IN THE SUPREME COURT OF IOWA
No. 19-1278

KRYSTAL WAGNER,
Individually and as Administrator of the Estate of Shane Jensen,

Plaintiff-Appellant,

vs.

STATE OF IOWA and WILLIAM L. SPECE
a/k/a BILL L. SPECE,

Defendants-Appellees.

CERTIFIED QUESTIONS OF LAW from the
HONORABLE C.J. WILLIAMS
UNITED STATES DISTRICT COURT for the
NORTHERN DISTRICT OF IOWA
Case No. 19-CV-3007-CJW-KEM

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. THE COURT SHOULD ANSWER THE CERTIFIED QUESTIONS BECAUSE THE ANSWERS MAY BE DETERMINATIVE OF THE CASE PENDING BEFORE THE FEDERAL DISTRICT COURT

Defendants ask the Court to decline to answer the certified questions because Defendants do not believe the Court's prior analysis of direct claims under the state constitution (*Godfrey* claims) explicitly addressed the viability of such claims when brought against a state officer in the officer's individual capacity. Individual capacity claims, however, have been available since the Court, following the rationale of *Bivens*, recognized the existence of direct constitutional claims against state officers. The Court should reject Defendants' invitation to ignore this important issue because reiterating the viability of individual capacity *Godfrey* claims, as a preliminary question, will provide certainty to the State of Iowa, its officers, employees, courts, and citizens, at the critical point where individual liberties and the government's use of force intersect.

District Judge Williams expressed his belief that the answers to his questions would chart the course, and may very well end a portion, of this litigation. 7/29/19 Opinion and Order, 25-28 (App. 39-42) (Summarized by the court as: "The certified questions may also be determinative of plaintiffs' direct constitutional claims before the Court"). Plaintiff agrees with District

Judge Williams' analysis of the impact of the answers to his certified questions. Defendants cannot genuinely present the answers to these questions as meaningless to the outcome of the litigation; instead, they attempt to circumvent the Court's analysis, reasoning, and precedent, by asking the Court to reverse course and decide, with no justification for abandoning *stare decisis*, that individual capacity *Godfrey* claims are not available. Questions of this importance, impacting the ability of Iowans to vindicate their state constitutional rights, deserve a full analysis of the merits, and should be consistent with the Court's adoption of *Bivens*-like claims against individual state actors under the state constitution.

This case, arising out of a state officer's killing of a citizen under color of law, provides the ideal vehicle for reiterating the availability of individual capacity claims and deciding several new matters of utmost importance. Specifically, answering the certified questions in this case will eliminate any question about whether the procedural and jurisdictional requirements of the Iowa Tort Claims Act apply to the individual capacity *Godfrey* claim arising out of the officer's violation. The Court should take full advantage of this opportunity to reinforce the viability of individual capacity *Godfrey* claims against state officers and, after doing so, answer the certified questions presented by the federal district court.

If the Court changes course and constrains the enforcement of the Iowa constitution by rejecting the continued existence of individual capacity *Godfrey* claims, the holding will be dispositive on Plaintiff's individual capacity *Godfrey* claims in the federal district court. It would also dispose of any such claims pending the state or federal courts in Iowa. If the Court, consistent with its prior holdings, reaffirms the existence of individual capacity *Godfrey* claims, the Court's answers to the certified questions may still be dispositive of Plaintiff's individual capacity *Godfrey* claims in the federal district court. No matter the outcome of the preliminary question on individual capacity claims, the certified questions satisfy the requirements of Iowa Code § 684A.1.

A. The Court's reaffirmation of the viability of individual capacity *Godfrey* claims is the first step in answering the certified questions, and the subject is of such importance that the Court should not sidestep this opportunity to provide certainty to the agencies, officers, employees, courts, and citizens of the State of Iowa.

