IN THE SUPREME COURT OF IOWA
Case 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 FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA
THE HONORABLE C.J. WILLIAMS, JUDGE

DEFENDANTS–APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

The Iowa Supreme Court must retain this matter, as only the Iowa Supreme Court is empowered to consider certified questions of law by a United States district court. Iowa Code § 684A.1.

STATEMENT OF THE CASE

On November 11, 2017, Shane Jensen, while brandishing a handgun, was involved in a standoff with law enforcement. (Memorandum Opinion and Order at 3; App. at 17). During the armed standoff, Officer Spece of the Department of Natural Resources shot and killed Mr. Jensen. (*Id.*; App. at 17). Following his death, Krystal Wagner, individually and as administrator of Mr. Jensen's estate, filed suit in federal court. (*Id.*; App. at 17). Wagner's Complaint identified five counts, including federal constitutional claims under § 1983 and Iowa constitutional claims against the State of Iowa and Officer Spece in his individual and official capacity. (*Id.* at 3–4; App. at 17–18). Wagner also brought two state law claims: wrongful death and loss of consortium. (*Id.* at 3–4; App. at 17–18).

The Defendants moved to dismiss the case, alleging (1) the State and Officer Spece in his official capacity were not "persons" susceptible to suit under § 1983; (2) the State was immune from suit under the Eleventh Amendment to the United States Constitution; (3) Iowa state district courts

possess exclusive jurisdiction over tort claims against the State; (4) Wagner failed to exhaust her administrative remedies as required by Iowa Code chapter 669 prior to bringing the state constitutional claims; and (5) Wagner's negligence claim was barred by chapter 669. (*Id.* at 5–7; App. at 19–21).

The district court readily dismissed all of the claims against the State and Officer Spece in his official capacity. (*Id.* at 10; App. at 24). The court affirmed that neither a State nor a state official sued in his official capacity are "persons" under § 1983. As well, the court concluded that the Eleventh Amendment prevented any claim from proceeding against the State or a state official sued in his official capacity absent waiver or abrogation. (*Id.* at 8–10; App. at 22–24). Thus, the only remaining claims for consideration were (1) Wagner's § 1983 claim against Officer Spece individually, and (2) Wagner's Iowa constitutional tort claim against Officer Spece individually.

The court proceeded to consider Defendant's arguments regarding compliance with the Iowa Tort Claims Act ("ITCA"), including administrative exhaustion, in the context of Wagner's individual-capacity claim under the Iowa Constitution. (*Id.* at 19–27; App. at 33–41). After surveying *Godfrey II* and its certified-question progeny, the court was unable to locate any controlling or persuasive authority on the issue. (*Id.* at 19–27;

App. at 33–41). Accordingly, it certified the following four questions to this Court for consideration:

> a. Does the Iowa Tort Claims Act, Iowa Code Chapter 669, apply to plaintiffs' constitutional tort causes of action?
>
> b. Is the available remedy under the Iowa Tort Claims Act for excessive force by a law enforcement officer inadequate based on the unavailability of punitive damages? And if not, what considerations should courts address in determining whether legislative remedies for excessive force are adequate?
>
> c. Are plaintiffs' claims under the Iowa Constitution subject to the administrative exhaustion requirement in Iowa Code Section 669.5(1)?
>
> d. Are plaintiffs required to bring their Iowa constitutional claims in the appropriate Iowa district court under Iowa Code Section 669.4?

(*Id.* at 29–30; App. at 43–44).

STATEMENT OF FACTS

This matter comes to this Court via certified question from a ruling on the Defendants' motion to dismiss in the United States District Court for the Northern District of Iowa. When ruling on a motion to dismiss, the district court is bound to accept all allegations contained in the Plaintiff's Complaint as true, and make all inferences in favor of the non-moving party. *Lustgraaf v. Behrens*, 619 F.3d 867, 873 (8th Cir. 2010). When considering whether to answer a certified question, this Court "rel[ies] upon the facts provided with the certified question." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 265

(Iowa 2018) [hereinafter "*Baldwin II*"]. The district court, considering the facts as alleged in the Complaint, provided as follows:

