STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT REEVES

Plaintiff-Appellant,

v.

COUNTY OF WAYNE, ET AL.,

Defendants-Appellees.

Supreme Court No. 168969

Court of Appeals No. 367444 & 367447

Wayne County CC No. 23-003148-CZ

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BRIEF OF *AMICUS-CURIAE* BRENNAN CENTER FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT ROBERT REEVES'

DATE: June 4, 2026

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Statement of Interest of *Amici Curiae*

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[1] This brief does not purport to convey the position of New York University School of Law.

Introduction

In *Bauserman v Unemployment Ins Agency*, this Court declared that "[i]f our Constitution is to function, then the fundamental rights it guarantees must be enforceable. . . . This Court has not only the authority, but also the primary responsibility of interpreting and enforcing our Constitution." 509 Mich 673, 692; 983 NW2d 855 (2022). Accordingly, "[w]hen 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, [this Court] will recognize and enforce a monetary-damages remedy." *Id.* at 711.

In this case, plaintiff-appellant seeks damages from a county and local officials for violations of his rights to free speech and to petition the government under Michigan's Declaration of Rights. See Pl's Appl Leave Appeal, Reeves v Wayne Co, Docket No. 80. Despite no finding that Michigan's Constitution delegates enforcement of those rights to another branch of government or that the legislature has provided an adequate alternate means to remedy the alleged violations, the court below affirmed dismissal of plaintiff-appellant's state constitutional claims because federal constitutional claims via 42 USC 1983 offered "a potential avenue for relief." *Reeves v Wayne Co*, opinion of the Court of Appeals, issued June 9, 2025 (Docket No. 367444), 2025 WL 1635273, at *8.

Michigan's Constitution is a separate source of rights with "significant independent meaning from the U.S. Constitution." Hon. Young, Jr. *A Judicial Traditionalist Confronts Unique Questions of State Constitutional Law Adjudication*, 76 Alb L Rev 1947, 1947 (2013). But by conflating federal constitutional rights with Michigan constitutional rights, the court below shirked the Michigan judiciary's duty to enforce Michigan's independent protections. Michigan citizens retain the protections of their Declaration of Rights at all times, including when the federal Constitution provides overlapping protections.

This Court should reverse the decision below because conditioning the recognition of state constitutional claims on the absence of federal remedies is inconsistent with *Bauserman* and offends basic precepts of state constitutional law. In *Bauserman*, this Court held that when Michigan judges assess whether alternate remedies preclude authorizing a direct action under Michigan's Declaration of Rights, they look to Michigan's Constitution and Michigan law. See *Bauserman*, 509 Mich at 681 (recognizing the judiciary's duty to authorize monetary damages to remedy state constitutional torts committed by the state "unless the Constitution has specifically

delegated enforcement of the constitutional right at issue to the Legislature or the Legislature has enacted an adequate remedy for the constitutional violation"). Such an approach is consistent with the federalist structure of our democracy, in which state constitutions offer a "double source of protection for the rights of our citizens." Hon. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 503 (1977). Double protection is "[o]ne of the strengths of our federal system"—not a reason to dismiss state constitutional claims. *Id.* See generally Hon. Sutton *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), p 8 ("In this country, state and local laws face two sets of constitutional constraints: those under the U.S. Constitution and those under the relevant state constitution.").

In Michigan, double protection is not simply a theoretical principle of federalism. In concrete ways, Michigan courts provide broader and more accessible redress for state constitutional violations than they or federal courts do for federal constitutional violations. First, this Court has found that multiple provisions of Michigan's Declaration of Rights provide broader protections than the federal constitution—and it may continue to do so in future cases. Second, because Michigan courts are not constrained by the responsibility of setting national precedent that binds diverse states with different populations and government structures, they are freer to exercise more comprehensive remedial powers than federal courts. Third, Michigan citizens face fewer procedural barriers when vindicating state constitutional rights than they do when seeking redress for federal constitutional violations. Should this court fail to correct the decision below, Michigan citizens will be deprived of the full extent of Michigan's constitutional protections.

