The recognition and redress of constitutional violations are quintessentially judicial functions, required of us by the Separation of Powers Clause.”). Otherwise, Michiganders’ state constitutional rights at a given point in time are subject to the whims of federal legislators and federal judges.

As the *Bauserman* Court explained, Michigan constitutional rights are not subject to such variability. It is not the job of the courts, nor the state Legislature, to “weigh[] policy considerations” and “pick and choose” which constitutional violations are enforceable. *Bauserman*, 509 Mich at 704. This includes evaluating the “propriety” of a state constitutional remedy when a federal cause of action *might* prove to afford some relief. See *id.* at 706-07, quoting *Smith*, 428 Mich at 650 (BOYLE, J., concurring). Those policy choices were made by the drafters of the Michigan Constitution. *Bauserman*, 509 Mich at 704. This Court alone is charged with enforcing those choices. See *id.* at 698; see also *Mays*, 506 Mich at 217 (MCCORMACK, C.J., concurring) (“[W]e are separate sovereigns. We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest Court in the land.”).

Because federal remedies are irrelevant to state constitutional rights, there is no reason to exempt municipalities and individual officials from liability for state constitutional torts.

2. Even if Section 1983 were relevant to *Bauserman* claims, it is an inadequate procedural vehicle for vindicating state constitutional rights.

Second, even if Section 1983 were relevant, it is inadequate. The Michigan Constitution may provide greater protection than the federal Constitution. And Section 1983 litigation comes with distinctive procedural obstacles that make it inadequate for protecting state constitutional rights. Under our federal system, this Court has an independent duty to give meaning to the Michigan Constitution's rights and provide meaningful relief for their violation.

a. The Michigan Constitution may provide greater protection than the United States Constitution.

To start, the 1963 Michigan Constitution may provide greater protection to constitutional rights than the federal Constitution. *Woodland v Mich Citizens Lobby*, 423 Mich 188, 202; 378 NW2d 337 (1985) ("That the state constitution may afford greater protections than the federal constitution is also well established and is based on fundamental constitutional doctrine and principles of federalism."). See also *Jones*, 462 Mich at 339 (KELLY, J., concurring) ("The existence of a federal cause of action does not necessarily protect an individual's state constitutional rights."). The Michigan Constitution moved its Declaration of Rights to the first article because its fundamental liberties "set[] up the basic legal guideposts for [its] implementation and enforcement." *Bauserman*, 509 Mich at 691, quoting 1 Official Record, Constitutional Convention 1961, p. 466. It is this Court's duty to examine the Michigan Constitution's text and history independently and decide what it means. *Bauserman*, 509 Mich at 692.

As applied to Robert, Article 1, § 5 of Michigan's 1963 Constitution is likely more protective of his speech than the First Amendment. See *Woodland*, 423 Mich at 188 ("[I]t is clear that the Michigan Constitution may afford broader free expression and petition protections against government infringements."); *People v Neumayer*, 405 Mich 341, 364; 275 NW2d 230 (1979) ("[I]n certain instances, the Michigan Constitution may confer

broader protection upon certain types of expression[.]”). See generally *AFT Mich v Michigan*, 497 Mich 197, 213 n 6; 866 NW2d 782 (2015) (“Textual differences, state constitutional and common-law history, state law preexisting the constitutional provision at issue, structural differences between the Michigan and United States Constitutions, or matters of special state interest may compel us to conclude that the state Constitution offers protections distinct from those of the federal Constitution”). Article I, § 5 is more detailed than the First Amendment: “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.” See US Const amend. I (“Congress shall make no law . . . abridging the freedom of speech[.]”); see also *Amalgamated Clothing Workers of Am, AFL-CIO v Wonderland Shopping Ctr, Inc*, 370 Mich 547, 563 & n 1; 122 NW2d 785 (1963) (describing 1963 Const art 1, § 5 as “more broadly worded” than the First Amendment and further describing art 1, § 5 of the 1963 Michigan Constitution as “more liberal” than its counterpart in art II, § 4 of the 1908 Michigan Constitution); *Corum v Univ of NC Through Bd of Governors*, 330 NC 761, 783; 413 SE2d 276 (1992) (“[North Carolina’s] Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.”). The verb “restrain” is not found in the First Amendment. Accord *Corum*, 330 NC at 781 (“The words ‘shall never be restrained’ are a direct personal guarantee of each citizen’s right of freedom of speech.”). Nor does the First Amendment specify that freedom of speech incorporates “all subjects,” whether written or published. Under constitutional interpretation principles, every one of these words should be given meaning. See **Exhibit 3**, *People v Johnson*, unpublished opinion of the Court of Appeals, issued December 14, 2023 (Docket No. 363774), 2023 WL 8699213, at *2-5 (MALDONADO, J., concurring) (reviewing Michigan caselaw and providing similar arguments).