> Plaintiffs allege that at all material times, the State of Iowa ("State") employed Officer William L. Spece as a conservation officer through the Iowa Department of Natural Resources ("DNR"). On or about November 9, 2017, a warrant was issued for Mr. Jensen's arrest. Officer Spece, who "was in Humboldt County on conservation-related business," assisted in the search for Mr. Jensen. While in possession of a handgun, Mr. Jensen became involved in a standoff with Officer Spece, a Humboldt Police Department officer, and three Humboldt County Sheriff's deputies. During the standoff, Officer Spece shot and killed Mr. Jensen.
>
> Plaintiffs allege numerous claims against the State and Officer Spece, and several of the counts identified by plaintiffs contain multiple causes of action. Plaintiffs assert that the State failed to have proper policies or practices in place and failed to properly train, equip, and/or supervise Office Spece. Plaintiffs allege that these failures led to the violation of Mr. Jensen's rights to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and under Article I, Section 8 of the Iowa Constitution. Plaintiffs also allege that the State violated Mr. Jensen's substantive due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 9 of the Iowa Constitution, although it is unclear which acts or omissions by the State form the basis of plaintiffs' claims. Plaintiffs additionally claim that the State was negligent in failing to "have in place reasonable policies and procedures regarding the use of deadly force, and/or to properly train, equip and supervise" Officer Spece.
>
> As to Officer Spece, plaintiffs allege that Officer Spece's use of deadly force against Mr. Jensen violated Mr. Jensen's right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and under Article I, Section 8 of the Iowa Constitution. Plaintiffs also assert that

> the use of deadly force violated Mr. Jensen's right to substantive due process under the Fourteenth Amendment to the United States Constitution and under Article I, Section 9 of the Iowa Constitution. Plaintiffs allege that Officer Spece was negligent in using deadly force against Mr. Jensen. Plaintiffs further claim that Officer Spece acted under color of state law. Plaintiffs' constitutional and negligence claims against Officer Spece seek judgment against him "individually and as a DNR officer." Finally, Krystal Wagner individually asserts claims for loss of consortium against the State and Officer Spece.

(Memorandum Opinion and Order at 2–4; App. 16–18) (internal citations omitted).

ARGUMENT

I. THE COURT SHOULD DECLINE TO ANSWER THE CERTIFIED QUESTIONS BECAUSE THE ONLY REMAINING IOWA CONSTITUTIONAL TORT CLAIM IN THIS ACTION IS AGAINST OFFICER SPECE IN HIS INDIVIDUAL CAPACITY, AND THE CERTIFIED QUESTIONS WILL THEREFORE NOT BE DETERMINATIVE OF THE CASE PENDING BEFORE THE CERTIFYING COURT.

A. Legal Standard.

This Court may resolve legal questions certified from a United States district court so long as four conditions are satisfied:

> (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.

Baldwin v. City of Estherville, 929 N.W.2d 691, 695 (Iowa 2019) [hereinafter "*Baldwin V*"] (quoting *Life Investors Ins. Co. of Am. v. Estate of Corrado*, 838

N.W.2d 640, 643 (Iowa 2013)). Here, the third condition is not satisfied because there is no valid Iowa constitutional tort claim pending in the certifying court, and the Court should therefore decline to answer the certified questions.

B. This Court Has Not Recognized a Constitutional Tort Claim Against a State Officer in His Individual Capacity.

As noted above, the district court granted the State's motion to dismiss on all counts except (1) the plaintiff's § 1983 claim against Officer Spece in his individual capacity, and (2) the plaintiff's Iowa constitutional tort claim against Officer Spece in his individual capacity. All claims against the State and Officer Spece in his official capacity have been dismissed.

In *Godfrey II*, a plurality of this Court recognized a direct cause of action, in limited circumstances, for damages under the Iowa Constitution against the state and state employees acting in their official capacities. *Godfrey v. State*, 898 N.W.2d 844, 881 (Iowa 2017) (Cady, C.J., concurring in part and dissenting in part) [hereinafter "*Godfrey II*"]. A year later, this Court in *Baldwin II* stated that *Godfrey II* "held that the State of Iowa and state officials acting in their official capacities could be sued directly" for certain constitutional violations. 915 N.W.2d at 265. And last year, in *Baldwin V*, this Court again asserted that *Godfrey II* only recognized "a direct cause of action for damages resulting from an Iowa Constitutional tort could be

brought against the state and state officials in their official capacities." 929 N.W.2d at 696.[1] Thus, *Godfrey*-type claims can only be brought against the state and state officials in their official capacities—there is no direct cause of action under the Iowa Constitution against state officials in their individual capacities.

