STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS, and TEDDY BROE, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellees,

v

UNEMPLOYMENT INSURANCE AGENCY,

Defendant-Appellant.
_____/

SC No. 160813

COA No. 333181

COC No. 15-000202-MM

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

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## INTEREST OF AMICI CURIAE[1]

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

The ACLU of Michigan is the Michigan affiliate of a nationwide, nonpartisan organization with over one million members dedicated to protecting constitutional rights. The ACLU has long been committed to supporting and participating in litigation that seeks to protect the constitutional rights of Michigan citizens, including the rights of those who are deprived due process under the law. The ACLU regularly files amicus curiae briefs on constitutional questions pending before this and other courts. The ACLU has particular expertise in issues relating to remedies for constitutional violations and governmental immunity.

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

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

curiae briefs on significant constitutional and political questions pending before this court and other courts.

## QUESTION PRESENTED

Whether the appellees have alleged cognizable constitutional tort claims allowing them to recover a judicially inferred damages remedy?

Amici's answer: Yes. This Court should follow other state supreme courts by holding that an implied cause of action for damages is presumptively available to vindicate violations of the Michigan Constitution unless either (a) the constitutional provision in question delegates the question to the legislature or (b) the legislature has enacted an equally effective damages remedy.

## INTRODUCTION

Thousands of Michiganders' economic lives allegedly lie in tatters in this case because the governmental agency that was supposed to help them in their time of need instead treated them as a source of revenue. This occurred because the state allegedly trampled their constitutional right to due process. The question before this Court is whether the judiciary—the branch of government tasked with ensuring that the political branches respect constitutional rights—will allow the Plaintiffs to be made whole if they prove their allegations.

Amici are organizations devoted to civil rights litigation and who therefore interact every day with Michiganders whose rights have been violated by their governments. They know that most people nurture a faith, rooted in a basic shared sense of fairness and democracy, that when their rights have been violated, they should be compensated rather than bearing the costs of governmental abuses themselves. Here, the question before this Court is whether to vindicate this basic faith that the People have in their democracy—or to quash it.

Amici further submit that *the rule* this Court announces matters almost as much as whether and how it answers the question in this particular case. For decades, Michigan law has been unsettled as to when and whether damages are available to compensate the victims of unconstitutional conduct. This Court should eliminate the ambiguity by adopting a simple rule that damages are available in the vast majority of cases alleging constitutional injures—a rule that will be easy to apply by lower courts and that will generate predictable answers.

Specifically, amici urge this Court to hold that a cause of action for damages is available as a remedy for any actions that are unconstitutional under the Michigan Constitution, whether implementing official policy or not, unless one of two strictly limited exceptions applies. Those exceptions are: (1) the judiciary may not infer the availability of a damages remedy if the

Constitution itself textually vests authority in the legislature to determine the remedies available for violating a particular constitutional provision; and (2) an implied damages remedy will not be available when the legislature has created a remedial scheme *that provides an equally effective mechanism* expressly designed to remedy violations of constitutional rights, a test which at least requires that consequential damages be available to the victims of unconstitutional conduct. Amici's proposed rule is consistent with separation of powers principles, with first principles of constitutional governance, with legal and constitutional history, and with the decisions of other state supreme courts that have considered the question.

As to separation of powers, the responsibility for protecting constitutional rights against overreach by the political branches is the special province of the judiciary, and awarding damages to compensate injured parties lies at the core of judicial power. See *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959); accord *Marbury v Madison*, 5 US (1 Cranch) 137, 167; 2 L Ed 60 (1803). And because the legislature is not permitted to arrogate judicial power nor to unduly constrain constitutional rights, it makes little sense to defer to the legislature on whether or how Michigan's judiciary may exercise these core judicial powers.

As to constitutional principles, the drafters of Michigan's Constitution emphasized that the rights it enumerates are "fundamental principles of liberty" requiring the highest level of protection. 1 Official Record, Constitutional Convention 1961, p 466. In turn, "[t]he very essence of civil liberty" consists of "every individual [being able] to claim the protection of the laws, whenever he receives an injury." *Mays v Governor*, 506 Mich 157, 217; 954 NW2d 139 (2020) (MCCORMACK, C.J., concurring), quoting *Marbury*, 5 US (1 Cranch) at 163. Amici's rule ensures that fundamental constitutional rights are preserved and protected by effective remedies.

As to history, the rule that those who suffer violations of fundamental rights not only predates Michigan's Constitution but the very republic. See, e.g., *Widgeon v E Shore Hosp Ctr*, 300 Md 520, 526; 479 A2d 921 (1984). Nothing suggests that this core common law principle should be second guessed. To the contrary, these first principles are consistent with Michigan's law and Constitution.

Finally, amici's rule is consistent with the majority approach among other state supreme courts, and with two particularly thorough and well-reasoned twenty-first century decisions by the supreme courts of Iowa and Montana. See *Godfrey v State*, 898 NW2d 844, 879 (Iowa, 2017); *Dorwart v Caraway*, 312 Mont 1; 2002 MT 240; 58 P3d 128 (2002).

In sum, this Court has the opportunity to issue a landmark decision protecting not just the constitutional rights of the Plaintiffs here, but of everyone in Michigan. This Court should grant leave to appeal and announce a rule, such as that proposed by amici, that will protect these bedrock rights for generations to come.

## FACTUAL BACKGROUND

The gravamen of this case is that Michigan's Unemployment Insurance Agency ("UIA") is alleged to have implemented an automated computer system that not only *identified* Michiganders suspected of unemployment fraud but also *adjudicated* the fraud allegations without providing benefit recipients adequate notice or opportunity to contest the allegations. Am Compl, ¶¶ 35–40. Plaintiffs ably describe their allegations in their briefing, so amici will not belabor the details of the Amended Complaint here and adopt Plaintiffs' statement of facts.

It bears noting, though, that public reporting has corroborated the scope and severity of Plaintiffs' allegations. Public estimates now establish that approximately 40,000 people were wrongfully accused of unemployment fraud as a result of the denial of pre-deprivation due process alleged in the Amended Complaint. De La Garza, *States' Automated Systems Are Trapping*

*Citizens In Bureaucratic Nightmares With Their Lives On the Line*, Time Magazine (May 28, 2020) <https://time.com/5840609/algorithm-unemployment/> (accessed May 3, 2021). A review of 22,427 cases of alleged fraud cases that resulted from the use of the automated system between 2013 and 2015, conducted by the UIA itself, determined that 93% of the fraud findings were erroneous. Felton, *Michigan Unemployment Agency Made 20,000 False Fraud Allegations—Report*, The Guardian (December 18, 2016) <https://www.theguardian.com/us-news/2016/dec/18/michigan-unemployment-agency-fraud-accusations> (accessed May 3, 2021).

Public reporting has also painfully illustrated the devastating effects on the personal and financial lives of those who were falsely accused of, and penalized for, fraud. One family whose tax returns were seized was forced to declare bankruptcy and had their automobile repossessed as a result of the lost income; they are now unable to get a mortgage or lease a car or an apartment. See *States' Automated Systems Are Trapping Citizens*, *supra*. Another man forced to declare bankruptcy as the result of an erroneous fraud finding struggled to care for his two children. Egan, *State of Michigan's Mistake Led to Man Filing Bankruptcy*, Detroit Free Press (December 22, 2019) <https://www.freep.com/story/news/local/michigan/2019/12/22/government-artificial-intelligence-midas-computer-fraud-fiasco/4407901002/> (accessed May 3, 2021). A prominent bankruptcy attorney told reporters that after the automated system was put in place, he went from seeing approximately one bankruptcy client per year who had debt to the UIA to twenty such cases in two or three months. Felton, *Criminalizing The Unemployed*, Detroit Metro Times (July 1, 2015) <https://www.metrotimes.com/detroit/criminalizing-the-unemployed/Content?oid=2353533> (accessed May 3, 2021). One individual who never even *received* benefits was wrongfully assessed fines and fees for an allegedly fraudulent application and committed suicide as a result. *Id.*; see also, e.g., Cunningham, *Unemployment Insurance Woes: Couple Fights State*

*Over 'Unjustified' $10,000 Fine*, Fox 17 News (May 11, 2015) <https://www.fox17online.com/2015/05/10/unemployment-insurance-woes-couple-fights-state-over-unjustified-10000-fine/> (accessed May 3, 2021); Shaefer & Gray, Memorandum to United States Department of Labor, *Michigan Unemployment Insurance Agency: Unjust Fraud and Multiple Determinations* (May 19, 2015), pp 9–11 (recounting several client stories) <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Shaefer-Gray-USDOL-Memo_06-01-2015.pdf> (accessed May 3, 2021).