Beyond the textual differences, this Court remains free to interpret the state Constitution and its remedies differently than how the United States Supreme Court

interprets Section 1983's remedies for violations of the First Amendment. As it relates to Robert's case, Section 1983 suits for First Amendment retaliation prosecution claims are ordinarily subject to a probable cause bar under *Hartman v Moore*, 547 US 250; 126 S Ct 1695; 164 L Ed 2d 441 (2006). This bar requires plaintiffs to show the absence of probable cause as part of their prima facie case, even for obviously pretextual, retaliatory prosecutions. See *id.* at 261, 265. Defendants have argued below that *Hartman's* probable cause bar prevents Robert from obtaining his relief for his *federal* § 1983 claim. See Defs. Br. on Appeal at 19. It is at least an open question whether Michigan courts would adopt a similar probable cause bar for a retaliation prosecution claim under the Michigan Constitution, especially when *Hartman* involved the sort of *Bivens* claim federal courts now disfavor.

Because Robert's state constitutional claim was summarily dismissed based on the identity of the government defendants, he has not been able to flesh out the differences between his state and federal retaliation claims. But the general principle that the Michigan Constitution may be more protective than its federal counterpart counsels against a categorical exemption based on Section 1983. Other state high courts agree. See, e.g., *Binette*, 244 Conn at 44 n 18 (applying the reasoning in *Bivens* and determining that Section 1983 does not impact plaintiff's state constitutional claim in part because the state constitutional provisions provided greater protection than the Fourth Amendment); *Zullo v State*, 209 Vt 298, 325; 2019 VT 1; 205 A3d 466 (2019) ("[T]he federal statutory remedy under 42 U.S.C. § 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).

b. Section 1983 litigation involves unique procedural obstacles that do not apply to *Bauserman* claims.

Furthermore, Section 1983 is inadequate because of the distinctive procedural obstacles that regularly bar federal relief. Chief Justice McCormack summarized them in her *Mays* concurrence: “Examples . . . include: the existence and scope of absolute and qualified individual immunities; the ‘official policy or custom’ requirement for local government liability; and the various ‘procedural’ defenses the Court has applied to section 1983, such as statutes of limitations, preclusion and abstention.” 506 Mich at 218 n 4, quoting Nahmod, *State Constitutional Torts: Deshaney, Reverse-Federalism and Community*, 26 Rutgers LJ 949, 950 (1995). These hurdles derive from a combination of early federal common law, “[p]rinciples of federalism and comity,” *Mays*, 506 Mich at 218 (McCORMACK, C.J., concurring), other judicial policy considerations, and the text of Section 1983 itself. See Gildin, *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, 916 (2011). Regardless of their validity, these hurdles to Section 1983 liability make it an inadequate substitute for remedies under state constitutions.

Claims under the Michigan Constitution do not (and should not) face these same hurdles to relief. As this Court explained in *Bauserman*, these claims come directly from the state Constitution itself, not *Bivens* and the federal common law nor Section 1983. See *Bauserman*, 509 Mich at 698, 701. Thus, the Court declined to import the *Monell* liability theory from Section 1983 jurisprudence, which artificially limits liability in instances when the government “is acting pursuant to a custom or policy.” *Bauserman*, 509 Mich at 707. The Court explained that “[w]hatever the merit of the policy concerns” of Congress (in enacting Section 1983) and the United States Supreme Court (in deciding *Monell v Dep’t of Soc Servs of the City of New York*, 436 US 658; 98 S Ct 2188; 56 L Ed 2d 611 (1978)),

they are irrelevant when interpreting the Michigan Constitution—the supreme law of the State. See *Bauserman*, 509 Mich at 708.