The four certified questions at issue all seek to further define the contours of Iowa's constitutional tort doctrine. However, any further development of the doctrine would have no impact on the pending matter before the United States district court, as there is no valid Iowa constitutional tort claim pending. This Court has previously declined to answer a certified question when it did "not involve any issue that need[ed] to be addressed in [the] appeal." *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884

[1] Iowa constitutional torts have developed in a somewhat unorthodox manner. The same day *Godfrey II* was announced, the Court denied further review of *Conklin v. State*, wherein the Iowa Court of Appeals determined that there is no private right of action under the Iowa Constitution. *See* 863 N.W.2d 301, *3–5 (Iowa Ct. App. 2015); Order, *Conklin v. State*, No. 14-0764 (June 30, 2017) (denying further review). Following *Godfrey II*, the doctrine was developed through a series of certified questions from United States district courts. Only one state court appeal, *Venckus v. City of Iowa City*, involved state constitutional tort claims, and the parties did not ask the Court to reconsider *Godfrey* or otherwise determine whether the plaintiff asserted cognizable constitutional claims. *See* 930 N.W.2d 792, 799 n.1 (Iowa 2019). Because certified questions typically do not involve reconsidering precedent, and neither party sought clarification or reconsideration in *Venckus*, Iowa's constitutional tort doctrine has continued to develop without any opportunity for the Court to clarify or otherwise reconsider *Godfrey*'s primary tenets.

(Iowa 1997). When a certified question would have no bearing on the underlying matter, "any answer on [the court's] part would be an advisory opinion. This court has repeatedly held it neither has a duty nor the authority to render advisory opinions." *Id.; see also FDIC v. Am. Cas. Co. of Reading, Pa.*, 528 N.W.2d 605, 607 (Iowa 1995) (explaining the court "should reject purely academic or extraneous questions").

Because the only claim under the Iowa Constitution remaining in the certifying court is against Officer Spece in his individual capacity, and this Court has never held that such a claim exists, the Court should decline to answer these certified questions on the basis that the answers would not be determinative of the cause pending before the certifying court.

C. This Court Should Not Recognize a Direct Cause of Action for Damages Under the Iowa Constitution Against State Officers in Their Individual Capacities.

1. *The Court need not resolve this substantial issue of first impression.*

As a threshold matter, it is neither necessary nor prudent to affirmatively resolve in this certified-question action whether individual capacity constitutional tort claims exist. This Court has "[t]he discretion to choose a more appropriate vehicle for developing [Iowa] law." *Eley v. Pizza Hut of Am., Inc.*, 500 N.W.2d 61, 63 (Iowa 1993). Indeed, because the Court has "the responsibility for the development of the law," it must also "have the

opportunity to choose cases which will serve as vehicles for the presentation of necessary statements of law." *Id.* (quoting Allan D. Vestal, *The Certified Question of Law*, 36 Iowa L. Rev. 629, 640 (1951)).

"The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else." *Foley v. Argosy Gaming Co.*, 688 N.W.2d 244, 248 (Iowa 2004) (quoting *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976)). The state law is that there is currently no direct claim for damages under the Iowa Constitution against a state officer in her individual capacity. This fact alone wholly disposes of this matter, and the Court can 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.

2. *If the Court nevertheless decides to reach the issue, the Court should find there is no direct constitutional cause of action against employees in their individual capacities.*

"[T]he distinction between official-capacity suits and personal-capacity suits is more than a mere 'pleading device.'" *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 72 (1989)). Employees sued in their personal capacities "come to court as

individuals," as opposed to those sued in their official capacities, who "assume the identity of the government that employs them." *Id.*

Federal constitutional causes of action—§ 1983 and *Bivens*—impose damages liability for constitutional violations against officers individually, but the rationale for the federal imposition of individual damages liability is entirely inapplicable in state courts. Section 1983's precursor was enacted "shortly after the end of the Civil War 'in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers.'" *Will*, 491 U.S. at 66 (quoting *Felder v. Casey*, 487 U.S. 131, 147 (1988)). In the face of undisputed, pervasive instances of state officials moonlighting in the Ku Klux Klan and otherwise using their positions in state government to serve as agents of white supremacy, Congress sought to guarantee a *federal* forum to vindicate *federal* constitutional rights. *See Monroe v. Pape*, 365 U.S. 167, 172–81 (1961), *overruled on other grounds by Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658 (1978).

