IN THE SUPREME COURT OF IOWA

NO. 15-0695

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CHRISTOPHER J. GODFREY,

*Plaintiff-Appellant*,

v.

STATE OF IOWA; TERRY BRANSTAD, KIMBERLEY REYNOLDS, JEFFREY BOEYINK, BRENNA FINDLEY, TIMOTHY ALBRECHT, and TERESA WAHLERT.

*Defendants-Appellees.*

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On Appeal from the District Court for Polk County
The Honorable Brad McCall

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# Brief of the Iowa League of Cities, the Iowa State Association of Counties, the Iowa Communities Assurance Pool, and the Iowa Association of School Boards as *Amici Curiae* in Support of the Appellees

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## IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa League of Cities is the unified voice of more than 870 municipalities in the State. Since its founding in 1898, the League has acted as a key resource for Iowa's cities by providing advocacy, training, and guidance to strengthen Iowa's communities.

The Iowa State Association of Counties (ISAC) is a private, nonprofit corporation whose members are county officials from Iowa's 99 counties. ISAC's mission is to promote effective and responsible county government for the people of Iowa.

The Iowa Association of School Boards is an association of public school boards, area education agencies, and community colleges. Its mission is to educate, support, and challenge the 1,900 Iowans who give their time and resources to ensure that Iowa's children receive a world-class education.

The Iowa Communities Assurance Pool (ICAP) is a self-insurance program for Iowa public entities that are covered under the Iowa Municipal Tort Claims Act. *See* Iowa Code § 670.7. ICAP's primary goal is to provide for the joint and cooperative

action of its members (relative to their financial and administrative resources) for two purposes: to provide risk management services and risk-sharing facilities to members and their employees and to protect each member of the pool against liability.

The defendants in this case are state employees, but the issue—whether the Iowa Constitution contains an implied cause of action for damages against the State and individual state actors—is, perhaps, most relevant to the hundreds of thousands of Iowans who serve in local governments across the State. As a result, *amici* have a significant interest in the outcome of this Court's ruling.

## INTRODUCTION

There is no legislative authority that gives Christopher Godfrey the ability to recover monetary damages against the State, the Governor, or anyone else for an alleged violation of the Iowa Constitution. So Godfrey is asking this Court to create that authority. *Amici* believe that the Court must decline that request.

Article 12, section 1 of the Iowa Constitution provides that "[t]he *general assembly* shall pass all laws necessary to carry this constitution into effect." (emphasis added). That means it's the legislature's job to fashion remedies for constitutional violations; it's not for the courts to decide. For that reason, and as the Court of Appeals ruled last spring, "it would create a significant separation-of-powers issue were [the Court] to judicially imply a remedy in the absence of a statute." *Conklin v. State*, 863 N.W.2d 301, 2015 WL 1332003, at *4 (Iowa Ct. App. 2015.

The focus of this brief, though, is not on whether the Court *can* fashion a remedy, but (assuming that the Court has such a power) on whether it *should* do so. It shouldn't—especially not in the manner that Godfrey is urging.

Godfrey's brief is Am.Jur.-like in its treatment of constitutional torts and implied causes of action. It spans 71 pages and cites 71 cases, 11 statutes, 22 constitutional provisions, and the Magna Carta. But what it doesn't do is discuss why Godfrey's *specific* claims justify the significant relief that he is requesting. Instead, Godfrey relies on platitudes ("the Iowa

Constitution reigns supreme over all of the branches"[1]) and generic arguments that would apply to any claim brought under any provision of the Iowa Constitution. In other words, Godfrey is arguing for the *Bivens*ification of Iowa's entire Bill of Rights.

That's extraordinary. The U.S. Supreme Court—which Godfrey relies on so heavily—has already rejected such a wholesale creation of implied damage remedies, and so has the Restatement (Second) of Torts. This Court should do the same.