The Court may answer certified questions when "when (1) a proper court certified the question, (2) the question involves a matter of Iowa law, (3) the question 'may be determinative of the cause ... pending in the certifying court,' and (4) it appears to the certifying court that there is no controlling Iowa precedent." *Life Investors Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 643 (Iowa 2013) (quoting Iowa Code § 684A.1).

Defendants challenge only the third requirement in the list, arguing the Court's answers to the certified questions "would have no impact on the pending matter before the United States district court, as there is no valid Iowa constitutional tort claim pending." Def. Brief, 17. Defendants' argument assumes, with no supporting authority, that the Court's prior opinions recognizing and refining direct actions under the state constitution (*Godfrey* claims) rejected the very individual capacity claims that underlie the entire *Bivens* doctrine. Def. Brief, 18. To the contrary, the Court's prior opinions have established *Godfrey* claims may be raised against the state *or* individual state officials. *See Baldwin v. City of Estherville*, 915 N.W.2d 259, 265, 277, 280 (Iowa 2018) (*Baldwin II*) (deciding immunity standard for individual government officials, noting concern that "government officials … would be reluctant to fully perform their jobs if *they* could be found strictly liable for [their] actions" and "to be entitled to qualified immunity a defendant must plead and prove … that *she or he* exercised all due care") (emphasis added); *Baldwin v. City of Estherville*, 929 N.W.2d 691, 694 (Iowa 2019) (*Baldwin V*) ("It is not clear whether *Baldwin II* addressed whether qualified immunity is available to government employers" as opposed to individuals); *Venckus v. City of Iowa City*, 930

N.W.2d 792, 805 (Iowa 2019) (prosecutorial immunity barred "claims in the petition against the individual prosecutors").

This Court's answer to the certified questions may also impact the claims dismissed without prejudice by the federal district court. In addition to the specific reasons set out by District Judge Williams in asking the Court to address the certified questions in this case, several claims filed by Plaintiff were dismissed "without prejudice." Judge Williams' Opinion and Order summarized those holdings:

> Counts I-III against the State, to the extent those claims are brought under the Iowa Constitution, and Counts IV-V against the State are **dismissed without prejudice**. . . Count IV against Officer Spece in his individual and official capacities is **dismissed without prejudice**. Count V, which only states a claim against Officer Spece in his official capacity, is **dismissed without prejudice**. (Emphasis in original)

7/29/19 Opinion and Order, 29 (App. 43). Plaintiff will have the opportunity to amend those claims to the extent necessary and appropriate depending on this court's response to the certified questions.

This Court has previously answered certified questions when "the answer … will determine whether [the plaintiff's] claim … can proceed, and it does not appear … that there is any controlling Iowa precedent." *De Dios v. Indemnity Ins. Co. of N. Am.*, 927 N.W.2d 611, 616 (Iowa 2019). The same is true in this case, where the answers regarding the applicability of the Iowa Tort Claims Act to individual capacity *Godfrey* claims would

determine whether Plaintiff's claim could proceed in the federal district court. The Court's answers on the applicability to such claims of the procedural and jurisdictional requirements of the ITCA, such as exhaustion of administrative remedies and the venue for suit, will determine whether Plaintiff's claims can proceed.

Defendants suggest that in *Hartford-Carlisle Savings Bank v. Shivers*, 566 N.W.2d 877 (Iowa 1997), the Court declined to answer a certified question when it did not involve any issue that needed to be addressed in the appeal. Def. Brief, 17. Defendants failed to inform the Court that, during the *Shivers* oral argument, "both parties agreed" to that premise. 566 N.W.2d at 884. Certainly, the parties in this case are not in agreement as to whether the Court should answer the certified questions. In *F.D.I.C. v. American Casualty Company*, 528 N.W.2d 605, 607 (Iowa 1995), also selectively quoted by Defendants, this Court wrote about the breadth of the certified question statute:

> We think our certification statute is not so limiting. Cases might be imagined in which we should reject purely academic or extraneous questions, but this is surely not such a case. Our answer to the certified question indeed may be determinative of the cause in federal court, a matter we of course leave entirely up to that jurisdiction. Our answer will only be a statement of Iowa common law. We emphatically decline to advise the Federal court on whether to apply it, but we think we have jurisdiction and that it would be inappropriate for us to refuse to respond to the certified question.