Perhaps the most critical point of this reporting is that it shows that the consequential damages of the UIA's alleged violations of the putative class members' due process rights vastly exceed the amounts that were actually wrongfully seized and withheld from them. Thus, even if every class member had their benefits restored and any wrongfully seized funds reimbursed, they will continue to be far worse off and indebted than they were before their rights were violated. Absent a remedy that truly aspires to makes them whole, many victims of these alleged constitutional violations may never be able to return to the economic and family lives they led before being accused and convicted of fraud by a computer.

## LEGAL BACKGROUND

### I. Relief Against State and Local Actors for Constitutional Violations Is Extremely Limited in Federal Court.

This case invites this Court to determine the test for whether and when damages should be available under the Michigan Constitution for violations of the Michigan Constitution by governmental actors. In analyzing this question, it is helpful to understand the numerous barriers that prevent victims of constitutional violations from vindicating their rights absent a favorable ruling from this Court. First, the federal courthouse doors are slammed shut against most litigants

seeking to vindicate *state* constitutional rights. Second, even for violations of the *federal* constitution (which will sometimes parallel a violation of the Michigan Constitution), damages are entirely unavailable against the state or state officials in their official capacity. Third, although damages are sometimes available for violations of parallel federal constitutional rights against municipal governments or against officials acting in their individual capacity, qualified immunity severely constrains the availability of such relief, leaving most victims of unconstitutional conduct uncompensated.

### A. Both Equitable and Damages Remedies Are Unavailable in Federal Court for Violations of the Michigan Constitution by State Officials Acting in Their Official Capacity.

The United States Supreme Court has made clear that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Pennhurst State School and Hosp v Halderman*, 465 US 89, 121; 104 S Ct 900; 79 L Ed 2d 67 (1984). That is true for claims seeking injunctive relief as well as the traditional legal remedy of damages. *Id.* at 121–122. Thus, when a state official acting in their official capacity (including the governor or a state agency like the UIA) violates the Michigan Constitution, the victim of the unconstitutional conduct has no remedy whatsoever in federal court. Accordingly, the rule this Court adopts in this case will dictate the remedies available to the victims of conduct that is unconstitutional under the Michigan Constitution.[2]

[2] In principle, a federal court could exercise supplemental jurisdiction over a claim for violating the Michigan Constitution against a *local* government or a state or local official acting in their *individual* capacity, to the extent such a cause of action existed under state law and if the federal court had other bases for exercising jurisdiction over other claims in the case, because the state constitutional claims against non-state defendants would not be entitled to Eleventh Amendment immunity. However, because neither Michigan's courts nor our legislature has authorized a cause of action for damages for constitutional violations against officials in their individual capacities for violations of the Michigan Constitution, federal courts would have no basis to award *damages* against such defendants for violations of the Michigan Constitution. In any event, federal courts

### B. Even for Violations of the Federal Constitution, Only Equitable Relief Is Available in Federal Court in Lawsuits Against State Actors Acting in Their Official Capacity.

A damages remedy is also unavailable against state officials acting in their official capacity for violation of constitutional rights, even when the conduct violates both the Michigan Constitution and a parallel provision of the United States Constitution. That is because the Supreme Court has held that the Eleventh Amendment sovereign immunity protects states from liability for violating federal rights, unless (a) the state consents to suit, (b) Congress abrogates the states' immunity pursuant to its limited powers to do so under the Fourteenth Amendment, or (c) the suit names a state official in their official capacity but seeks only a prospective injunction ordering relief to prevent the official from committing future violations of a federal right. See *Seminole Tribe of Fla v Florida*, 517 US 44, 55, 57–72; 116 S Ct 1114; 134 L Ed 2d 252 (1996); *Barton v Summers*, 293 F3d 944, 948–949 (CA 6, 2002). The third exception represents the *Ex Parte Young* doctrine and is a limited one that permits a plaintiff to sue only to enjoin future violations of federally protected rights, and it may not be used when the "state is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration." *Va Office for Protection and Advocacy v Stewart*, 563 US 247, 255; 131 S Ct 1632; 179 L Ed 2d 675 (2011). In other words, in a state like Michigan that has not consented to suit for federal constitutional violations, it is impossible to sue the state (or a state official in their official capacity, which comes to the same

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are often highly reluctant to use their supplemental jurisdiction to address such a claim regardless of the remedy sought. See, e.g., *Hastert v Boyne City Police Dep't*, 2016 WL 4626880 (ED Mich, 2016).

thing) for damages or any form of retrospective relief under 42 USC 1983 when a federal constitutional right has been violated.[3]

### C. Even for Violations of the Federal Constitution by Non-State Actors or State Actors Acting in Their Personal Capacity, Liability in Federal Court is Highly Constrained Due to the Doctrine of Qualified Immunity.

Victims of conduct that is unconstitutional under the Michigan Constitution *might* have a chance to pursue a federal damages remedy if and only if the conduct also violates a parallel federal constitutional provision (allowing suit under 42 USC 1983) *and* if the conduct in question was committed by a *local* official, or by a state official acting in their individual capacity. However, the doctrine of qualified immunity imposes major barriers to relief even in such cases.

Federal courts apply the doctrine of qualified immunity to any suit brought under 42 USC 1983 seeking damages against a state or local official acting in their individual capacity. Under qualified immunity, the victim of unconstitutional conduct will not be entitled to damages, no matter how severe the injury they suffered, unless "existing precedent . . . placed . . . the constitutional question beyond debate." *Ashcroft v al-Kidd*, 563 US 731, 741; 131 S Ct 2074; 179 L Ed 2d 1149 (2011). It is sometimes said that the doctrine provides immunity for "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 743, quoting *Malley v Briggs*, 475 US 335, 341; 106 S Ct 1092; 89 L Ed 2d 271 (1986). Furthermore, "[o]nce the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Binay v Bettendorf*, 601 F3d 640, 647 (CA 6, 2010). And in determining whether qualified immunity applies, federal courts may not "'define clearly established law at a high level of generality'" but must instead demand "specificity" in identifying

[3] The United States Supreme Court has similarly held that 42 USC 1983 does not provide a cause of action against the state in *state* court for violations of the federal constitution. See *Will v Mich Dep't of State Police*, 491 US 58, 66; 109 S Ct 2304; 105 L Ed 2d 45 (1989).

prior clearly established law. *Mullenix v Luna*, 577 US 7, 12; 136 S Ct 305; 193 L Ed 2d 255 (2015), quoting *al-Kidd*, 563 US at 742. This has meant, for example, that despite the well-known constitutional prohibition on excessive use of force, the Supreme Court has conferred immunity on an officer who "fired six rounds in the dark at a car traveling 85 miles per hour . . . without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it." *Id.* at 20 (Sotomayor, J., dissenting).

Given such principles, it is perhaps unsurprising that most qualified immunity cases "come out the same way—by finding immunity for the officials." Baude, *Is Qualified Immunity Unlawful?*, 106 Cal L Rev 45, 82 (2018) (surveying United States Supreme Court decisions); see also Chung et al, *Shielded*, Reuters (May 8, 2020) <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (accessed May 3, 2021). This has led to judicial criticism of the doctrine of qualified immunity at every level of the federal judiciary and from judges with varying legal philosophies. See, e.g., *Baxter v Bracey*, __ US __; 140 S Ct 1862; 207 L Ed 2d 1069 (2020) (Thomas, J., dissenting from denial of certiorari) (suggesting that the current doctrine is untethered from historical immunity doctrines); *Kisela v Hughes*, __ US __; 138 S Ct 1148; 200 L Ed 2d 449 (2018) (Sotomayor, J., dissenting from summary reversal). For example, in *Jamison v McClendon*, 476 F Supp 3d 386 (D Miss, 2020), a federal district court reluctantly concluded that it was "required" to grant immunity to an "officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal" after stopping a Black man driving a Mercedes, purportedly because the temporary tag on the man's car was folder over. *Id.* at 392. In so holding, the court recounted in detail how qualified immunity has "served as a shield" for officers responsible for "thousands" of deaths and "[c]ountless . . . other forms of abuse and misconduct," *id.*, and concluded that the doctrine is "extraordinary and unsustainable," *id.* at 423.

The point that is critical for this Court to consider is not whether qualified immunity doctrine in its current form is right or wrong—though amici are certainly convinced that it is wrong. Rather, the point is that the federal doctrine consistently bars the victims of unconstitutional conduct from obtaining relief in federal court, even for quite egregious and unconstitutional actions.

## II. *Bivens* Originally Envisioned Providing Relief in Most Cases, But the United States Supreme Court's Subsequent Jurisprudence Has Become Unrecognizable and Is No Longer Faithful to Bivens or Its Logic.