Requiring Michigan courts to adjudicate state constitutional claims for damages against local government actors or entities even when a federal remedy might also lie is both workable and consistent with prevailing state practice. For decades, many states have permitted state constitutional damages actions against local officials notwithstanding the fact that analogous federal claims might also be available against local officials. See Section III.[2] To our knowledge,

[2] To the extent there is a trend in enforcement of damages against local officials for state constitutional violations, it is toward greater access to state damages remedies. See Gildin, State Court Report, *Legislative Efforts to Abolish Qualified Immunity Yield Mixed Results*, State Court Report <https://statecourtreport.org/our-work/analysis-opinion/legislative-efforts-abolish-qualified-immunity-yield-mixed-results> (posted May 30, 2024) (accessed October 29, 2025) (acknowledging new pathways to obtain damages for violations of state constitutional rights by

no states that have permitted such actions have reversed course because of overwhelmed judicial dockets or depleted legislative coffers.[3] As Justice Welch acknowledged in *Bauserman*, "constitutional-tort claims are, and will continue to be, rare." 509 Mich at 724 (WELCH, J., concurring).

For these reasons, this Court should clarify monetary damages are available to redress violations of Michigan's Declaration of Rights committed by government actors, including local officers and entities, whether or not remedies exist for parallel violations of federal constitutional rights.

Argument

I. State Constitutional Protections Require State Remedies

Our "state and federal founders saw federalism and divided government as the first bulwark in rights protection and assumed that the States and state courts would play a significant role, even if not an exclusive role, in that effort." Hon. Sutton, *The Enduring Salience of State Constitutional Law*, 70 Rutgers U L Rev 791, 795 (2018). Prior to the enactment of the Fourteenth Amendment and incorporation of the Bill of Rights against the states, state constitutions provided "the primary protections for individual rights." Hon. Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz St L J 771, 773 (2021). Post-incorporation, "the conceptual genius of federalism remains an integral component of our system of government." Hon. Connors & Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 Me L Rev 1, 11-12 (2023). *See State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev at 491 ("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.").

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local officials in New Mexico, Colorado, and Connecticut and abrogation of certain immunities impeding access to damages in Massachusetts and California).

[3] We have identified only one state supreme court that has reversed prior precedent authorizing actions for damages under a state constitution. See *Burnett v Smith*, 990 NW2d 289, 290 (Iowa, 2023) (overruling *Godfrey v State*, 898 NW2d 844 (Iowa 2017) (holding that state officials can be sued directly under Iowa's Constitution for damages)). While in *Burnett* the Iowa Supreme Court acknowledged that the Iowa legislature responded to *Godfrey* by passing legislation adding "a qualified-immunity defense and a heightened pleading standard for a plaintiff alleging a violation of law by a state or local official," the Court determined *Godfrey* was wrongly decided largely because the *Godfrey* court "misinterpreted the relevant constitutional text, misread Iowa precedent, and overlooked important constitutional history." *Burnett*, 990 NW2d at 298, 306.

The court below treated Michigan's Constitution not as a document of independent force but instead as a supplement to the federal Constitution, relevant only to rights not addressed by the federal Constitution. But like all state constitutions, Michigan's Constitution protects Michigan citizens at all times, including when federal remedies may potentially be available. Michigan's Constitution "has long contained a distinct Bill or Declaration of Rights." *Bauserman*, 509 Mich at 714 (WELCH, J., concurring) (citing Const 1963, art 1; Const 1908, art 2; Const 1835, art 1). Most of these provisions, including the rights at issue in this case, predate the Fourteenth Amendment and incorporation of the Bill of Rights. Compare Const 1835, art 1, § 20 with Const 1963, art 1, § 3. To relieve Michigan courts of their "primary responsibility of interpreting and enforcing [Michigan's] Constitution" because of a potential federal remedy for related federal constitutional claims flattens our federalist system of "double protection" into a single layer. *Bauserman*, 509 Mich at 692. *See State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev at 491 ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution.").