But this case presents more than "purely academic or extraneous questions." The certified questions presented by District Judge Williams "may indeed be determinative of the cause in federal court" and should be answered.

Defendants argue the Court should pass on reaffirming the viability of individual capacity *Godfrey* claims and "reserve for another day the substantial issue of first impression of whether a state employee can be individually liable for constitutional tort damages based on actions taken while acting pursuant to state authority." Def. Brief, 19. Defendants encourage the Court to find "a more appropriate vehicle for developing" this area of law, but fail to explain how this case, involving a grave, permanent deprivation of a young Iowan's constitutional rights, is a defective vehicle for that purpose. *Id.* at 18.

Defendants cite *Eley v. Pizza Hut of America, Inc.*, 500 N.W.2d 61 (Iowa 1993), in support of their "reserve for another day" argument. The reason this Court passed on *Eley* was a lack of specificity in the facts. *Id.* at 64 ("Because the stated facts are in conflict and could be a basis for this court to answer the certified questions in a variety of ways, we are unable to comply with the court's request"). That problem does not exist in this case, as the district court adopted Plaintiff's complaint as the statement of facts for

purposes of the certified questions. 7/29/19 Opinion and Order, 30 (App. 44). As the Court will see when it reviews the complaint, there is no lack of specificity in the facts underlying Plaintiff's claims against Defendants. *See* Complaint (App. 1-14).

The only other case cited by Defendants in support of their request that the Court refuse to address individual capacity *Godfrey* claims is *Foley v. Argosy Gaming Co.*, 688 N.W.2d 244, 248 (Iowa 2004), which is unhelpful because the quoted language was included only as authority for the Court's standard against "reconsideration of *stare decisis*" via certified question. The certified questions in this case do not require a reconsideration of *stare decisis*. The only precedent challenged in this case is the continued viability of individual capacity *Godfrey* claims which have been available since this Court's adoption of the *Bivens*-like remedy against state officials and the government.

B. To preserve, enforce, and further the rights, privileges, and protections bestowed upon our people by the Iowa constitution, state officers have been, and remain, subject to individual capacity *Godfrey* claims as tempered by the "all due care" immunity recognized in *Baldwin V*.

"[*S*]*tate* constitutions and not the Federal Constitution were the original sources of written constitutional rights." *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014) (emphasis in original). "James Wilson declared that

the purpose of the states was "'to preserve the rights of individuals.'" *State v. Baldon*, 829 N.W.2d 785, 808 (Iowa 2013) (quoting I *Records of the Federal Convention of 1787* 356 (Max Farrand ed., 1937)). "[W]hile there are many provisions of the United States Constitution limiting the power of states, there are no provisions prohibiting or restricting the power of state courts to interpret authoritatively their state constitutions." *Id.* at 809. Indeed, "[o]ur Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection…" Hon. Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133, 1145 (2012).

Notwithstanding the preeminence of state constitutional protections in the mechanisms for protecting Americans' civil liberties, the federal courts took action to ensure the federal constitutional protections against the governmental invasion of the integrity of body and property had the teeth necessary to prevent those who would rather trample the constitution than abide it. Those same federal courts recognized the importance of an enforcement scheme, purely of the courts' making, to dissuade *individual*

federal officers from violating citizens' rights and to provide redress for those who fell victim to such violation.