Both parties, as well as some of this Court's prior jurisprudence regarding implied constitutional causes of action under Michigan law, have examined the United States Supreme Court's decision in *Bivens v Six Unknown Fed Bureau of Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971). Accordingly, it is instructive to examine *Bivens* and its progeny in some detail, and to understand how far modern *Bivens* jurisprudence has deviated from *Bivens*' original logic that victims of unconstitutional conduct require compensation and that such compensation promotes governmental compliance with constitutional norms.

In examining *Bivens*, it is also critical to keep in mind that neither *Bivens* nor its progeny—which concern when *federal* courts will recognize an implied *federal* cause of action under the *federal* constitution—bind this Court when considering when to recognize an implied *state* cause of action in *state* court under the *state* constitution. As this Court has recognized, "strictly interpreting the judicial power of Michigan courts to be identical to the federal court's judicial power does not reflect the broader power held by state courts." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 362–363; 792 NW2d 686 (2010). In particular, this Court should not "feel compelled to abandon [*Bivens*] simply because some members of the United States Supreme Court have grown sour on [it]." *Mays v Governor*, 506 Mich 157, 217; 954 NW2d 139 (2020)

(MCCORMACK, C.J., concurring). Michigan and the United States "are separate sovereigns," and this Court "decide[s] the meaning of the Michigan Constitution and do[es] not take [its] cue from any other court, including the highest Court in the land." *Id.*

It is true that recent *Bivens* jurisprudence shows that "[t]he United States Supreme Court has preferred to promote the unfettered exercise of governmental decision-making over the competing goals of deterring constitutional wrongs and compensating losses caused by impingements on liberty." 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, 882–883 (2011). But "[j]ust as state courts may legitimately find rights to be guaranteed by state constitutions where the United States Supreme Court has refused to protect the right under the federal Constitution, state courts are free to adopt a remedial scheme that more generously compensates the rights-holder and incentivizes the government and its officials to abide by constitutional constraints." *Id.* at 883.

### A. Act I: *Bivens* and Its Immediate Progeny Established a Presumptive Cause of Action for Damages That Would Seemingly Compensate Most Victims of Unconstitutional Conduct by Federal Officers.

*Bivens* held that an implied federal cause of action should be recognized to compensate individuals whose Fourth Amendment rights were violated by federal agents. 403 US at 389. *Bivens* emphasized the troubling inability of people to protect themselves against governmental violations of their rights, explaining that "there is no safety for the citizen, except in the protection of the judicial tribunals." *Id.* at 395 (quotation marks omitted). *Bivens* further explained that it "should hardly seem a surprising proposition" to allow for damages in such situations given that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.*

*Bivens* was based not only on the deterrent effect of a damages remedy, but also on the importance of compensating individuals who have suffered constitutional injuries. *Id.* at 407–408 (Harlan, J., concurring) ("I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result."). It therefore relied upon structural arguments why, in a constitutional republic, a cause of action for damages must presumptively be available for constitutional wrongdoing.

The Court's immediate post-*Bivens* cases were of a similar ilk, holding that a cause of action for damages was available against a former Congressperson for violating the equal protection and due process rights of his staff, *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979), and against federal prison staff for violating the Eighth Amendment rights of people incarcerated in federal facilities, *Carlson v Green*, 446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980). *Carlson* made the presumption in favor of a damages remedy explicit: "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." 446 US at 18.

*Carlson* further indicated that the implied cause of action "may be defeated in a particular case, however, in two situations." *Id.* The first circumstance was when "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Id.* (quotation marks and citation omitted). The second circumstance was when "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and

viewed as equally effective." *Id.* at 18–19. As to this second situation, the Court went on to hold that the Federal Tort Claims Act was *not* an equally effective alternative remedy because, *inter alia*, it did not provide for punitive damages. *Id.* at 22. Significantly, nothing in the majority opinions in *Bivens*, *Passman*, and *Carlson* suggested that the *Bivens* cause of action was limited to individual officers sued in their individual capacity, nor that a *Bivens* cause of action was unavailable against federal agencies or for federal policies and practices, nor that *respondeat superior* liability was unavailable under *Bivens*.

### B. Act II: The Exceptions Devour *Bivens*' and *Carlson's* Presumptive Rule.

The first post-*Carlson* case in the *Bivens* line was *Chappell v Wallace*, 462 US 296; 103 S Ct 2362; 76 L Ed 2d 586 (1983). There, the Court applied the "special circumstances" exception to hold that military service members who alleged that they had been treated less favorably because of their race could not sue superior officers for constitutional injuries given the "special nature of military life" and Congress' special authority over the military. *Id.* at 304. The same day, in *Bush v Lucas*, 462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983), the Court found that a civil servant who alleged that he was reassigned as punishment for exercising his First Amendment rights could not proceed via an implied cause of action because Congress had created an "elaborate remedial system," *id.* at 388, in which the employee's constitutional claims were "fully cognizable," *id.* at 386. Significantly, some facets of the remedial scheme (such as the burden of proof) were *more* favorable to the employee than a judicially recognized implied cause of action would have been. See *id.* at 390–391 (Marshall, J., concurring).

After *Bush* and *Chappell*, the exceptions began to expand as the Court's composition changed. In *United States v Stanley*, 483 US 669; 107 S Ct 3054; 97 L Ed 2d 550 (1987), Justice Scalia, writing for the Court, expanded the special factors exception, denying a cause of action to

service members who were subjected by civilian medical personnel, without their knowledge or consent, to experiments using LSD. Dissenting, Justice O'Connor lamented that "[n]o judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation." *Id.* at 709. Then in *Schweiker v Chilicky*, 487 US 412; 108 S Ct 2460; 101 L Ed 2d 370 (1988), the Court expanded the alternative remedies exception, holding that social security applicants did not have an implied cause of action for violations of due process in the denial of their benefits because an administrative scheme allowed them to recover the underlying benefits, even though that scheme provided them with no mechanism to assert their constitutional claims nor to recover the consequential damages they suffered as the result of improper benefit denials. Justice Brennan's dissent documented how the administrative remedies that the majority found sufficient "fail[ed] miserably to compensate disabled persons illegally stripped of the income upon which, in many cases, their very subsistence depends." *Id.* at 437 & n 4.

Next, the Court began to carve out entire categories of defendants against whom *Bivens* actions would be unavailable. In *FDIC v Meyer*, 510 US 471; 114 S Ct 996; 127 L Ed 2d 308 (1994), the Court held that damages would not lie against a federal agency. In so holding, the court relied in significant part on the reasoning that "the purpose of *Bivens* is to deter *the officer*," *id.* at 485, thus ignoring that compensating people harmed by unconstitutional conduct was actually a crucial original purpose of *Bivens*, and that deterrence was *not* the primary justification of a damages cause of action, see *Bivens*, 403 US at 397 ("[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment."); *id.* at 407–408 (Harlan, J., concurring in the result). And in *Correctional Servs Corp v Malesko*, 534 US 61; 122 S Ct 515; 151 L Ed 2d 456 (2001), the Court held that a private corporation engaged in a governmental function (running a federal prison) could

not be sued for the death of an incarcerated person in violation of the Eighth Amendment. The Court reasoned that "*Bivens* . . . is concerned solely with deterring the unconstitutional acts of individual officers," not with remedying constitutional injuries or deterring corporations acting on the government's behalf. *Id.* at 522, citing *Meyer*, 510 US at 473–474.

### C. Act III: *Bivens*' Presumption of Compensation for Constitutional Harms Is Expressly Inverted, Creating Presumptive Immunity.

As the twenty-first century has progressed, the Court has inverted the original *Bivens* presumption in *favor* of implied constitutional causes of action for damages and now operates with a strong presumption *against* them. In so doing, the Court repeatedly cites the frequency with which it itself has invoked the two "exceptions" over the years. See *Malesko*, 534 US at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). Today's Court says that "expanding the *Bivens* remedy is now a disfavored activity." *Ziglar v Abassi*, __ US __; 137 S Ct 1843, 1857; 198 L Ed 2d 290 (2017) (quotation marks and citation omitted). The most recent cases also argue that this doctrinal shift is justified by the fact that the Supreme Court no longer easily implies causes of action to vindicate *statutory* rights. See, e.g., *Ziglar*, 137 S Ct at 1857. But even so the modern Court admits that "[t]he decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself." *Id.* at 1856. And the Court (like the Defendant here, see Def Supp Br, p 19) has largely ignored that *Bivens* itself did *not* significantly rely upon the Court's jurisprudence at the time about the availability of statutory causes of action; "[r]ather, the [*Bivens*] Court drew far stronger support from the need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary." *Ziglar*, 137 S Ct at 1880 (Breyer, J., dissenting). Indeed, dissenting in *Malesko*, Justice Stevens

explained what has really happened, namely that the "driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself." 534 US at 82.