These principles apply just as forcefully when it comes to enforcing state constitutional rights against localities and local officials. Localities must abide by Michigan's Constitution, as "[l]ocal governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution." *Hanselman v Killeen*, 419 Mich 168, 187; 351 NW2d 544 (1984) (citing *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972); *Mason Co Civic Research Council v Mason Co*, 343 Mich 313; 72 NW2d 292 (1955)). Similarly, state and local officials alike are required to take an oath to abide by both the United States Constitution and Michigan's Constitution before assuming office. *See* MCL 15.151 (oath required for state officers); MCL 168.204 (oath required for county officers); MCL 168.363 (oath required for township officers). That oath does not prioritize the federal Constitution. *See* Const 1963, art 11, § 1 ("I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state . . . ."); *see also People v Tanner*, 496 Mich 199, 221-222; 853 NW2d 653 (2014) ("While members of this Court take an oath to uphold the United States Constitution, we also take an oath to uphold the Michigan Constitution, which is the enduring expression of the will of 'we, the people' of this state. In light of these separate oaths of office, we need not, and cannot, defer to the United States Supreme Court in giving meaning to the latter charter.") (citations omitted).

By conditioning access to monetary damages for local violations of Michigan's Constitution on the absence of potential federal remedies, the court below abandoned *Bauserman's* holding that Michigan citizens look to Michigan courts to vindicate Michigan constitutional rights when Michigan's political branches have not provided an adequate remedy. In doing so, the court deprived Michiganders of the independent protections of their constitution.

II. Federal Remedies Inadequately Redress Violations of Michigan's Declaration of Rights Committed by Local Officers and Municipalities

Although state and federal constitutions contain many overlapping provisions, federal remedies will often inadequately redress state constitutional violations, even when state and federal rights appear to be analogues.

First, as this Court has acknowledged, state constitutional rights often offer greater protection than federal constitutional rights. This remains the case even when state courts have previously interpreted certain state constitutional rights in lockstep with the federal constitution because federal courts can weaken or abolish existing constitutional protections.

Second, state courts are freer to exercise broad remedial powers than federal courts. This renders federal constitutional remedies inherently less protective than state constitutional remedies.

Third, federal litigants seeking federal constitutional remedies via 42 USC 1983 face a variety of judicially imposed barriers to relief rooted in the intent of the 1871 Congress that enacted the statute, including concerns about avoiding excessive federal intrusion into local affairs. These rationales do not apply when Michigan judges are enforcing Michigan's Declaration of Rights.

A. Michigan Constitutional Rights Often Afford Broader Protections Than Analogous Federal Constitutional Rights

Contrary to the reasoning of the court below, the fact that the federal Constitution affords a second layer of protection for Michigan citizens does not mean that federal remedies adequately redress state constitutional violations.

One reason for this is that state constitutional rights are frequently more protective than analogous federal rights. *See 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 . . . well established and is based on fundamental constitutional doctrine and principles of federalism."). *See generally* Gardner, *State Constitutional Rights As Resistance to National*

Power: Toward A Functional Theory of State Constitutions, 91 Geo L J 1003, 1031-1032 (2003) ("[S]tate supreme courts have decided hundreds of cases in which they interpret the state constitution to provide more generous protection for individual liberties than similar provisions of the U.S. Constitution.").[4] This Court has construed multiple provisions in its Declaration of Rights more broadly than their federal cognates. See, e.g., *Jackson v Southfield Neighborhood Revitalization Initiative*, opinion of the Michigan Supreme Court, issued July 16, 2025 (Docket No. 166320), 2025 WL 1959046, at *3 (Takings Clause); *People v Armstrong*, opinion of the Michigan Supreme Court, issued April 2, 2025 (Docket No. 165233), 2025 WL 994370, at *5, as amended (June 3, 2025) (Search/Seizure); *People v Parks*, 510 Mich 225, 244; 987 NW2d 161 (2022) (Cruel/Unusual Punishment); *Delta Charter Twp v Dinolfo*, 419 Mich 253, 272-273; 351 NW2d 831 (1984) (Due Process); *People v Jankowski*, 408 Mich 79, 96; 289 NW2d 674 (1980) (Double Jeopardy).

When the court below directed the plaintiff-appellant to pursue a federal claim to redress conduct that allegedly violated his state constitutional rights, the court overlooked the fact that conduct that may not run afoul of an analogous federal constitutional prohibition can still violate state constitutional rights. In fact, in the context of the specific rights at issue in this case, this Court has held open the possibility that Michigan's rights to free speech and to petition the government for redress may afford broader protections than the federal Constitution. See *Woodland*, 423 Mich at 202; see also *People v Johnson*, unpublished opinion of the Court of Appeals, issued December 14, 2023 (Docket No. 363774) 2023 WL 8699213, at *2 (MALDONADO, J., concurring) ("There are valid reasons to believe that the Michigan Constitution offers broader protection for speech than the United States Constitution, and I hope the Supreme Court takes advantage of this opportunity to examine the issue closely.").