The federal government was just as resistant to accountability for its officers as the Defendants in this case:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In doing so, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 391-92 (1971). But the United States Supreme Court knew better. It knew that constitutional provisions without an enforcement mechanism, including personal accountability for government officials who violate the constitution, were nothing but words. This Court should continue to follow the lead of the United States Supreme Court, as it did in recognizing *Godfrey* claims generally, and reaffirm the viability of *Godfrey* claims against state officials in their individual capacity. Here, as in *Bivens*, there is "no explicit congressional declaration that persons injured by a" government officer's violation of constitutional rights "may not recover money damages *from the agents*" who committed the violation. *Bivens*, 403 U.S. at 397 (emphasis added). In doing so, the Court should remember "*Bivens* and its progeny

serve only as a guide. Because we are considering a claim under our state constitution, those federal court cases, based on the federal constitution, are not determinative." *Binette v. Sabo*, 710 A.2d 688, 697 (Conn. 1998) (recognizing *Bivens*-like claim under the Connecticut state constitution).

Defendants correctly note that both Section 1983 and *Bivens* actions may be pursued against federal officials in their individual capacities. Defendants are incorrect, however, in their assertion that, "the rationale for the federal imposition of individual damages liability is entirely inapplicable in state courts." Def. Brief, 20. The very reasoning promoted by Defendants for Section 1983 individual liability, "Congress sought to guarantee a *federal* forum to vindicate *federal* constitutional rights," is mirrored at the state level. Def. Brief, 20 (emphasis in original). If the Court accepts Defendants' argument, and individual capacity *Godfrey* claims are no longer viable, there will be no *state* forum to vindicate *state* constitutional rights against the agents who violate those rights. The federal courts would lack subject matter jurisdiction over the claim and neither Section 1983 nor *Bivens* can stand on alleged violations of state constitutional rights. Section 1983, the statutory means of enforcing federal rights violated by state agents, is informative, but it's not a perfect analog to a *Godfrey* claim.

Bivens and its progeny, on the other hand, highlight the importance of individual capacity claims against government officers who violate citizens' constitutional rights. As a bonus, the reasoning behind individual capacity *Bivens* claims is not as clouded by history as Section 1983. The rationale of *Bivens* was artfully described by the Supreme Court of Connecticut in *Binette v. Sabo*:

> Furthermore, we agree with the fundamental principle underlying the United States Supreme Court's decision in *Bivens*, namely, that a police officer acting unlawfully in the name of the state possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. The difference in the nature of the harm arising from a beating administered by a police officer or from an officer's unconstitutional invasion of a person's home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships. A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another's residence. A police officer's legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to protect and defend those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. *Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively violates those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.*

710 A.2d at 698 (emphasis added) (internal citations omitted).

In their argument asking the Court to abandon individual capacity *Godfrey* claims, Defendants point out North Carolina, and only North Carolina, as a state which has adopted a *Bivens*-like state constitutional claim but has declined to recognize such claims against government actors in their individual capacity. Def. Brief, 22-23 (citing *Corum v. Univ. of N.C.*, 413 S.E.2d 276 (N.C. 1992))[1]. The decision to rely on *Corum* is curious given its holding that "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 413 S.E.2d at 292 ("these" constitutional rights refers to "individual rights protected under the Declaration of Rights" which "are a part of the supreme law of the State"). The North Carolina Supreme Court decided its constitution did not support claims against state actors in their individual capacity, relying on *Hoke v. Henderson*, 15 N.C. 1 (1833), but it cited no modern authority for its decision. Defendants cite no other states as having rejected individual capacity claims.

Defendants' closing argument against individual capacity *Godfrey* claims is a policy argument. Citing a recent law review article, Defendants suggest individual officer liability could be unfair to state actors. Def. Brief,

[1] Defendants' Brief cites to 413 S.E.2d 761 (N.C. 1992), which appears to be a case of transposing page numbers from different reporters. The case is reported under 330 N.C. 761 and 413 S.E.2d 276.