The result of this dramatic turn in the Court's jurisprudence can be measured by its results. In *Ziglar*, for example, the Court held that there is no remedy available for immigrants detained by the government for lengthy periods of time for "no legitimate reason" who were held in cells lit for 24 hours a day, denied "basic hygiene products such as soap or a toothbrush" and communication to the outside world, "strip searched often," and whom guards "slammed . . . into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion." 137 S Ct at 1853. And in *Hernandez v Mesa*, __ US __; 140 S Ct 735, 739–740; 206 L Ed 2d 29 (2020), the Court denied a remedy to the family of a 15-year-old child who was fatally shot by Border Patrol agents while playing a game with friends that involved running up to the border fence, touching it, and then running back to Mexico.

The lesson is clear. A doctrine that once envisioned a presumption *in favor* of compensating the victims of unconstitutional action, and thereby promoting compliance with constitutional rights, has been inverted. This now means that federal courts routinely deny any meaningful remedy even for egregious violations of basic constitutional norms unless the narrowest possible interpretation of *Bivens*, *Davis*, or *Carlson* compels a contrary result. This happened largely because the "special factors" exception to the presumptive rule devoured and ultimately eviscerated the rule. As one state supreme court aptly noted in refusing to import such an exception into its own remedies jurisprudence, "[t]he special-factors doctrine is a standardless exception that provides the court with a convenient escape hatch. In other words, a *Bivens* claim

exists except where a majority of the court finds it inconvenient." *Godfrey v State*, 898 NW2d 844, 879 (Iowa, 2017).

## III. This Court's Decision in *Smith* Established That Implied Causes of Action for Damages Are Available Under the Michigan Constitution, But Adopted No Test and Did Not Incorporate *Bivens*, Let Alone Its Progeny, as the Law in Michigan.

The first case in which this Court addressed the question of whether and when an implied cause of action for damages should be recognized for violations of the Michigan Constitution after the adoption of the 1963 constitution was *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987). *Smith* was a fractured six-justice decision with no majority reasoning. The question in *Smith* was whether there is an implied cause of action for damages to enforce due process protections of the Michigan Constitution.[4] This Court issued a memorandum opinion stating several holdings, each of which had the support of at least four justices. With regard to the cause of action question, *Smith*'s memorandum opinion held only that "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action" and "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544.

The four justices who supported this holding articulated different justifications in separate concurring opinions. Justice BOYLE, writing for herself and Justice CAVANAGH, discussed *Bivens* as background at some length, but writing in 1987 she necessarily did so without the benefit of seeing how the "exceptions" originally suggested in *Bivens* could be warped over time to undermine the rule. *Id.* at 644–648. Justice BOYLE went on to propose a multi-factor test for when

[4] Technically, the question in *Smith* concerned the availability of such a cause of action based on the 1908 constitution rather than the current 1963 constitution. That detail is not materially relevant here.

damages should be available for a constitutional violation, drawing partly from the *Bivens* jurisprudence in place at the time. *Id.* at 648–651. Those factors have been summarized as: "(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 damage 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 damage remedy." *Mays v Snyder*, 323 Mich App 1, 65–66; 916 NW2d 277 (2018) (quotation marks omitted). Justice Boyle also would have imposed a limitation that is actually contrary to *Bivens* jurisprudence, namely that damages liability for constitutional injuries would be limited to situations in which state officials acted pursuant to a policy or custom of the sort that would establish municipal liability under 42 USC 1983, as interpreted by *Monell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). See *Smith*, 428 Mich at 642–643 (BOYLE, J., concurring).

Justices ARCHER and LEVIN also believed that damages should be available for violations of the Michigan Constitution, but without the limitations Justice BOYLE would have imposed. Specifically, they "did not agree" that a damages cause of action should require an examination of "whether the alleged constitutional violation occurred by 'virtue of a governmental custom or policy'" or whether, in a *particular* case, a "'damage remedy is proper.'" *Id.* at 658 (quoting Justice BOYLE's concurrence). Accordingly, none of the limitations proposed by Justice BOYLE were incorporated in the memorandum opinion that constituted this Court's holding, nor was the Court's actual holding expressly premised in any way on *Bivens* or its progeny. See *Mays v Governor*, 506 Mich at 170–171 (MCCORMACK, C.J., concurring) ("Maybe this holding [in *Smith*] was informed by *Bivens*, but maybe not.").

## ARGUMENT

### I. This Court Should Adopt Amici's Proposed Rule That Damages Are Proper to Remedy Violations of the Michigan Constitution Unless the Constitution Itself Expressly Vests the Remedy Determination for a Particular Right in the Legislature or the Legislature Has Created an Equally Effective Cause of Action.

Amici urge this Court adopt a strong presumption in favor of the availability of damages to remedy a violation of the Michigan Constitution. Specifically, a cause of action for damages is available as a remedy for any actions that are unconstitutional under the Michigan Constitution, whether implementing official policy or not, unless one of two strictly limited exceptions applies. First, as this Court has previously held, a cause of action for damages cannot be held to be implied by the Constitution when the text of the Constitution instead vests authority in the legislature to determine the remedies available for violating a particular provision. See *Lewis v State*, 464 Mich 781, 785; 629 NW2d 868 (2001). Second, an implied cause of action is not available when the legislature has already implemented an alternative remedial scheme *that provides an equally effective mechanism* expressly designed to remedy violations of a particular constitutional right. To be equally effective, the legislative remedy should be at least as protective of constitutional rights as a judicially recognized implied cause of action would, which should mean, at the least, the general availability of consequential damages, including exemplary damages in appropriate circumstances. See *Kewin v Mass Mutual Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980) (explaining that exemplary damages are a component of consequential damages available for malicious, willful, or wanton actions).

Amici's proposed rule is appropriate for several mutually reinforcing reasons, as explained more fully below. First and foremost, it is the only rule fully consistent with the separation of powers and the judiciary's role in the constitutional structure as the branch of government specifically designated to protect the constitutional rights of Michiganders. Second, the rule is

compelled by the hoary principle that a right is meaningless without a corresponding and effective remedy. Third, the rule is consistent with legal history and practice, including with English common law that predates the founding of the American republic.

Amici's rule is also consistent with the practice of numerous state supreme courts, including recent and particularly thorough decisions by the Iowa and Montana supreme courts. See *Godfrey*, 898 NW2d 844; *Dorwart v Caraway*, 312 Mont 1; 2002 MT 240; 58 P3d 128 (2002); see also, e.g., *Zullo v State*, 209 Vt 298, 318; 205 A3d 466 (2019); *Corum v Univ of NC*, 330 NC 761; 413 SE2d 276 (1992); *Widgeon v E Shore Hosp Ctr*, 300 Md 520; 479 A2d 921 (1984); *Cooper v Nutley Sun Printing*, 36 NJ 189, 196; 175 A2d 639 (1961). Although different states apply different specific rules in determining exactly when to authorize damages remedies for constitutional violations, the existence of such a remedy in at least some circumstances was already the majority rule *prior* to the compelling decisions in Iowa and Montana. In 2002, the Montana Supreme Court counted that "twenty-one states had recognized an implied cause of action for state constitutional violations. Three additional states had indicated that they would do so under certain narrow circumstances. A private cause of action has been recognized in a twenty-fifth state by federal courts and four states have enacted statutes which authorize causes of action for violation of state constitutional rights." 312 Mont at 10. See also *Godfrey*, 898 NW2d at 856–857 & nn 2–3 (collecting cases on both sides of the issue and describing various levels of state courts as being "nearly equally divided").

### A. Amici's Rule Is Dictated by Separation of Powers Principles, Which Confer the Power to Protect Michiganders' Constitutional Rights on the Judiciary.

The Michigan Constitution vests the entire "judicial power of the state" in this Court. Const 1963, art 3, § 1. The scope of this power is broad, encompassing all judicial powers "not ceded to the federal government." *Lansing Schools*, 487 Mich at 362. Thus, under the Michigan

Constitution, the "whole of [the judicial] power reposing in the sovereignty is granted [to the judiciary] except as it may be restricted in that instrument." *Id.*, quoting *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 680; 229 NW 618 (1930). Thus, for example, this Court may exercise power over cases that would not be cognizable in the federal courts due to the case-or-controversy requirement of Article III of the United States Constitution. See *id.*

It is also well-established that this Court has not only the power, but the primary *responsibility*, to interpret and enforce the Michigan Constitution. "To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959), quoting *Cooley's Constitutional Limitations* (7th ed), p 132. Accord *Marbury v Madison*, 5 US (1 Cranch) 137, 167; 2 L Ed 60 (1803) ("The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."). The judiciary "has the legitimate authority, in the exercise of the well-established *duty* of judicial review, to evaluate governmental action to determine if it is consistent" with the Constitution. *Sharp v City of Lansing*, 464 Mich 792, 802; 629 NW 2d 873 (2001) (emphasis added).