The lower court's error is compounded by the fact that constitutional law—both state and federal—is not a static field. State and federal constitutional rights expand and contract over time due to decisions of either state or federal courts. See *Sitz v Dep't of State Police*, 443 Mich 744,

[4] For a more recent metric, the Brennan Center's *State Court Report* database of significant state constitutional cases and pending decisions since 2021 contains over 1000 entries involving state constitutional law, many of which involve decisions deviating from federal law. See State Court Report, *State Case Database* <https://statecourtreport.org/state-case-database> (accessed October 30, 2025).

763; 685 NE2d 762 (1993) ("[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government."); Hon. Bently, *State Court Adherence to Decisions Incorporating Federal Constitutional Law*, 110 Iowa L Rev 1013, 1026 (2025) (suggesting that "change[s] in federal law create 'stranded' state constitutional doctrine that requires state courts to react and clarify the status of state constitutional law"). This renders assumptions about the adequacy of federal constitutional remedies to redress state constitutional violations temporary and unreliable. See, e.g., *State v Robinette*, 80 Ohio St3d 234, 239, 245; 685 NE2d 762 (1997) (abandoning prior independent state constitutional holding in light of a change in federal Fourth Amendment jurisprudence in order to "harmonize" Ohio constitutional law with federal constitutional law).

Recent United States Supreme Court decisions upending pillars of federal jurisprudence illustrate this dynamic. For example, in 2022, the Court reversed prior precedent to hold that there was no federal constitutional right to an abortion, *Dobbs v Jackson Women's Health Org*, 597 US 215 (2022), and made substantial changes to the legal standard applied to federal second amendment challenges to gun regulations. *New York State Rifle & Pistole Ass'n, Inc v Bruen*, 597 US 1 (2022). In some contexts, jurists have stated that the status of state constitutional protections vis-a-via analogous federal protections is uncertain given ongoing developments in federal constitutional law. See, e.g., *State v Barrow*, 989 NW2d 682, 689, 690 (Minn 2023) (CHUTICH, J., concurring) (noting that Minnesota's search and seizure protections may no longer be coextensive with federal law due in part to "[t]he creeping expansion of the automobile exception, illustrated by . . . Supreme Court precedents."). Given the trajectory of recent United States Supreme Court decisions, "[t]his conundrum is likely to arise in a variety of areas of constitutional law." *State Court Adherence to Decisions Incorporating Federal Constitutional Law*, 110 Iowa L. Rev. at 1026-27.

B. State Courts Have More Comprehensive Remedial Powers Than Federal Courts

Even when rights are jointly protected by state and federal constitutions, state and federal courts differ in how they enforce such rights. For this reason, federal remedies will often prove to be inadequate substitutes for state constitutional remedies.

As noted by federal judges and scholars alike, when federal courts issue federal constitutional rulings, they frequently apply a "federalism discount," underenforcing those rights

relative to state courts. See *51 Imperfect Solutions*, p 175 (citing Natapoff, *Underenforcement*, 75 Fordham L Rev 1715, 1747 (2006); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1218, 1248 (1978)). This tendency toward underenforcement generally derives from prudential concerns by federal judges about avoiding unduly interfering with local governance and imposing blunt national solutions. See *51 Imperfect Solutions*, p 175. ("Federalism considerations may lead the U.S. Supreme Court to underenforce (or at least not overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions impacted. No state supreme court by contrast has any reason to apply a 'federalism discount' to its decisions.").