25 (citing Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Calif. L. Rev. 933, 978 (2019). While the quoted text certainly appears in the article, Professor Fallon ultimately suggested an approach consistent with this Court's prior decision to allow claims against individual state actors:

> To get the [*Bivens*] doctrine back on a better path, the Supreme Court should begin by acknowledging the fundamental correctness of the *Bivens* approach, despite admitted grounds for possible disagreement concerning its proper application: judge-crafted remedies for constitutional violations are not only historically pedigreed, but sometimes constitutionally necessary to promote rule-of-law values.

Id. at 988. Professor Fallon also challenged the "assumption that fear of personal liability would have undesirable chilling effects on officials threatened with suit," noted that "[r]ecent empirical work significantly undercuts that premise." *Id.* at 989-990; *see also* James E. Pfander, Alexander A. Reinart & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, Stan. L. Rev. (Forthcoming), available at https://ssrn.com/abstract=3343800.

Even if the Court were compelled to question its precedent and decide this case on the policy issues presented by Defendants, it need not recreate the wheel, as it weighed and accounted for these policy concerns just one year ago. In *Godfrey v. State*, 898 N.W.2d 844, 856 n.2 (Iowa 2017) ("*Godfrey II*"), this Court cited 14 jurisdictions as recognizing direct damage

actions under their state constitutions. In *Baldwin II*, this Court examined the immunity rules for each of those jurisdictions and noted two of the jurisdictions no longer appeared to allow direct constitutional claims. 915 N.W.2d at 266-274. After analyzing the constitutional claim schema in each of those jurisdictions, this Court settled on the "all due care" affirmative defense for constitutional torts, holding that "a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law." *Id.* at 281. The "all due care" standard serves as safeguard against the unjustified imposition of individual liability in *Godfrey* claims, mitigating the unsubstantiated assumption that individual liability would chill government actors' willingness to do their jobs. The context of *Baldwin II* further supports this Court's prior acceptance of individual capacity claims, as the case only considered the immunity standard for individual government actors.

This Court's prior decisions recognizing direct state constitutional torts and defining the contours of official immunity available to government officials charged with constitutional violations clearly contemplated individual capacity *Godfrey* claims. The Court should take advantage of the opportunity presented in this case to reiterate the availability of individual

capacity claims, consistent with the rationale of *Bivens* and *Godfrey* to dissuade state officers from violating, and provide redress for the violation of, the constitutional rights of Iowans, subject to the protection of this Court's "all due care" affirmative defense against liability.

II. THE PROCEDURAL AND JURISDICTIONAL REQUIREMENTS OF THE IOWA TORT CLAIMS ACT DO NOT APPLY TO *GODFREY* CLAIMS

After reiterating that individual capacity claims are viable under *Godfrey*, the Court should answer the certified questions presented by District Judge Williams. Because the legislature elected not to include constitutional torts in the definition of "claims" covered by the Iowa Tort Claims Act, and because the Iowa constitution must maintain its status as the supreme law of this state, the Court should hold that the Iowa Tort Claims Act does not apply to Plaintiff's individual capacity *Godfrey* claims against Defendant Spece.

A. The Iowa constitution is the supreme law of our state and should not be subject to legislative limitation.

Defendants' entire argument on this point fails to distinguish between common law tort claims and the constitutional tort claims recognized in *Godfrey*. Defendants' claim that the maxim "the King can do no wrong" prevailed in Iowa prior to the passage of the Iowa Tort Claims Act is simply false. Def. Brief, 26. The Iowa Constitution created a Governor, not a King,

of Iowa. Iowa Const. art. IV, § 1. No one is above the law and the supreme law of the State of Iowa is the Iowa Constitution. Iowa Const. art. XII, § 1.

This case has absolutely nothing to do with what the legislature wanted, did, or intended to do. The rights set out in Article I of the Iowa Constitution are not derived from legislative authority, nor are they contingent upon legislative enactment. The primary and specific right at issue in this case, to not be subjected to an unreasonable seizure, is a basic right of the human race that goes all the way back to the Magna Carta, adopted in the year 1215. *Brown v. State*, 674 N.E.2d 1129, 1138-39 (N.Y. 1996).