The *Bauserman* Court’s reasoning follows this Court’s prior refusals to immunize government actors for violations of the 1963 Michigan Constitution. In *Buckeye Union Fire Ins Co v State*, this Court denied sovereign immunity to the State after its nuisance property caused fire damage to neighboring properties. 383 Mich 630, 632, 644; 178 NW2d 476 (1970). In its reasoning, the Court stated that government immunities are subject “to applicable and overriding provisions of the State Constitution.” *Id.* at 641. That is, “the legislature does not have an unlimited discretion in shaping the pattern of the State’s immunity from liability.” *Id.* And because the Michigan Constitution’s Takings Clause prohibits taking private property without just compensation, sovereign immunity was unavailable. *Id.* at 641, 645.

Six years later, this Court abrogated common-law sovereign immunity. *Pittman v City of Taylor*, 398 Mich 41, 49; 247 NW2d 512 (1976). There, this Court elaborated: “The distinction present in our case law between the immunity of the state and that of other governmental units seems particularly anachronistic in today’s society.” *Id.* at 48. And the Court confirmed: “The reasons given by this Court for abolishing the common-law defense of governmental immunity for municipal corporations are equally relevant in this situation.” *Id.*

More recently, Justice Boyle explained in her *Smith* concurrence that both state common law and statutory immunities should not apply to state constitutional torts. 428 Mich at 640. See also *Mays*, 506 Mich at 188-89 (plurality opinion) (calling Justice Boyle’s discussion of immunities “persuasive”). In support, she explained that “[t]he Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount.” *Smith*, 428 Mich at 640. Namely: “It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform.” *Id.*

With these procedural obstacles in mind, it cannot be said that Section 1983 is “at least as protective of [Michigan] constitutional rights.” *Bauserman*, 509 Mich at 705. Like other state high courts, Michigan provides a remedy directly under its Constitution without the same limitations that plague federal claims asserted under Section 1983. See, e.g., *Corum*, 330 NC at 786 (“[W]hen there is a clash between these constitutional rights and sovereign immunity [or other common law defenses], the constitutional rights must prevail.”); *Zullo*, 209 Vt at 319 (“[W]e conclude that the judge-made doctrine does not supersede the right of the people to seek redress from the State for violations of fundamental constitutional rights.”); *Mack v Williams*, 138 Nev 854, 871-72; 822 P3d 434 (2022) (refusing to import federal qualified immunity doctrine for claims directly under the Nevada Constitution); *Dorwart v Caraway*, 312 Mont. 1, 21; 2002 MT 240; 58 P3d 128 (2002) (refusing to import federal qualified immunity doctrine for claims directly under the Montana Constitution); *Espina v Jackson*, 442 Md 311, 345; 112 A3d 442 (2015) (reaffirming that Maryland courts have not imported the *Monell* policy-or-custom requirement for state constitutional claims); *Brown v State*, 89 NY2d 172, 193-94; 674 NW2d 1129 (1996) (refusing to import the *Monell* policy-or-custom requirement for claims directly under the New York Constitution). At minimum, a finding that Robert’s Section 1983 claim is adequate for his state constitutional claim is particularly inappropriate at the motion for summary disposition stage. See MCR 2.203 (joinder of claims); see also *Widgeon v Eastern Shore Hosp Ctr*, 300 Md 520, 535; 479 A2d 921 (1984) (refusing to dismiss state constitutional claim given the availability of non-constitutional state tort claims and Section 1983 claims and reasoning that “where several remedies are requested, an election is not required prior to final judgment”); *Corum*, 330 NC at 789 (permitting both Section 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”).

* * *

Whether the remedies under the 1963 Michigan Constitution apply to state and non-state government actors alike is significant to this Court’s jurisprudence. MCR 7.305(B)(3). In *Bauserman*, this Court confirmed that its “inherent judicial authority,” “separation of powers,” and “the language of the Constitution itself” demand an adequate remedy for “all constitutional violations, not just those that [it] think[s] are wise or justified.” *Id.* at 706-07. But it declined to specifically answer if its reasoning applies to municipalities and individual officials. *Id.* at 708 n 13.