First, there is no reason for this Court to step out of a judicial role and into a law-making role when an alternative cause of action (statute or tort) already exists that provides a remedy for the alleged injury. Such is the case with Godfrey's sexual-orientation discrimination claim under the Equal Protection Clause; the Iowa Civil Rights Act covers the same issue.

Second, Godfrey's due process claim (that the Governor lowered his salary for "strictly partisan political purposes") is not the kind of fundamental, well-defined constitutional violation that cries out for a judicially created damages remedy.

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[1] Plt. Br. 56

And third, the wholesale adoption of a *Bivens* remedy for every violation of every provision of the Bill of Rights would raise significant public policy issues. Such a broad-based cause of action would create unintended consequences and raise dozens of questions that will need years of litigation to sort out. In the meantime, our public servants (and the state and local governments they serve) will pay the price. That is not a desired result, which is why the Court should leave it to the legislature to weigh the competing public-policy interests at stake.

## I. The authorities that Godfrey relies on—*Bivens* and the Restatement (Second) of Torts—require that the Court be hesitant, and exercise careful judgment, when deciding whether to create a non-statutory cause of action.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) the Supreme Court created an implied cause of action for damages against a federal officer who violated the plaintiff's Fourth Amendment rights. "Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," Justice Brennan wrote. *Id.* at 396. But that was of no matter, because, according

to the Court, it was "well settled" that where federal rights were concerned, the federal courts could "use any available remedy to make good the wrong done." *Id.* And because the plaintiff had no remedy for his wrong, the Court created one.

Described not-so-endearingly by some members of the current Supreme Court as a "relic of the heady days,"[2] *Bivens* has not been expanded much beyond its Fourth Amendment roots. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court created a damages remedy under the Fifth Amendment where the victim of sex discrimination (at the hands of a Congressman) had no other remedy (Title VII was not applicable). And in *Carlson v. Green*, 446 U.S. 14 (1980), the Court permitted a claim for damages under the Eighth Amendment. But since *Carlson* (and thus, in the last thirty-five years), the Court has rejected every request to expand *Bivens* remedies to other fact patterns or constitutional provisions.[3]

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[2] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., joined by Thomas, J., concurring)

[3] *Minneci v. Pollard*, 132 S. Ct. 617, 622 (2012) ("Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an

In deciding those post-*Bivens* cases, the Supreme Court has made two important and related observations about so-called *Bivens* actions.

First, court-created damage remedies for constitutional violations are just that: court created. When the justices declare that an injured party can sue a federal official for damages based upon a constitutional violation, they are not interpreting the Constitution; they are using their common-law powers to create a remedy that will be available until (or unless) Congress decides to act. *See Carlson*, 446 U.S. at 19 (presuming that Congress could have overruled *Bivens*, but deciding that, in amending the Federal Tort Claims Act, Congress chose not to do so).

Second, the use of those common-law powers must come with an exercise of "judgment," meaning that the Court must first look to alternative (existing) remedies, and then, even if no alternative is available, it must pay "particular heed" to "special factors counseling hesitation" in creating a remedy that Congress has not

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action."); *see also Wilkie v. Robbins*, 551 U.S. 537, 568 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Schweiker v. Chilicky*, 487 U.S. 412, 420–22 (1988); *Bush v. Lucas*, 462 U.S. 367, 389–90 (1983).

authorized. *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (summarizing the *Bivens* line of cases). As Justice Stevens put it in *Wilkie v. Robbins*: "[A]ny freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." 551 U.S. 537, 550 (2007).

Or put another way: there are countervailing policy considerations to allowing damages actions, and thus the platitude that "every injury requires a remedy" doesn't justify the creation of a new cause of action for every constitutional wrong.