In turn, a core component of judicial power is that "[w]hether consequential relief be granted" in a particular case "go[es] merely to the practice, not to the power of the court." *Washington-Detroit Theater Co*, 249 Mich at 681–682. "That the judicial power includes the ability to fashion remedies is a principle as old as our republic." *Mays*, 506 Mich at 222 (MCCORMACK, C.J., concurring). As discussed more fully below in Section I.C, it would be odd to conclude that equitable relief is available to address constitutional injuries but that damages are not, given that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 US at 395.

In fact, a contrary "presumption in favor of equitable relief perverts the usual treatment of damages as a common remedy at law and injunctions as extraordinary remedies available only when no adequate remedy at law exists." Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S Cal L Rev 289, 301 (1995). See also Karlan, *The Irony of Immunity*, 53 Stan L Rev 1311 (2001) (pointing out that injunctive remedies for constitutional violations will often be more intrusive than damages remedies). That is why, in *Bivens*, Justice Harlan explained that the well-established "availability" of "equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests . . . courts of the power to grant damages absent express congressional authorization." *Bivens*, 403 US at 404 (Harlan, J., concurring in the judgment). In other words, recognizing damages remedies for violations of the Michigan Constitution is squarely within the scope of the judicial power conferred on this Court and its subsidiary courts.

Moreover, "it is axiomatic that the Legislature cannot grant a license to state and local governmental actors to violate the Michigan Constitution. In other words, the Legislature cannot so 'trump' the Michigan Constitution." *Sharp*, 464 Mich at 810. Furthermore, "[i]t is beyond the power of the legislature to take . . . judicial power" from the courts. See *Johnson*, 357 Mich at 257–258. Thus, except with respect to constitutional provisions that specifically confer upon the legislature a role in their implementation, allowing the legislature to determine whether damages are available to remedy constitutional violations would violate separation of powers principles, allowing the legislature to take a key remedial arrow out of the judicial quiver of remedies, thus diminishing the judiciary's power (and responsibility) to protect Michiganders' constitutional rights.

Similarly, Michigan's courts have long held that the legislature may not "curtail[]" or "unduly burden[]" self-executing constitutional rights. *Wolverine Golf Club v Hare*, 24 Mich App 711, 725; 180 NW2d 820 (1970), aff'd 384 Mich 461; 185 NW2d 392 (1971), quoting *Hamilton v Sec'y of State*, 227 Mich 111, 125; 198 NW 843 (1924). Rather, it is by fully enforcing constitutional rights that the judiciary fulfills "the principal function of the separation of powers [which] is to . . . protect individual liberty[.]" *In re Certified Questions From United States Dist Court*, __ Mich __, __; __ NW2d __; 2020 WL 5877599, at *12 (2020) (Docket No. 161492); slip op at 21.

So, it is undisputed that the judiciary has the responsibility to adjudicate cases involving violations of the Michigan Constitution. And it is similarly undisputed that the legislative branch is not authorized to constrain that power. Given these uncontroversial propositions, it should necessarily follow that the legislature cannot, through silence—i.e., by failing to enact a statutory cause of action for damages for violations of the state constitution—deny the judiciary the most basic tool in the judicial toolbox for remedying constitutional violations. "The legislature cannot do by indirection that which it cannot do directly." *Brennan v Connolly*, 207 Mich 35, 39; 173 NW 511 (1919).

Other state supreme courts are in accord. As the Iowa Supreme Court has explained, "[j]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country." *Godfrey*, 898 NW2d at 865, quoting *King v S Jersey Nat'l Bank*, 66 NJ 161; 330 A2d 1 (1974). It "would be ironic indeed if the enforcement of individual rights and liberties in the [state] [c]onstitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement. It is the state

judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Id.* It is a "truism that a constitution is the expression of the will of the people and thus stands above legislative or judge-made law," such that "the absence of legislative enabling statutes cannot be construed to nullify rights provided by the constitution if those rights are sufficiently specified." *Zullo*, 209 Vt at 318 (quotation marks and citations omitted). See also, e.g., *Binette v Sabo*, 244 Conn 23, 34; 710 A2d 688 (1998) ("[W]e conclude that we possess the inherent authority to create a cause of action directly under the Connecticut constitution."); *Corum*, 330 NC at 783 ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.").

This widespread understanding that the judiciary is uniquely positioned, indeed obligated, to protect individual rights can be thought of us emerging from "two overlapping" aspects of judicial power: "(1) the courts' adjudicative function, and (2) their structural checking function." *Reinventing* Bivens, *supra*, 68 S Cal L Rev at 303. As to the first, the Court, unlike political branches, is specifically designed to neutrally determine whether an unconstitutional act has occurred and to adjudicate competing claims of fact and law in a way that the political branches, who will typically be the ones who stand accused of the violation in question, simply will not be institutionally positioned to do. As to the second, related, obligation, it is courts alone that are designed to play a "structural role" of "ensur[ing] that the political branches do not exceed their constitutionally granted powers." *Id.*

In other words, the very design of tripartite constitutional governance assumes that it is the *courts* who stand as the guardians of individual liberty. Amici's proposed rule ensures just that. It ensures that the courthouse doors are presumptively open to the victims of constitutional injuries who have suffered damages unless the Constitution specifically bars the judiciary from playing

that role with respect to specific rights. In turn, amici's rule still grants the appropriate degree of deference to the legislature by allowing it to legislate procedures and rules to govern the litigation of constitutional causes of action, so long as any legislation does not unduly diminish the constitutional right in question by denying effective relief to those who are injured by unconstitutional conduct. This is consistent with well-recognized limitations on the legislature's ability to legislate with respect to constitutional protections more generally, yet still gives the legislature a significant role. And most importantly, the rule does not allow the political branches to succumb to the all-too-common temptation to arrogate power to themselves at the expense of individual rights.

### B. Amici's Rule Is Most Consistent with the Bedrock Principle That Rights Are Meaningless Without Effective Remedies.

Article 1 of the Michigan's 1963 Constitution is entitled "Declaration of Rights." Because it "guarantees the civil and political integrity [and] the freedom and independence of our citizens," the Declaration of Rights "is the bedrock upon which all else in the constitution may be built." 1 Official Record, Constitutional Convention 1961, p 106 (remarks of Governor Swainson). And that is not just the (then) governor talking. The committee at the constitutional convention that drafted the Declaration went out of its way to underscore the centrality of its work to Michigan's constitutional design. Under the prior constitution, the declaration of rights was the second article. But when introducing the Declaration of Rights, the committee explained that "the liberties of the people are so fundamental to the Michigan constitution and to free representative government generally that the declaration of rights which establishes the fundamental principles of liberty and sets up the basic legal guideposts for their implementation and enforcement, should appear in the first article of the new constitution." 1 Official Record, Constitutional Convention 1961, p 466. Convention delegates subsequently described these rights as "the most inviolate part of our

constitution," emphasizing that it is one of the judiciary's "major functions" to "guarantee[]" those rights. 2 Official Record, Constitutional Convention 1961, p 2196 (remarks of Delegate Habermehl).

This deliberate prioritization by the Michigan Constitution's drafters of the centrality of the declaration of rights matters. Based on analogous history, the Iowa Supreme Court in analyzing whether to recognize an implied damages remedy for state constitutional violations explained that, "[u]nlike the federal constitutional framers who did not originally include a bill of rights and ultimately tacked them on as amendments to the United States Constitution, the framers of the Iowa Constitution put the Bill of Rights in the very first article." *Godfrey*, 898 NW2d at 864. So too here.

If constitutional rights are the "bedrock" of a democracy, then remedies are the foundation. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Mays*, 506 Mich at 175 (MCCORMACK, C.J., concurring), quoting *Marbury*, 5 US (1 Cranch) at 163. As this Court explained decades ago, when abolishing the doctrine of common law sovereign immunity in Michigan, "Government instituted for (the) equal benefit, security and protection (of the people) must accept responsibility for misfeasance causing injury to its citizens during the course of normal governmental operations. It is plainly injust to refuse relief to persons injured by the wrongful conduct of the State. No one seems to defend that refusal as fair."[5] *Pittman v City of Taylor*, 398 Mich at 48; 247

[5] To be sure, this principle yields in the face of *legislatively* created rights without remedies if the *legislature* that created the right decides not to provide a cause of action. See *Pittman*, 398 Mich at 49 n 8, distinguishing *Thomas v Dep't of State Highways*, 398 Mich 1; 247 NW2d 530 (1976) (addressing whether statutory governmental immunity was available where the complaint in question was not of a constitutional dimension). But when the right in question is conferred by the *constitution* rather than the legislature, then for the reasons stated in the prior section, it is

NW2d 512 (1976) (quotation marks, citations, and footnotes omitted). See generally Chemerinsky, *Against Sovereign Immunity*, 53 Stan L Rev 1201 (2001) (arguing that the doctrine of sovereign immunity, when applied to constitutional wrongs, is contrary to core principles of constitutional democracy). "Implicit in this reasoning is the premise that [a] [c]onstitution is a source of positive law, not merely a set of limitations on government." *Brown v New York*, 89 NY2d 172, 187; 674 NE2d 1129 (1996). "No government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the State behind those values." *Id.* at 238.