As discussed by the North Carolina Supreme Court in *Corum*, the concept of sovereign immunity must play second fiddle to the inalienable rights contained in our state constitution. *See Corum*, 413 S.E.2d at 292.

B. The Iowa legislature elected not to include constitutional tort claims in the list of claims covered by the Iowa Tort Claims Act.

Defendants' position is that the legislature, not this Court, should decide how *Godfrey* claims are handled. Defendants suggest the legislature can control the procedure, remedies, and availability of direct constitutional claims. Defendants premise their argument on the *Baldwin* cases decided alongside the Iowa Municipal Tort Claims Act ("IMTCA") and ask this court

to apply those decisions to the ITCA notwithstanding the major textual differences between the statutes. The problem with this argument, beyond the fact that it relegates the Iowa constitution to a position of subservience to the Iowa Code, is that the legislature specifically *included* constitutional torts in the IMTCA and specifically *excluded* them under the ITCA.

Under the IMTCA a "tort" is defined as follows:

> "Tort" means every civil wrong which results which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or *denial or impairment of any right under any constitutional provision*, statute or rule of law.

Iowa Code § 670.1 (emphasis added). This definition, lacking any ambiguity, evidences the legislature's decision to include constitutional torts in the universe of claims covered by the IMTCA.

The legislature, however, chose a different path under the ITCA, defining "claim" without referencing constitutional torts. Under the ITCA, "claim" is defined as follows:

> Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment.

Iowa Code § 669.2(3)(b). The legislature not only refused to include *Godfrey* claims in the definition of "claim" in the ITCA, it did so while explicitly

requiring the state to defend, indemnify and hold harmless any employee against claims made against the employee under the Iowa constitution. Iowa Code § 669.21(1). There is no way to read Section 669.2(3)(b) to include *Godfrey* claims without rendering superfluous the phrase "claims arising under the Constitution" in Section 669.21(1). Defendants' effort to have the ITCA interpreted the same as the IMTCA must fail because the legislature used different language in each code chapter, and because the legislature acknowledged the existence of constitutional claims in one section of the ITCA, but decided not to include those claims in the ITCA's definition of a covered "claim."

Under Iowa law, principles of statutory construction are not invoked unless the statute is ambiguous. *City of Waukee v. City Dev. Bd.*, 590 N.W.2d 712, 717 (Iowa 1999). The ITCA is not ambiguous in its definition of "claim" and "the court should not search for a meaning beyond its expressed terms." *State v. Knowles*, 602 N.W.2d 800, 801 (Iowa 1999). The "rules of statutory construction cannot be employed to raise ambiguity in a statute; rather, the ambiguity must be found prior to employing any rules of statutory construction." *Iowa W. Racing Ass'n v. Iowa Racing and Gaming Comm'n*, 546 N.W.2d 898, 900 (Iowa 1996).

This Court, when confronted with the task of determining the meaning of a statute, has explained:

> The goal of statutory construction is to determine legislative intent. We determine legislative intent *from the words chosen by the legislature*, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (emphasis added). Defendants' request to interpret the ITCA based not on what the legislature stated, but on "what it should or might have said," must be rejected. *Id*.

In *Consol. Freightways Corp. v. Nicholas*, 137 N.W.2d 900 (Iowa 1965), this Court explained;

> Legislative intent must be deduced from the clear language of the statute and such language must be construed according to its plain and ordinary meaning. We reasoned therein that if the words used were to have any other meaning or the term was being used in a sense different from its accepted meaning the legislature could and should expressly define the meaning of the term as it is to be used in that statute. Having not done so, we presume the terms used were to be given no other than their plain, ordinary and accepted meaning.