These reasons are inapplicable when state courts are adjudicating state constitutional claims against local officials. While "[t]he Supreme Court may decline to enforce a constitutional right to its full conceptual boundaries because of a concern that its interpretation would not only bind the federal government but also impose uniformity on the states[,] this concern has no applicability to state courts; they need not worry that their constitutional rulings will constrain the prerogatives of other jurisdictions." Hon Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 NYU L Rev 1307, 1330 (2017) (quotation marks and citations omitted). *See* Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 Tex L Rev 1269, 1275 (1985) ("State judges should not suffer from the conservatizing influences, which affect federal courts, of the need to make nationally uniform rules, which often bind the officials of another sovereign."). For example, in *Jones v Mississippi*, 593 US 98; 141 S Ct 1307; 209 L Ed 2d 390 (2021), the United States Supreme Court declined to extend Eighth Amendment protections for juvenile defendants beyond those established in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016). In doing so, it reminded state courts that *Jones'* holding "does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." *Jones*, 593 US at 120. Since *Jones*, this Court has strengthened state constitutional protections for juvenile defendants beyond the federal floor. *See e.g.*, *Parks*, 510 Mich at 247 ("The fact that the United States Supreme Court has decided to draw the line at 17 does not preclude us from drawing a different line pursuant to the broader protections provided by the Michigan Constitution. . . . [T]he Supreme Court, in fact, recently indicated that states have a wide latitude in providing greater *Miller* protections."). *See generally* Kathrina Szymborski Wolfkot, State

Court Report, *Michigan's High Court is Charting a Course Against Punitive Excess*, <https://statecourtreport.org/our-work/analysis-opinion/michigans-high-court-charting-course-against-punitive-excess> (posted April 25, 2025) (accessed October 31, 2025).

State judges are also better equipped to enforce state constitutional rights comprehensively than federal judges enforcing federal rights. Unlike federal judges applying nationwide laws, state judges can take "differences in culture, geography, and history" into account when interpreting and enforcing state constitutional protections, giving them more confidence that contentious or controversial decisions will be accepted by local stakeholders. *51 Imperfect Solutions*, p 17. In addition, as the courts that hear the vast majority of cases in the United States, "state courts can develop the law in certain areas based on a much higher volume of experience" while "confronting the consequences of decisions on local populations," all of which "provides value." *Primacy in Theory and Application*, 75 Me L Rev at 13. And because it is far easier to amend state constitutions than the federal Constitution, state judges need not underenforce state constitutional protections due to concerns about the difficulty of federal constitutional error-correction via the federal amendment process. *Id.* at 14. Michigan voters have not hesitated to engage in state constitutional revision in response to disfavored constitutional court decisions. *See* Const 1963, art. 1, § 28; art 10, § 2.

C. Many Federal Judicial Barriers that Limit Access to Federal Remedies Have Not Been Adopted by Michigan Courts

Over the past several decades, decisions by the United States Supreme Court have made it harder for victims of unconstitutional conduct to access federal remedies. *See generally* Murray & Lavender, *Barriers to Vindicating State Constitutional Rights in Civil Litigation*, 60 Harv CR-CL L Rev 887, 896 (2025) ("U.S. Supreme Court decisions on the scope of §§ 1983 and 1988 have over the years increasingly impaired a plaintiff's ability to vindicate federal constitutional rights."). They have done so by narrowing liability theories, bolstering qualified immunity, and imposing other procedural and practical barriers to relief. *See* Reinert, Schwartz, & Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw U L Rev 737, 752-758 (2021).

Because the structure of section 1983 litigation has been animated by "[p]rinciples of federalism and comity" that do not apply when state courts adjudicate state constitutional claims, *Mays v Governor of Mich*, 506 Mich 157, 220; 950 NW2d139 (2020) (McCormack, C.J., concurring), state courts should decline to reflexively incorporate such barriers into state

constitutional jurisprudence. See generally 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, 905-911 (2012). But by directing Michigan citizens to pursue section 1983 claims instead of state constitutional claims, the decision below uncritically grafts federal barriers into Michigan's Declaration of Rights.