The Restatement (Second) of Torts says the same thing. Depending on the specific language of the state constitution, the reporters concluded that a state supreme court can (in appropriate circumstances) recognize an implied damage remedy. But the reporters caution courts that "[t]his process requires policy decisions by the court, and it should be aware of them and face them candidly." Restatement (Second) of Torts § 874A, cmt. (d),

(1979). The Restatement further notes that the "court is not required to provide a civil remedy" and thus "it must be careful to exercise its discretion cautiously and soundly." *Id.*

Following the Restatement's guidance, the Utah Supreme Court has said that it will not recognize an implied damage remedy unless (1) the plaintiff establishes "that he or she suffered a 'flagrant' violation of his or her constitutional rights," (2) that there is no existing cause of action to address his or her injuries, and (3) that equitable relief is "wholly inadequate." *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 16 P.3d 533, 538-39 (Utah 2000).

That test isn't easy to meet, but that's because there are "myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a constitutional violation," and "the legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries." *Id.* at 539. Thus, out of "respect [for] the legislature's important role in our constitutional system of government," the courts should generally

refrain from creating constitutional torts. *Id.; see also Dick Fischer Dev. No. 2, Inc. v. Dep't of Admin.*, 838 P.2d 263, 268 (Alaska 1992) ("We are also hesitant to extend the *Bivens* decision, and will not allow a claim for damages except in cases of *flagrant* constitutional violations where little or no alternative remedies are available." (emphasis added)).

That is a constant theme in federal and state cases: Even where courts are willing to create a non-statutory cause of action, they do so very sparingly, very carefully, and with great hesitation. They look first for other causes of action that remedy the same type of injury, and they make sure that the claim is specific and significant enough that the public policy issues (and thus the separation of powers implications) are not of great concern.

## II. Godfrey's specific claims, and the public policy concerns at issue, counsel against the creation of non-statutory cause of action.

### A. The Iowa Civil Rights Act allows for damages for sexual-orientation discrimination, so there is no need to imply a remedy under article 1, section 6 of the Iowa Constitution.

Godfrey alleges that the defendants docked his pay because of his sexual orientation, and he wants this Court to imply a cause of action under article 1, section 6 to remedy that injury. There is no reason to do so. The Iowa Civil Rights Act (ICRA) already prohibits sexual-orientation discrimination, so Godfrey has a complete statutory remedy. No court has recognized an implied cause of action in such circumstances.

Godfrey argues that the ICRA doesn't "provide an adequate remedy" because it "protects vastly different interests than does the Constitution of the State of Iowa." Plt. Br. 53. But the particular equal-protection violation alleged here *is* covered by the ICRA, so the fact that the Equal Protection Clause also protects other interests is of no consequence.

Godfrey might be hoping that an implied cause of action would carry a potential for punitive damages, since the ICRA

doesn't. [4] But that is exactly why the Court should refrain. The legislature has decided not to provide for punitive damages for claims of discrimination based on age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, disability, and familial status, and it would be a significant affront to that legislative judgment for the court to imply a cause of action for the very same wrong. *See Bush v. Lucas*, 462 U.S. 367, 373 (1983) (explaining that the power to "grant relief that is not expressly authorized by statute" must be "exercised in the light of relevant policy determinations made by the Congress"). Indeed, "[u]nder our limited role in government, it is not for [the courts] to chart a different course from the legislature absent a conflict with our constitution." *State v. Heemstra*, 721 N.W.2d 549, 569 (Iowa 2006) (Cady, J., dissenting).

Because Godfrey has a complete (not just adequate) remedy for his alleged equal protection injury, a non-statutory remedy is unwarranted.

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[4] *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 689 (Iowa 2013) ("[W]e conclude our legislature did not intend to allow for punitive damages under the ICRA except when it expressly did so.").

### B. Godfrey's due process claims do not amount to the type of flagrant constitutional violation that justifies the creation of a non-statutory cause of action.

Godfrey also alleges that the defendants violated his due process rights because they decreased his pay "for strictly partisan political purposes" and then "publicly and falsely claim[ed] that" they asked him to resign because of "poor work performance." Plt. Br. 13. Because there are no statutory damage remedies for these alleged constitutional violations, Godfrey asks the Court to create one.