Id. at 904. In this case, if the legislature wanted the IMTCA and the ITCA to both be interpreted to include *Godfrey* claims, then "the legislature could and should [have] expressly defined the meaning of [the claims/torts

covered]" in the same way under each statute. *Id*. "Having not done so," this court must "presume" the legislature intended to cover *Godfrey* claims under the IMTCA, but not under the ITCA. Defendants' attempt to equivocate the IMTCA with the ITCA, despite the unique language used in each chapter, must be rejected.

In *Godfrey v. State*, 847 N.W.2d 578 (Iowa 2014) ("*Godfrey I*"), this Court held that claims which fall outside the language of the ITCA are not subject to the certification procedures of the ITCA. This Court reasoned that claims against individual state employees acting "outside" the scope of their employment are not subject to the attorney general's certification process set forth in the ITCA. *See* Iowa Code § 669.21. In 2017, this Court held in *Godfrey II* that where a statute does not provide adequate remedies for constitutional violations a "direct" action against the state is allowed. 898 N.W.2d at 844. Applying *Godfrey I* and *Godfrey II* to the physical deprivation of liberty and assault and battery claims against the state and its employees at issue in this case, the Court should hold that a direction action lies against Defendant Spece, and the claims are not subject to the requirements of the ITCA.

Even if constitutional claims were covered under Iowa Code § 669.2(3), Iowa Code § 669.14(4) exempts claims for assault, battery, false

arrest, and false imprisonment. As such, the constitutional torts alleged in this case are outside the scope of the ITCA, just like the claims in *Godfrey I*, so the ITCA and its procedural and jurisdictional requirements and limitations should not apply.

Because the Iowa Tort Claims Act, by its own terms, does not apply to *Godfrey* claims, the Court should answer all four certified questions in the negative.

C. The State cannot claim federal courts lack jurisdiction over *Godfrey* claims while simultaneously removing select *Godfrey* claims to federal court.

If the Court decides the Iowa Tort Claims Act applies to *Godfrey* claims, it should nonetheless hold that the venue selection provision of the law, Iowa Code § 669.4, does not apply to such claims. The State's argument that federal courts have no subject matter jurisdiction to decide *Godfrey* claims is undermined by the State's position in two other *Godfrey* claim cases the State elected to remove to federal court. *See Pothoff v. Iowa*, U.S. Dist. Ct. Northern Dist. Iowa, Case No. 2-19-cv-01030-CJW-KEM, removed on October 25, 2019; and *Yakish v. Smith*, U.S. Dist. Ct. Northern Dist. Iowa, Case No. 1-19-cv-00120, removed on October 30, 2019. The State's decision to remove these cases to federal court clearly indicates its belief that federal courts have jurisdiction over the claims.

The State can't have it both ways. Either federal courts have subject matter jurisdiction over *Godfrey* claims, or they do not. The State's one-sided ability to select the forum, on a case-by-case basis, for state constitutional claims is a prime example of why this Court should hold that Iowa Code § 669.4 is not applicable to such claims.

CONCLUSION

For all the reasons set forth above and in Plaintiff's earlier Brief, the certified questions of law should be answered as follows:

1. No, the ITCA does not apply to plaintiff's constitutional tort causes of action;

2. Yes, the available remedy under the Iowa Tort Claims Act for excessive force by a law enforcement officer is inadequate based on the unavailability of punitive damages;

3. No, Plaintiff's claims under the Iowa Constitution are not subject to the administrative exhaustion requirement in Iowa Code Section 669.5(1); and

4. Iowa Code Section 669.4 does not apply to Iowa Constitutional claims. Federal courts have supplemental jurisdiction over Iowa Constitutional claims when joined with a federal claim sharing a common nucleus of operative facts because the State of Iowa has consented to such jurisdiction for reasons of judicial efficiency.

ATTORNEY'S COST CERTIFICATE

I, Nathan Borland, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant's Final Reply Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by:*/s/ Nathan Borland*

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