Take qualified immunity—"a federal, judicially created doctrine that immunizes state, local, and federal officials from liability for discretionary functions unless (1) the official violated a federal constitutional right, and (2) the right was clearly established at the time the challenged conduct occurred." *Mack v Williams*, 138 Nev 854, 871; 522 P3d 434 (2022) (rejecting qualified immunity as a defense to damages claims under Nevada's search and seizure provision). Over several decades, the United States Supreme Court has "increasingly broadened the protections of qualified immunity." *New Federalism and Civil Rights Enforcement*, at 752. However, states need not follow—and many have not followed—the United States Supreme Court's approach to immunities in civil litigation. Some states do not recognize qualified immunity as an available defense in state constitutional litigation. *E.g.*, *Mack*, 138 Nev. 854; *Dorwart v Caraway*, 312 Mont 1; 2002 MT 240; 58 P3d 128 (2002); *Clea v Mayor & City Council of Balt*, 312 Md 662; 541 A2d 1303 (1988).[5] Others permit officers to assert the defense of qualified immunity relying in part on the federal standard while not fully embracing it. E.g., *Zullo v State*, 209 Vt 298, 333-334; 2019 VT 1; 205 A3d 466 (2019). And other states use unique state-specific tests. E.g., *Fleming v Bridgeport*, 284 Conn 502, 531-532; 935 A2d 126 (2007).

This Court has not yet decided to what extent qualified immunity shields government officials in *Bauserman* actions. But as a federal doctrine that both does not bind states and furthers distinctly federal interests, deciding whether to import qualified immunity into Michigan law should be left to the judges, legislature, and people of Michigan—not federal judges. See *Redressing Deprivations of Rights*, 115 Penn St L Rev at 905 (arguing that the United States

[5] Federal appellate courts have reached similar conclusions, finding that "qualified immunity, as a federal doctrine, does not protect government officials from liability under state law." *Mack*, 138 Nev at 871 (citing *Johnson v Bay Area Rapid, Transit Dist,* 724 F3d 1159, 1171 (CA 9, 2013); *Jenkins v City of New York*, 478 F3d 76, 86 (CA 2, 2007); *Samuel v Holmes*, 138 F3d 173, 179 (CA 5, 1998); *Andreu v Sapp*, 919 F2d 637, 640 (CA 11, 1990)).

Supreme Court has strengthened qualified immunity in part to "limit[] the untoward federal regulation and supervision of state and local governments").[6]

The decision below also effectively imports limitations on municipal liability from the *Monell* line of cases into Michigan law. But in *Bauserman*, this Court already declined to embrace *Monell's* "direct custom or policy theory and rejection of a respondeat superior theory of liability" at least with respect to claims against state officers. *Bauserman*, 509 Mich at 707-708. It reasoned that such limitations were "in large part, based on the intent of Congress in adopting [42 USC 1983]," and the Court was "not in a position to vindicate those policy concerns by incorporating the same reasoning into damages remedies under Michigan's Constitution." *Id.* at 708. Nothing in *Bauserman* suggests that a different rationale should apply when litigants seek damages against a local officer or local government entity.

Moreover, the limitations on municipal liability established in *Monell v Dep't of Social Servs*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978), stem from congressional concerns about federal overreach that do not apply in state constitutional litigation against local officers. In *Monell*, the United States Supreme Court's analysis of the text and legislative history of Section 1983 compelled it to reject a *respondeat superior* theory of municipal liability for Section 1983 claims. *Id*. at 691. The Court found that use of the verb "cause" in the text of Section 1983 precluded imposing vicarious liability on municipalities and that the statute's legislative history indicated that the enacting Congress thought "imposition of such an obligation unconstitutional." *Id.* at 692-693. Since *Monell*, the United States Supreme Court has reaffirmed the federalist principles that underlie Section 1983's limitations on municipal liability. See *Bd of Co Comm'rs of Bryan Co, Okl v Brown*, 520 US 397, 415; 117 S Ct 1382; 137 L Ed 2d 626 (1997) ("A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose."); *City of Canton v Harris*, 489 US 378, 391-392; 109 S Ct 1197; 103 L Ed 2d 412 (1989) ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. . . . It would also engage the federal courts in an endless

[6] Even if Michigan judges wanted to honor Michigan-specific qualified immunity standards in the context of a Section 1983 claim that was not removed to federal court, they could do not so. *See Howlett By and Through Howlett v Rose*, 496 US 356; 110 S Ct 2430; 110 L Ed 2d 332 (1990) (holding that state immunity defenses unavailable in federal proceedings are unavailable when state courts adjudicate federal claims).

exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism."). See also *Brown v State*, 89 NY2d 172, 195; 674 NE2d 1129 (1996) ("[C]oncerns of federalism underlie much of the Supreme Court's reluctance to expand the relief available under section 1983 and thereby unduly interfere with States' rights."). Neither the intent of the 1871 Congress nor federalism concerns are relevant to state judicial efforts to enforce Michigan's Declaration of Rights against government officers or entities—whether they be state or local.