There are two problems with that request.

To begin, it's not clear that these alleged wrongs even amount to a constitutional violation, so there is certainly no need to discuss damages. Godfrey doesn't define the phrase "partisan political purposes," and his Third Amended Complaint doesn't contain any allegations that would shed light on the issue. As for the poor-work-performance allegations, Godfrey doesn't cite a single case where a court has held that a state's chief executive commits a constitutional violation if he comments unfavorably on an agency director's performance (especially when adjectives like

"good" performance and "bad" performance are so subjective). We also doubt such a case exists.

But even if the Court were to conclude that Godfrey has alleged a constitutional violation (or that it's at least possible), those violations would not be of the "flagrant" kind that justifies the creation of an implied damage action. A constitutional violation is flagrant if the defendant "violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'" *Spackman*, 16 P.3d at 538 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). There is no indication that the due process claims here are established, much less clearly established, so there is no reason for this Court—for the first time—to jump into the business of recognizing implied damage claims under the Iowa Constitution.

### C. Creating a blanket non-statutory cause of action for every alleged violation of the Iowa Bill of Rights would pose significant public policy and separation of powers concerns.

The main thrust of Godfrey's brief is that the Bill of Rights is important, and thus any violation of those rights should allow for damages. In other words, Godfrey is asking the Court to jettison

the claim-by-claim approach that the U.S. Supreme Court applies and that the Restatement (Second) of Torts instructs courts to follow. The Court should not oblige.

The breadth of such a ruling would have far-reaching—and likely unforeseen—consequences. To begin, there would be a flood of questions from nervous public servants, with "Could I be personally liable?" being the first. The answer isn't exactly clear, because we don't know exactly what a *Godfrey* claim would look like. And that's another problem. Will the court allow for punitive damages? What about qualified immunity? If yes on the immunity, what's the standard? These questions will take years to litigate, which will create significant uncertainty.

That is of great concern for local governments, because legal uncertainty leads to legal bills. Local government officials are often thinly paid (if they're paid at all), so when they hear rumblings of legal action, they understandably want every issue vetted by legal counsel, even if the answer seems (and is) clear. That's because the fear of personal liability, even remote, can "dampen the ardor of all but the most resolute, or the most

irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)

And that's to say nothing of the cost of defending against *Godfrey* suits. At a time when schools and local governments are already stretched for cash, just one new lawsuit (even a frivolous one) could create significant financial burdens. That, as the Supreme Court has recognized, is a "special factor counselling hesitation." *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994).

The question, then, is whether these negative consequences—the financial stress on local governments, the emotional stress on government officials, the potential chilling of policy making, and the years of legal uncertainty—justify the benefits of a damages action for any perceived violation of the Iowa Constitution. It seems clear, at least on a high-level review, that the answer is no. But that's the problem of lawmaking through brief-writing: we can only speculate at the highest of levels.

The legislature, on the other hand, is well-suited to weigh these competing costs and benefits. It can hear from all

stakeholders through one-on-one conversations, hearings, letters to the editor, town halls, Pizza Ranch visits, or whatever. And it can also create certainty by crafting a statutory scheme—if it chooses—that clearly defines the elements of the cause of action, outlines immunities, and places limits on damages, if limits are necessary. In other words, the legislature can create a comprehensive statutory scheme that can be amended at any time. This Court can only take the cases as they come. So if it adopts the broad remedy that Godfrey is asking for (i.e., a damages claim for any violation of the Bill of Rights), then it can't easily change course.

In sum, the creation of a damages remedy for every constitutional wrong is a policy choice that should be left to the legislature. *Amici* respectfully ask that the Court affirm the district court's summary judgment ruling.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2,953 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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**PROOF OF SERVICE AND CERTIFICATE OF FILING**

I hereby certify that on October 12, 2015, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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