Now, it should answer: “Yes.” If the Constitution demands a remedy for “all constitutional violations,” the Court must enforce its rights against *all* government actors.² See, e.g., *Craig ex rel Craig v New Hanover Co Bd of Ed*, 363 NC 334, 342; 678 SE2d 351 (2009) (“[I]ndividuals may seek to redress *all* constitutional violations, in keeping with the ‘fundamental purpose’ of the Declaration of Rights to ‘ensure that the violation of [constitutional] rights is *never* permitted by anyone who might be invested under the Constitution with the powers of the State.’”), quoting *Corum*, 330 NC at 782-83 (first emphasis added).

II. The ability to seek money damages for state constitutional torts is an issue of significant public interest.

Whether the fundamental rights guaranteed by the 1963 Michigan Constitution are enforceable against government actors at all levels is plainly an issue of “significant

² The Court of Appeals’ opinion is the first published state court decision limiting *Bauserman* to state actors. But it is far from the only decision. See, e.g., **Exhibit 4**, *Duncan v St Clair Co*, unpublished opinion of the Court of Appeals, issued October 16, 2024 (Docket No. 367903), 2024 WL 4511061, at *4 & n 1; **Exhibit 5**, *Searcy v Wayne Co*, unpublished opinion of the Court of Appeals, issued May 30, 2024 (Docket No. 365111), 2024 WL 2793464, at *10-11; *Hague v Kent Co*, No. 1:24-CV-9, 2024 WL 4116459, at *11 (WD Mich, September 9, 2024); *Wineries of Old Mission Peninsula Ass’n v Peninsula Twp*, No. 1:20-CV-1008, 2024 WL 1152521, at *7 (WD Mich, February 16, 2024). But see **Exhibit 6**, *QC by Coker v Lukes*, unpublished opinion of the Court of Appeals, issued November 12, 2024 (Docket No. 366791), 2024 WL 4757824, at *8 (reading footnote 13 in *Bauserman* as the Court declining to answer whether non-state government defendants can be liable for state constitutional torts).

public interest.” See MCR 7.305(B)(2).³ This is especially true because local officials are the government actors most likely to interact with Michiganders. Cf. *Brown*, 89 NY2d at 192 (“[I]t is on the local level that most law enforcement functions are performed and the greatest danger of official misconduct exists.”). As the *Bauserman* Court recognized: “If our Constitution is to function, then the fundamental rights it guarantees must be enforceable. Our basic rights cannot be mere ethereal hopes if they are to serve as the bedrock of our government.” 509 Mich at 692.

But more than that, it is in the public interest that this Court enforce state constitutional interests because of the Supreme Court’s recent retreat from *Bivens* claims, see *Bauserman* 509 Mich at 698; see also *Egbert v Boule*, 596 US 482, 491; 142 S Ct 1793; 213 L Ed 2d 54 (2022) (“[W]e have emphasized that recognizing a cause of action under *Bivens* is ‘a disfavored judicial activity.’”), quoting *Ziglar v Abbasi*, 582 US 120, 135; 137 S Ct 1843; 198 L Ed 2d 290 (2017), along with its continued reliance on complex procedural obstacles to Section 1983 liability. See pp. 18-20, earlier. Unlike federal courts, this Court “retains all judicial power not ceded to the federal government,” *Bauserman*, 509 Mich at 701, including its ability to provide money damages for state constitutional torts. *Id.* at 687.

As the federal courts retreat from remedying federal constitutional violations, it is even more important that this Court zealously guard state constitutional rights. Justice Brennan advised state courts to do just this during the Burger Court era, when the United

³ MCR 7.305(B)(2) requires that Robert’s case is “against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer’s official capacity.” Defendant Wayne County is a political subdivision of Michigan. See Const 1963 art. 7, § 1 (providing counties with the “powers and immunities provided by law”); MCL 691.1401(e) (defining “political subdivision” to include counties); *Black’s Law Dictionary* (12th ed) (defining “political subdivision” as “[a] division of a state that exists primarily to discharge some function of local government”). And Defendants Doherty and Stella are officers of that subdivision sued in their official and individual capacities. See Compl. ¶¶ 15-16 (alleging that the individual Defendants are sued in both their official and individual capacities).