That same "insight," i.e., that courts "must ensure that each individual before it receives an adequate remedy for the violation of constitutional rights," was "at the heart of *Bivens*," at least in its original form. *Reinventing* Bivens, *supra*, 68 S Cal L Rev at 293. *Bivens* emphasized that where constitutionally protected rights were concerned, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 US at 392, quoting *Bell v Hood*, 327 US 678, 684; 66 S Ct 773; 90 L Ed 939 (1946). That is so, *Bivens* emphasized, both because damages deter future unconstitutional actions *and* because "compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result." *Id.* at 408 (Harlan, J., concurring in the judgment) ("agree[ing]" with the majority on this point).

*Bivens* further explained that effective judicial remedies for unconstitutional actions by governmental actors are particularly important because of the unique ways that governmental power prohibits the people from defending themselves from governmental outreach without

ordinarily the judiciary, not the legislature, that is charged with enforcing the right and protecting individual liberty from the political branches of government.

judicial assistance. For example, in *Bivens*, which involved an alleged violation of the Fourth Amendment, the Court explained that when a federal official demands entry into someone's home, that individual is usually in no position to resist, as resistance may well be a crime. *Bivens*, 403 US at 393.

State supreme courts have repeatedly invoked this logic in finding damages to be available for violations of their own constitutions. As one court recognized: "[T]here is a great distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state. 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. *Dorwart*, 312 Mont at 16. The "very purpose" of a declaration of rights, another court explained, is to protect against the special risks of "[e]ncroachment by the State . . . accomplished by the acts of individuals who are clothed with the authority of the State." *Corum*, 330 NC at 782–783. Accord, e.g., *Godfrey*, 898 NW2d at 876–877; *Binette*, 244 Conn at 43.

The existence of this kind of coercive power, which has motivated state and federal courts to find damages to be an appropriate remedy for governmental abuse, is very much in evidence in this case. Unemployment insurance is a government benefit that is supposed to provide a safety net to protect people who are facing one of the most economically fragile moments most will ever endure from falling into penury and financial ruin. But here, rather than offering a hand up, it is alleged that the UIA implemented a program that punched Michiganders down, using the uniquely coercive powers of government to make a trying time truly catastrophic for tens of thousands of vulnerable families. UIA is alleged to have automatically—and unconstitutionally—accused thousands of fraud, and assessed staggering financial penalties, all without notice or a meaningful hearing. UIA then used uniquely coercive methods especially available to the government, such

as garnishment of tax returns, to enforce its automated orders, resulting in bankruptcies, economic ruin, and even suicide, of people in their time of greatest need.

This all underscores why amici's proposed rule should be adopted to ensure that a damages remedy is presumptively available to the victims of constitutional injuries. The possibility of prospective injunctive relief is insufficient to serve either purpose (deterrence and compensation) that an implied cause of action for damages vindicates. By definition, the threat of a prospective injunction will never compensate the victims—such as those here—of unconstitutional conduct. Indeed, here, many victims likely would have lacked standing to bring an action for prospective relief at all. Even restoring the lost benefits or wrongfully assessed penalties does not compensate the victims here for the consequent economic devastation wrought upon their families through bankruptcy, repossession, foreclosure, and even suicide. Nor will the threat of a future injunction fully (if at all) deter either an individual officer or a policymaker from pursuing a course of unconstitutional action the next time it seems convenient to discard constitutionally mandatory procedures in the name of "efficiency." "To avoid that possibility in the face of sometimes short-sighted popular and political sentiment will take a vigilant judiciary *with a full arsenal of remedies*." *Dorwart*, 312 Mont at 23 (emphasis added). That is what amici's proposed rule ensures.

### C. Amici's Rule Is Most Consistent with History and the English Common Law.

The concept that a litigant who is harmed by governmental violation of their rights is entitled to damages predates the republic. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 US at 395. Accord, e.g., *Zullo*, 209 Vt at 326; *Brown*, 89 NY2d at 192.

Specifically, "[u]nder the common law of England, where individual rights, such as those now protected by [the state constitution], were preserved by a fundamental document (e.g., the

Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages. The violation of the constitutional right was viewed as a trespass, giving rise to a trespass action." *Widgeon v E Shore Hosp Ctr*, 300 Md 520, 526–527; 479 A2d 921 (1984).[6] In reaching this conclusion, *Widgeon* reviewed several common law cases. See *id.*, citing *Wilkes v Wood*, Lofft's 1, 98 Eng Rep 489 (1763) (holding a governmental official liable in damages for an illegal search); *Huckle v Money*, 2 Wils 205; 95 Eng Rep 768 (1763) (holding a governmental official liable for punitive damages, despite the lack of significant consequential damages, for an arrest conducted pursuant to an unlawful general warrant); and *Entick v Carrington*, 19 How St Tr 1029 (1765) (upholding damages against the King's messengers for an unlawful seizure of papers and books). Indeed, "the common law *expected* officers to be mulcted in damages for their errors in judgment," and "[s]ome courts explicitly stated that the law expected that officers would be grievously punished for such errors." Wurman, *Qualified Immunity and Statutory Construction*, 37 Seattle U Law Rev 939, 987 (2014) (emphasis added); see *id.* at 965–972 (discussing supporting cases and treatises).

[6] Issues relating to the imposition of damages for constitutional violations have been well developed by the Court of Appeals of Maryland, which is Maryland's highest court. *Widgeon* held that damages are available for violations of the Maryland Constitution. Subsequently, the court held that sovereign immunity protects the state itself from being *directly* sued for constitutional violations unless it consents to suit; however, an individual officer can always be sued for damages *regardless* of whether that officer was acting in their individual or official capacity. See *Ritchie v Donnelly*, 324 Md 344, 369–370 (1991). Additionally, the court has held that the state legislature can confer individual immunity on individual officers by statute, but only by waiving *state* sovereign immunity such that the state steps into the shoes of the officer by consenting to be sued in their stead. See *id.* at 374 n 14; *Lee v Cline*, 384 Md 245, 262, 266; 863 A2d 297 (2004). Accordingly, although Maryland's courts technically preserve the notion of sovereign immunity, they have created a rule that ensures that individuals harmed by unconstitutional governmental action always have a chance to pursue a damages remedy against someone. *Either* they can sue the official who performed the unconstitutional act, *or* they can sue the state instead under any circumstance in which the state has consented to suit on its officers' behalf.

Reviewing this history, the Iowa Supreme Court has recognized that the "notion that unconstitutional actions by government officials could lead to compensatory and exemplary damages was well established in English common law." *Godfrey*, 898 NW2d at 866. Moreover, "in the common law regime, remedies at law—or damages—were usually the first choice to remedy a protected right. It is equitable remedies, not damage remedies, which reflected the innovation in the common law." *Id.* at 868 (collecting sources). *Godfrey* placed particular emphasis on *Entick*, noting that it "has been referred to as 'perhaps the most important of all constitutional law cases to be found in the law reports of England; for it gave security under the law to all who may be injured by the torts of government servants.'" *Godfrey*, 898 NW2d at 867, quoting Wade, *Liability in Tort of the Central Government of the United Kingdom*, 29 NYU L Rev 1416, 1416–1417 (1954). *Godfrey* also found it significant that Iowa Courts had expressly acknowledged *Entick*'s historical stature. See *id.*

The same is true in Michigan. This Court has described *Entick* as "one of the landmarks of English liberty." *People v Marxhausen*, 204 Mich 559, 565; 171 NW 557 (1919), quoting *Boyd v United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886). And the fact that the common law allowed claims for damages for violations of citizens' fundamental rights is also significant because of the Michigan Constitution's mandate that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7; see *Dorwart*, 312 Mont at 15 (relying on an identical provision of the Montana Constitution); *id.* at 14 (collecting similar decisions from other state courts). Thus, just as in Iowa, Montana, and other jurisdictions, amici's proposed rule that damages are presumptively available for violations of the Michigan Constitution will not break with history but embrace it.

This rich history of providing damages remedies for constitutional wrongs is also recognized by treatises today. The Restatement (Second) of Torts provides that

> [w]hen a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action. [Restatement Torts, 2d, § 874A.]