III. Recognizing State Constitutional Damages Actions Against Municipalities and Local Officials Is Manageable and Aligns with Prevailing State Practice

The extent to which Michigan citizens can bring damages claims against local entities and officers for violations of Michigan's Declaration of Rights has substantial ramifications. After all, when citizens interact with government officials or entities, they are usually local. See, e.g., *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."). Because a decision on the availability of state constitutional damages against local officials would potentially impact so many Michigan citizens, Michigan courts—not federal courts—should decide and police such claims.

For decades, state judiciaries across the country have permitted residents to sue local officials for damages under state constitutions. See, e.g., *Dorwart*, 312 Mont. at ¶ 75 (2002); *Spackman ex rel Spackman v Bd of Ed of Box Elder Co Sch Dist*, 16 P3d 533, 537-539; 2000 UT 87 (2000); *DiPino v Davis*, 354 Md 18, 50-53; 729 A2d 354 (1999); *Binette v Sabo*, 244 Conn 23, 47; 710 A3d 688 (1998) ("[T]here is no reason to expect that our decision today will result in a flood of litigation. Indeed, in light of the relief already available under state common law and 42 U.S. § 1983 . . . it is likely that the creation of a damages remedy under article first, §§ 7 and 9, will give rise to few, if any, additional law suits."); *Corum v Univ of NC Through Bd of Governors*, 330 NC 761, 789; 413 SE2d 276 (1992).[7] We have been unable to identify any states that have altered these standards due to a flood of cases or depleted legislative coffers.

To be sure, as Justice Welch noted in her *Bauserman* concurrence, some state courts have declined to permit litigants to pursue damages actions under state constitutions because adequate

[7] While *Corum* dealt with state constitutional actions for damages against state actors, North Carolina courts have authorized *Corum* actions against local government actors and entities. E.g., *Copper ex rel Copper v Denlinger*, 363 NC 784, 788; 688 SE2d 426 (2010).

alternate remedies were available. But in the overwhelming majority of such cases, state courts have declined to open pathways because of the presence of adequate *state* remedies—either statutory, common law, or judicial remedies. See, e.g., *Salminen v Morrison & Frampton, PLLP*, 377 Mont 244, 255; 2014 MT 323; 339 P3d 602 (2014) (finding dismissal of a state constitutional cause of action proper because of the existence of alternate state law remedies); *St. Luke Hosp, Inc v Straub*, 354 SW3d 529, 537-538 (Ky, 2011) (declining to recognize a state constitutional cause of action for damages because of the availability of "traditional tort actions"); *Khater v Sullivan*, 160 NH 372, 374; 999 A2d 377 (2010) (affirming the rule that state courts will not authorize a state constitutional cause of action for damages "where an established statutory, common law, or administrative remedy is adequate" but will do so "where no established remedy exists or that remedy is meaningless" (quotation marks, brackets, and citations omitted)); *Sunburst Sch Dist No 2 v Texaco, Inc*, 338 Mont 259, 279-280; 2007 MT 183; 165 P3d 1079 (2007) (finding that the lower court erroneously instructed a jury on a constitutional tort theory because "adequate remedies exist under statutory or common law"); *Katzberg v Regents of Univ of Cal*, 29 Cal 4th 300, 326-327, n 29; 58 P3d 339 (2002) (declining to recognize a state constitutional tort because relief via a writ of mandate would have remedied the alleged violation and noting that the court "d[id] not determine what role the availability of a federal law remedy (for example, under 42 U.S.C. § 1983) should play in the determination whether a state action for damages should be recognized for violation of a state constitutional provision"); *Kelley Prop Dev, Inc v Town of Lebanon*, 226 Conn 314, 339; 627 A2d 909 (1993) (holding that Connecticut courts "should not construe [their] state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy"); *Provens v Stark Co Bd of Mental Retardation & Developmental Disabilities*, 64 Ohio St 3d 252, 261; 594 NE2d 959 (1992) (establishing that Ohio courts will not authorize a state constitutional tort when there are "reasonably satisfactory remedies provided by statutory enactment and administrative process"); *Augat v New York*, 244 AD2d 835, 837; 666 NYS2d 249 (1997) (affirming denial of state constitutional torts because "each of claimants' constitutional tort allegations may be analogized to an existing common-law tort for which there are adequate alternate remedies"); *Davis v Town of Southern Pines*, 116 NC App 663, 675-676; 449 SE2d 240 (1994) (remanding for grant of summary judgment for defendants on plaintiff's state constitutional claims because "a direct cause of action under the State Constitution is permitted only 'in the