States Supreme Court began walking back its recognition of affirmative Section 1983 remedies:

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, 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). See also *Am Legion v Am Humanist Ass'n*, 588 US 29, 72; 139 S Ct 2067; 204 L Ed 2d 452 (2019) (KAVANAUGH, J., concurring) (citing Sutton, *51 Imperfect Solutions: State Constitutions and the Making of American Constitutional Law* (New York: Oxford Univ Press 2018)). In today's era, plaintiffs are looking to state courts again. And recently, other state high courts are heeding the call. E.g., *Mack*, 138 Nev at 865, 869-72 (recognizing a direct cause of action under the Nevada Constitution with citations to *Bauserman* throughout).

Finally, enforcing state constitutional rights against all government actors serves the public interest in another way: the independent development of state constitutional law. This Court is free to interpret its state Constitution differently than the federal Constitution. See *id.* at 862. By confirming that *Bauserman* remedies are available against municipalities and individual officials, Michigan courts can address the question that comes next (and the question Robert has not yet been able to fully brief): How is a plaintiff's state constitutional claim different on the merits? Taking Robert's case as an example, should his case proceed, Michigan state courts can ask: Is Article 1 § 5 of Michigan's 1963 Constitution more protective of free speech than the federal Constitution and Section 1983? Should we import a federal no-probable-cause requirement in retaliatory prosecution cases, like in *Hartman v Moore*? If the County is liable, how should we calculate damages?

The public deserves to know (1) whether their Michigan constitutional rights are enforceable, and if so, (2) what those rights actually mean as compared to the federal Constitution. By enforcing state constitutional torts against municipalities and individual officials, these issues of public interest can be addressed.

III. The Court of Appeals' decision conflicts with *Bauserman* and will cause material injustice.

Contrary to the lower courts' contentions, this Court does not need to "make new law" or "extend *Bauserman*" beyond its central holding. See **Exhibit 2** at 36; **Exhibit 1** at 10. Rather, a straightforward application of the *Bauserman* test results in a ruling for Robert. This Court should hold that the Court of Appeals clearly erred in concluding that *Bauserman* remedies are categorically unavailable against non-state government actors. See **Exhibit 1** at 9-10. Otherwise, the Court of Appeals' opinion will cause material injustice to plaintiffs like Robert, who are denied relief based on the identity of the government actor and not the legality of the government action. See MCR 7.305(B)(5).

Bauserman's central holding could not be clearer. 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." 509 Mich at 706. Because this holding is rooted in this Court's "inherent judicial authority," "separation of powers," and "the language of the Constitution itself," the Court explicitly "part[ed] ways" with Justice Boyle's five-factor test, including its focus on "the unavailability of *any* other remedy." *Bauserman*, 509 US at 705-07; *Jones*, 462 Mich at 337 (emphasis added). The *Bauserman* Court did not provide a third exception for municipalities and individual officials, nor did it bar recovery when plaintiffs have *any* alternative remedy—state or federal. It merely recognized that the defendant in that case was a state agency, and thus, it "decline[d] to address" the availability of money damages

against non-state government actors because that was not at issue in that case. *Id.* at 708 n 13.

Applying the *Bauserman* test to Robert, (1) nothing in 1963 Const art 1, §§ 3 and 5, delegates enforcement to another branch, and (2) the state Legislature has not provided an adequate statutory remedy “at least as protective” of his retrospective harms to his state constitutional rights.⁴ See *id.* at 705. That’s the analysis.

The Court of Appeals’ opinion did not touch on the *Bauserman* opinion’s central holding nor its reasoning. It did not reference either the Michigan Constitution’s text or a remedy provided by the Michigan Legislature. Instead, the court misread footnote 13 of the 31-page opinion—which specifically stated the Court “decline[d] to address” whether non-state government actors are liable for state constitutional torts—as affirmatively answering: “No, they are categorically immune from liability.” See **Exhibit 1** at 9-10; quoting *Bauserman*, 509 Mich at 708 n 13. Then, the Court of Appeals minimized the significance of *Bauserman* by labeling it a mere “reaffirm[ation of] the limited scope of *Smith*.” **Exhibit 1** at 10.