Critically, the comments clarify that this also extends to recognizing causes of action for violations of a constitution. *Id.*, official comment (a). Numerous state supreme courts have, therefore, relied on the Restatement as additional support for concluding that recognizing an implied cause of action for damages under the state constitution is consistent with longstanding legal practice. See, e.g., *Dorwart*, 312 Mont at 13, 15; *Brown*, 89 NY2d at 189–190; *Binette*, 244 Conn at 34.

Defendant claims, without citation to any authority, that inferring the availability of damages for constitutional harms would "remov[e] the Court from its important role of interpreting existing law and . . . plac[e] it in the role of policymaker in creating *new remedies*." Def Supp Br, p 20 (emphasis added). But as demonstrated above, "defendants' ahistorical argument is . . . upside down. The availability of damages at law is . . . an ordinary remedy for violation of constitutional provisions, not some new-fangled innovation." *Godfrey*, 898 NW2d at 868. Inferring a damages remedy will not make new policy; it will follow centuries of rich legal tradition. Cf. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 Harv L Rev 1532, 1542 (1972) ("Given a common law background in which courts created damage remedies as a matter of course . . . it is not unreasonable to presume that the judicial power would encompass such an undertaking.").

In sum, the common law has long established, and maintained, that damages are available to vindicate harms that result from the unconstitutional actions of governments and governmental

officials. Amici's proposed rule merely applies this historical common law tradition, ensuring that the victims of unconstitutional conduct will always have a recourse for compensatory damages unless the Michigan Constitution itself specifically reserves that question to the legislature.

## II. Under Amici's Test, Damages for Plaintiffs' Alleged Procedural Due Process Violations Are Plainly Available.

As explained above, one of the primary virtues of amici's test is that it creates a strong presumption that damages are available to vindicate rights protected by the Michigan Constitution. That presumption can be rebutted only when (1) the constitutional text itself demands otherwise or (2) the legislature has implemented an equally effective remedy to address constitutional violations that, at the least, allows for consequential damages, including exemplary damages in appropriate cases. This yields predictable results rather than requiring courts to engage in a complex, case-by-case, multi-factor analysis as would be required under Justice BOYLE's *Smith* concurrence. Here, application of amici's proposed two-step test yields a simple and straightforward result.

First, the text of Michigan's due process clause does not even arguably confer any authority on the legislature to determine the appropriate remedies for violations of due process rights.[7] See Const 1963, art 1, § 17. Defendant responds that this Court should not infer a cause of action for damages because the Michigan Constitution expressly creates a cause of action for one particular constitutional violation, supposedly showing that the drafters of the constitution knew how to

[7] The due process clause of the Michigan Constitution is also self-executing. See *Mays*, 323 Mich App at 32 n 6 (citing Michigan cases and federal cases finding the analogous Fourteenth Amendment of the United States Constitution to be self-executing); cf. *Godfrey*, 898 NW2d at 870–871 (finding Iowa's due process guarantees to be self-executing, applying essentially the same test that Michigan courts use for determining when constitutional provisions are self-executing).

create a constitutional cause of action when they wanted to. See Def Supp Br, p 36, citing Const 1963, art 11, § 5. But aside from placing the burden of the presumption on the wrong side of the scale, Defendant's argument errs on its own terms. Article 11, section 5, the provision relied upon by Defendant, is a structural provision regarding the civil service, contained in Article 11 of the Constitution—not one of the "fundamental principles of liberty [that] sets up the basic legal guideposts" for constitutional governance that are protected by the Declaration of Rights. 1 Official Record, Constitutional Convention 1961, p 466. *None* of those bedrock rights includes express language conferring authority on this Court to enforce them, indicating that the drafters took such authority for granted. Furthermore, Article 11, § 5 does *not* in fact address the availability of a cause of action for damages. Rather it is a *standing* provision, clarifying that "any citizen of the state" has standing to bring a suit to enjoin violations. It does not in any way demonstrate that the drafters of the Constitution discussed the availability of damages when they intended them to be available.

Second, it is undisputed that the legislature has not enacted legislation channeling due process claims into a statutory cause of action—let alone one that provides an equally effective remedy including consequential and exemplary damages as would be required under amici's proposed test.[8] This is all amici's test requires, so this Court should allow Plaintiffs' cause of action for damages based on Michigan's due process clause to proceed if it adopts amici's rule.

[8] In fact, even courts that have recognized sovereign immunity in some circumstances have refused to permit it as a defense to lawsuits alleging violations of due process. See *Zullo*, 209 Vt at 317. Defendant relies on *Meyer* (one of *Bivens*' progeny in the era of *Bivens*' decline) for the proposition that the Supreme Court has declined to imply a cause of action for procedural due process. See Def Supp Br, p 35. But as explained above, *supra*, p 17, and as Defendant acknowledges elsewhere, Def Supp Br, p 12, *Meyer* was not based on the fact that the claim in question involved alleged violations of procedural due process. Rather, it was based on the flawed conclusion (rejected under Michigan law by Justice BOYLE's *Smith* concurrence), that an agency could not be

Defendant responds that Plaintiffs each have a remedy for the constitutional harm they suffered in the form of the ability to appeal the UIA's decisions in their underlying unemployment cases. Def Supp Br, pp 40–41. But in many cases the time to appeal the UIA's decisions expired without Plaintiffs' knowledge *precisely because* of the alleged due process violations, which include allegations that Plaintiffs were not properly notified of the accusations and evidence against them. In any event, as Defendant itself acknowledges, its proposed remedy was not specifically designed to address due process concerns and is not a general cause of action to address due process violations. *Id.*, pp 38–39. Worse yet, as Defendant again acknowledges, its proposed remedy would allow Plaintiffs only to recover the funds that were wrongfully withheld or extracted from them—not the significant consequential damages (including exemplary damages, when appropriate) for the lives that have been ruined as a result of Defendant's alleged violations. See Def Supp Br, p 40 (stating that its remedy only "would result in the return of the property a claimant might allege they were deprived of without due process"). Thus, the legislative prong of amici's proposed test is plainly not satisfied for either of two independent reasons: (1) the legislature has not created a general cause of action to address due process violations at all, and (2) the (partial) remedy that does exist does not permit consequential (including exemplary) damages, and thus unduly restricts people's constitutional rights.[9]

held liable for damages in an implied constitutional cause of action for its policies and customs. See *Meyer*, 510 US at 484–485.

[9] Defendant further argues that the availability of a potential *federal* cause of action for violations of the *federal* constitution demonstrates that Plaintiffs have an adequate remedy at law. This is wrong for two reasons. First, as explained above in the Legal Background section, *supra*, Section I.A and below at page 40–41, note 11, the availability of relief under federal law for violations of constitutional rights is highly constrained and, as here, typically presents no avenue for relief *against the state*. And second, it would invert basic principles of federalism for a state to abdicate its own responsibility to protect its own residents from violations of its own constitution merely because some relief might be available someday, somehow, in some federal court for a violation of a separate constitutional right. "State sovereignty is not just an end in itself: 'Rather, federalism

Defendant nonetheless relies on second act *Bivens* cases like *Schweiker* for the proposition that an administrative process that provides some relief, but not consequential damages, should suffice. But as detailed in the discussion of *Bivens*, *supra*, Legal Background, Section II.C, such arguments unmoored *Bivens* from its original logic and ultimately inverted it, creating a federal system where the availability of damages to remedy constitutional violations by federal officials are the exception rather than the rule. See *Reinventing* Bivens, *supra*, 68 S Cal L Rev at 291 (noting that such decisions have "come to virtually subsume the general rule in favor of a judicial cause of action); see also, e.g., *Godfrey*, 898 NW2d at 877 (emphasizing the importance in constitutional cases that punitive or exemplary damages be available because they "express sharp *social* disapproval" of egregiously unconstitutional practices), quoting Madden et al, *Bedtime for* Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 Harv J on Legis 469, 489–490 (1983) (emphasis in *Godfrey*); *In re Town Highway No 20*, 191 Vt 231, 261; 45 A3d 54 (2012) (finding that consequential damages for mental and emotional distress were "clearly necessary to provide meaningful relief" and thus allowing a constitutional tort to proceed despite other damages being available through other means). This Court need not, and should not, follow *Schweiker*'s path.[10]

secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v United States*, 564 US 211, 221; 131 S Ct 2355; 180 L Ed 2d 269 (2011), quoting *New York v United States*, 505 US 144, 181; 112 S Ct 2408; 120 L Ed 2d 120 (1992).