absence of an adequate state remedy'" (quoting *Corum,* 330 NC at 782)); *Lyles v New York*, 194 Misc 2d 32, 36-37; 752 NYS2d 523 (Ct Cl, 2002) (holding that available common-law tort claims precluded the Court from finding an implied state constitutional tort remedy); see also *Spackman*, 16 P3d at 538 n 10 (acknowledging that the court " d[id] not reach the question of whether existing federal law remedies should preclude a state court from awarding damages for a state constitutional tort" but noting a Connecticut Supreme Court opinion arguing "that the relevant inquiry is whether the plaintiff lacks a state remedy" (citing *Binette,* 710 A2d at 707-708 (1998) (CALLAHAN, C.J., concurring and dissenting))); *Boggs v New York*, 51 Misc 3d 376, 382; 25 NYS3d 545 (Ct Cl, 2015) ("[T]he Court here concludes that the availability of an action pursuant to § 1983 does not foreclose recognition of a constitutional tort cause of action for cruel and inhuman treatment under the State Constitution."). *Bauserman*'s presumption that a judicial remedy is available for violations of Michigan's Declaration of Rights "unless the Constitution has specifically delegated enforcement of the constitutional right at issue to the Legislature or the Legislature has enacted an adequate remedy" is consistent with this state consensus. *Bauserman*, 509 Mich at 681.[8]

By contrast, we have identified just two state supreme courts that have held that plausible federal relief via Section 1983 is a valid reason to decline to authorize a state constitutional damages action when no state remedy is otherwise available. *Fields v Mellinger*, 244 W Va 126, 129-136; 851 SE2d 789 (2020); *State Dep't of Corrections v Heisey*, 271 P3d 1082, 1096 (Alas, 2012). Neither case should be persuasive to this court: *Fields* provided no analysis to support the claim that a federal remedy would, in fact, adequately redress the alleged state constitutional violation; and while *Heisey* held that "an 'alternative remedy' may include federal remedies," *Heisey*, 271 P3d at 1096, Alaska courts "will not imply a private cause of action for damages under the Alaska Constitution except in cases of flagrant constitutional violations where little or no alternative remedies are available." *Hertz v Beach*, 211 P3d 668, 677 n 12 (Alas, 2009) (quotation marks and citations omitted). There is no analogous flagrancy requirement in Michigan law.

[8] Some courts have further found that common law remedies inadequately redress state constitutional violations because of the distinctive harms inherent in state constitutional violations. See, e.g., *Binette* 710 A2d at 696-97 ("[W]hen a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively *violates* those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.").

So while "[i]n practice, it appears that courts in other states have held that adequate alternative remedies preclude a constitutional remedy for monetary damages under many circumstances," *Bauserman*, 509 Mich at 721-722. (WELCH, J., concurring), exceedingly few states regard federal remedies as adequate alternatives to redress state constitutional violations.

Conclusion

The decision below fails to fully appreciate the role of state constitutions in our federalist system and neglects the Michigan judiciary's duty to independently enforce Michigan's Declaration of Rights. As this court held in *Bauserman*, Michigan courts must hear state constitutional claims whenever Michigan has not otherwise provided an alternate remedy. This Court should reverse the decision below and clarify that possible federal remedies do not relieve Michigan judges of their duty to hear state constitutional claims seeking damages against government actors, including local officers and entities. Michigan government officials are bound by Michigan's Constitution regardless of whether they are state or local officials and whether the federal Constitution also constrains their conduct.

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Respectfully submitted,

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