This mistake parallels the one made in *Jones v Powell*, in which the Court rejected state constitutional claims as “inapplicable in actions against a municipality or an individual defendant.” 462 Mich at 337. Concurring, Justice Kelly correctly identified that *Smith* never “directly address[ed] whether plaintiffs can recover against individuals for

⁴ Robert’s intentional tort claims are insufficient for the specific, retrospective harms to his state constitutional rights. See *Bauserman*, 509 Mich at 696 (“The purpose of codifications of rights in the federal Constitution, our Constitution, and the constitutions of other states is to protect against these unique and dangerous encroachments.”), citing *Corum*, 330 NC at 782-83; *Dorwart*, 312 Mont at 16 (“Common law causes of action intended to regulate relationships among and between individuals are not adequate to redress the type of damage caused by the invasion of constitutional rights.”); *Mack*, 138 Nev at 868 (rejecting argument that state torts claims were sufficient because they “ultimately protect[] and serve[] different interests than such constitutional guarantees.”). Nor is injunctive relief from future criminal prosecutions sufficient. The Court of Appeals dismissed Robert’s “claims for injunctive relief ... under the Michigan Constitution,” **Exhibit 1** at 12. And regardless, the six-year statute of limitations for his criminal charge, receiving and concealing stolen property, has recently run. See MCL §§ 750.535, 767.24(10); Compl. Ex. 3 (listing date of offense as July 24th and July 25th, 2019).

violations of rights protected under the Michigan Constitution.” *Id.* at 337-38 (KELLY, J., concurring). Rather, “*Smith* addresses whether a cause of action for a state constitutional violation is available against the state; it does not hold that an action is available against the state, alone.” *Id.* at 339.

But the *Jones* opinion was understandable, because the only authority on the matter was *Smith*, a memorandum opinion with no majority reasoning. Without additional guidance, this Court in *Jones* turned to Justice Boyle’s concurrence and her five-factor test. Based in *Bivens* jurisprudence, Justice Boyle’s test weighed policy concerns, including “the availability of another remedy.” *Smith*, 428 Mich at 651 (BOYLE, J., concurring). Treating this fourth factor as a necessary element (rather than as one of five factors), the *Jones* Court reasoned that it would only recognize liability for state constitutional torts “on the basis of the unavailability of any other remedy.” *Jones*, 462 Mich at 337; but cf. *Mays*, 506 Mich at 197 (plurality opinion) (“The existence of alternative remedies is given considerable weight. . . but it is not dispositive.”).

Unlike this Court in *Jones*, the Court of Appeals had “further guidance” from *Bauserman*. See *Bauserman*, 509 Mich at 685. And that guidance did away with Justice Boyle’s five-factor test and the policy considerations that drove the *Jones* opinion. *Id.* at 705-06. In its place, the Court left only “two specific circumstances” for rejecting a cause of action, *id.* at 706—neither of which mentions the availability of a remedy provided by the *federal* Congress.

But the Court of Appeals ignored this additional guidance, and it ignored *Bauserman*’s holding altogether. It kicked Robert’s claim at the motion for summary disposition stage precisely because he “has a *potential* avenue for relief under 42 USC 1983, *assuming* he can properly plead and prove his claims.” **Exhibit 1** at 10 (emphasis added).

This clear error conflicts with *Bauserman*’s unambiguous language and will cause material injustice. See MCR 7.305(5)(b). Without this Court’s intervention, a plaintiff’s

ability to obtain relief for state constitutional violations will depend not on the injury or the right at issue, but on the identity of the violator. If all Michigan government actors are subject to the Michigan Constitution,⁵ then all Michigan government actors should be held accountable for violating its fundamental principles.

Relief Sought

This Court should grant Robert’s application for leave to appeal, and ultimately, reverse the Court of Appeals’ holding that municipalities and individual officials are categorically exempt from liability for state constitutional violations. See MCR 7.305(I). This additional guidance will ensure that the 1963 Michigan Constitution and its Declaration of Rights limit the power of *all* Michigan government actors—and in turn—“afford a remedy for *all* constitutional violations.” *Bauserman*, 509 Mich at 707.

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⁵ See Const 1963 art. 11, § 1 (requiring all public officers take an oath to support the Michigan Constitution); Const 1963 art. 7, §§ 2, 22 (authorizing municipalities to enact ordinances “subject to the constitution”).

Certificate of Word Count

Plaintiff-Appellant's Application for Leave to Appeal complies with the word limits of MCR 7.212(B)(1) because it contains 8,349 words, as determined by Microsoft Word, excluding items exempt by MCR 7.212(B)(2).

Certificate of Service

I hereby certify that on August 27, 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