[10] Rather, this Court should follow the rule that courts should defer to the legislature's attempts to displace an implied constitutional damages remedy "only where (1) [the legislature] has provided an alternative remedy considered by [the legislature] to be equally effective in enforcing the Constitution, *and* (2) the Court concludes that in light of the substitute remedy, the displaced remedy is no longer 'necessary' to effectuate the constitutional guarantee." *Of Rights and Remedies*, *supra*, 85 Harv L Rev at 1549.

The ease and predictability of applying of amici's test and lack of necessity to parse complex administrative remedial schemes nicely illustrates *why* this Court should adopt the simple proposed test for determining when damages are available to remedy a constitutional violation. The analysis here leaves little room for varying outcomes, will be easy for future courts to apply, and, most importantly, ensures that the victims of constitutional violations have a remedy unless the Constitution has delegated that decision to a branch other than the judiciary.

## III. Damages Remedies Should Be Available for Constitutional Violations Perpetrated by Governmental Officials Regardless of Whether Such Officials Are Implementing an Official Policy or Custom.

Defendant argues that even if this Court holds that Plaintiffs may sue for damages for due process violations, this lawsuit should be dismissed because Plaintiffs have failed to plead that the alleged violations here occurred as a matter of state policy or custom. Def Supp Br, p 22–26. Given that the UIA is unlikely to have been able to implement and operate the automated fraud detection system at issue here other than as a matter of policy or custom, this argument seems tenuous at best. But even if this Court were to accept that argument, Plaintiffs should be allowed to proceed for a different reason. Namely, for purposes of determining when damages are available for unconstitutional conduct by government officers, this Court should decline to embrace the distinction between policy-and-custom suits and suits involving *respondeat superior* liability for constitutional violations by individual officers. [11]

[11] For the same reasons discussed in this section, amici further contend that the same rule should apply to municipalities. Namely, municipalities should both be held liable for their own direct violations of the Michigan Constitution and held vicariously liable for such violations committed by their employees. Amici recognize that in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), this Court suggested that an inferred damages remedy under the Michigan Constitution was not available against municipal governments. *Id.* at 335. However, any discussion of municipal liability in *Jones* was plainly dicta. *Jones* was a brief, per curiam decision that was issued in lieu of granting leave to appeal. In the circuit court, the plaintiff in *Jones* alleged constitutional violations against the both the City of Detroit and several individual officers.

To be sure, that distinction was suggested by Justice BOYLE's concurrence in *Smith*. But such a distinction is inconsistent with the reasons presented above for inferring the existence of a constitutionally implied damages cause of action in the first place. Amici respectfully suggest that this Court can and should take this opportunity to clarify the law and hold that damages are available for violations of the Michigan Constitution for *any* constitutional violation, whether or not perpetrated as a matter of official policy or custom.

The argument for a cause of action for damages flows in a straightforward manner from the arguments in support of amici's proposed rule. Again, amici's proposed rule is supported by (1) the judiciary's responsibility in a separation-of-powers regime, to protect people in Michigan against overreach by the political branches, *supra*, Argument, Section I.A; (2) the need to provide an effective remedy to people who have suffered damages as the result of unconstitutional acts, *supra*, Argument, Section I.B; and (3) our legal tradition, including the English common law,

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However, only claims against two of the individual officers proceeded to trial, and the verdict on one of those claims was the only one at issue on appeal. *Id.* at 332–333. Accordingly, any mention of municipal liability was necessarily dicta. For similar reasons, this Court may not be in a position to definitely decide the issue of municipal liability in this case, but can nonetheless make clear that any language to the contrary in *Jones* was, indeed, dicta that does not bind lower courts.

It is also important to note that *Jones*' reasoning was based largely on the availability of lawsuits in federal court pursuant to 42 USC 1983 against municipalities for constitutional violations. However, *Jones* did not address the many ways in which such liability would be incomplete. First, 42 USC 1983 provides no relief whatsoever in cases in which the violation of the Michigan Constitution in question does not also violate the United States Constitution. Second, even in cases where there is a parallel federal constitutional violation, municipalities cannot be held liable under 42 USC 1983 on a *respondeat superior* basis, leaving countless victims of constitutional violations without a realistic remedy unless the municipal conduct rises to the level of a policy or custom as defined by *Monell, supra*. Third, as described above in the Legal Background, Section I.C, relief is often not available even against individual officers under 42 USC 1983 due to the ways in which federal courts have expansively interpreted and applied qualified immunity principles.

*supra*, Argument, Section I.C. Each of these principles similarly supports allowing *respondeat superior* liability for unconstitutional conduct by government officials.

As to the first factor, allowing damages liability for constitutional violations by individual officers will create a set of rational incentives that protect constitutional rights. Governmental entities will have an incentive to adequately train, discipline, and monitor their staff to a greater degree than would be the case if liability was available only when a plaintiff could clear the high hurdle of establishing that a violation satisfied *Monell*'s policy-or-custom standard. "[T]he State is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees." *Brown*, 89 NY2d at 194; see also *Zullo*, 209 Vt at 321 (same). The increased risk of discipline likely to result from *respondeat superior* liability will undoubtedly sharpen the mind of governmental employees and provide incentives for them to respect the constitutional rights of the residents of this state to avoid discipline. "When a constitutional violation is involved . . . the emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future." *Godfrey*, 898 NW2d at 877. So "*society* has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others." *Id.* (emphasis in *Godfrey*), quoting *Smith v Wade*, 461 US 30, 54; 103 S Ct 1625; 75 L Ed 2d 632 (1983). Indeed, while *Bivens* itself was not focused exclusively on deterrence, it did emphasize the importance of deterring individual officers. And although *Bivens* did so by creating a cause of action against the individual officer rather than through *respondeat superior* liability, the Court likely understood that this was a fiction because government employees would be indemnified in most circumstances, as noted by then-Professor, now-Judge Pillard of the D.C. Circuit. See Pillard, *Taking Fiction Seriously: The*

*Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo LJ 65, 66, 103–104 (1999).

As to the second justification for damages liability, a victim who has suffered losses as the result of unconstitutional conduct is in equal need of compensation regardless of whether or not their injury was the result of official policy or custom. The role of the judiciary is to protect and compensate people whose rights have been violated, whenever they have been violated—not to pick and choose amongst them. Defendants aver that inferring a damages remedy constitutes legislation from the bench. But to the contrary, it is a rule that fails to provide damages to *all* who have suffered constitutional injuries for fiscal reasons that would constitute judicial policymaking. Such a rule—picking winners and losers amongst the victims of unconstitutional conduct—is far more "policy-like" than establishing a bright-line rule that the victims of unconstitutional conduct are entitled to compensation. "This Court is ultimately responsible for enforcing our state's Constitution, and remedies are how we do that." *Mays*, 506 Mich at 215 (McCormack, C.J., concurring).

Finally, as to the third basis for providing damages, as demonstrated above, at Argument, Section I.C, the historical rule is that damages are available for injuries inflicted by individual officers regardless of whether their actions reflect official policy. For example, in the "landmark" English case *Entick*, see *Marxhausen*, 204 Mich at 565, one issue concerned whether the Secretary of State had wrongfully authorized a warrant for entry into the plaintiff's home—arguably a matter of official policy. But a second issue concerned whether the King's messengers, who simply executed the warrant, violated the plaintiff's right by failing to bring a constable with them as required by the warrant itself. Since the warrant itself said that a constable had to be present, the violation perpetrated by the messengers clearly was *not* a result of unlawful state policy. Yet in

affirming the award of damages to the plaintiff, *Entick* specifically held that the messengers could not avoid trespass liability for exceeding the scope of the warrant. See *Entick*, 19 How St Tr 1029 (1765) (Lord Chief Justice Camden's resolution of the "third question"), available at <http://users.soc.umn.edu/~samaha/cases/entick_v_carrington.html> (accessed May 3, 2021). In other words, the principle that damages should be available to compensate the victims of unconstitutional conduct committed by overzealous officers even when they are *not* implementing official policy or custom is older than our republic, let alone this state. See also *Qualified Immunity and Statutory Construction*, *supra*, 37 Seattle U L Rev at 963 (analyzing Blackstone and other sources and concluding that common law liability was available for excessive force claims where individual officers were found guilty of "exceeding their authority").

In sum, the same considerations that should persuade this Court to follow amici's rule with respect to the availability of damages for constitutional violations generally should similarly persuade the Court to conclude that damages are available to remedy constitutional injuries regardless of whether they are inflicted as a matter of governmental policy or custom.

## CONCLUSION

This is a case about first principles. It is about whether this Court will vindicate Michiganders' faith that their government ought not be allowed to violate their rights with impunity. This Court should grant leave to appeal, adopt amici's clear and simple rule that the courthouse doors in Michigan are presumptively open to protect "bedrock" constitutional rights of people in this state, and affirm the judgments below.

Respectfully submitted,

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