However, Congress did not go so far as to abrogate state sovereign immunity in federal courts, leaving damages against the state and state officials in their official capacities unreachable still. *Quern v. Jordan*, 440 U.S. 339, 342 (1979). Thus, to reconcile the goal of § 1983—guaranteeing a

federal forum to vindicate federal constitutional rights—with the limitations of Eleventh Amendment sovereign immunity in federal courts, the Supreme Court interpreted the word "person" within the statute to contemplate damages liability against state actors individually. *See Will*, 491 U.S. at 71.

In *Bivens*, the United States Supreme Court found a right to damages implicit within the Fourth Amendment. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971). The Court determined that actions taken in the name of the United States are materially different from those taken by private actors, and Constitutional damages must play a role in curbing the misconduct of federal officers. *Id.* at 392. Yet, conspicuously absent from the opinion is any discussion of sovereign immunity. Instead, the Court side-stepped this obstacle and simply announced that federal officers are to be sued in their personal capacities, obviating the need to navigate the tension between sovereign immunity and the Court's remediation principle. Subsequent articulations of *Bivens* have excused this omission by characterizing the action as a federal analog to § 1983 liability, thereby functionally inheriting § 1983's statutory basis for seeking damages against individual officers whose conduct offends the United States Constitution. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675–76 (2009); *see also Butz v. Economou*, 438 U.S. 478, 504 (1978).

Section 1983 did not create any substantive rights, but rather provided a remedial vehicle to enforce rights found elsewhere, namely the United States Constitution. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002). However, through § 1983, Congress implicitly created a substantive *duty* that does not elsewhere exist—the duty of a private person to abide by the Constitution under penalty of damages. *See* John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 Const. Commt. 189, 195 (2008). Still, this duty must be understood within its proper historical context: Congress sought to guarantee a forum to enforce the United States Constitution against state officers who were unreachable in state courts as a matter of practice and unreachable in federal courts as a matter of law. *Monroe*, 365 U.S. at 172–81. The novelty—and, in fact, fiction—of individual liability for constitutional violations was therefore embraced to effectuate this specific, legislative purpose.

Because individual liability is a federal, legislative solution to a state problem, it has no place in state constitutional torts, as there is no need to resort to legal fictions in order to guarantee a forum to vindicate constitutional rights. The North Carolina Supreme Court recognized this in *Corum v.*

University of North Carolina. *See* 413 S.E.2d 276, 292 (N.C. 1992).[2] When finding a direct cause of action under the North Carolina Constitution, the court emphasized that such actions were "essential to the preservation of free speech." *Id.* at 289. Yet, notwithstanding the "essential" nature of the claim and the need to give substance to constitutional promises, it was beyond question that such an action was only available against an officer in her official capacity. *Id.* at 292–93. "As a matter of fundamental jurisprudence the Constitution itself does not recognize or create rights which may be asserted against individuals." *Id.* The court further reasoned,

> The Constitution only recognizes and secures an individual's rights vis-a-vis "We, the people of the State of North Carolina," not individual members of that body politic. Of course, the State may only act through its duly elected and appointed officials. Consequently, *it is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution*. Therefore, plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity.

Id. at 293 (emphasis added). Thus, despite monetary damages being available under § 1983 against individual officers, and the court's express adoption of the *Bivens* remediation principle, the North Carolina court confirmed that

[2] Notably, this Court in *Godfrey II* identified *Corum* as "[a]mong the better reasoned state supreme court decisions interpreting whether state constitutional provisions are self-executing for purposes of monetary damages." 898 N.W.2d at 858.

direct actions for violating its state constitution cannot lie against private citizens. *Id.*

The Iowa Constitution similarly does not restrain the conduct of private individuals. *See, e.g.*, *State v. Lacey*, 465 N.W.2d 537, 539 (Iowa 1991); *State v. Flynn*, 360 N.W.2d 762, 767 (Iowa 1985); *State v. Holiday*, 169 N.W.2d 768, 771 (Iowa 1969); *Rice v. Sioux City Memorial Park Cemetery*, 60 N.W.2d 110, 157 (Iowa 1953). As in *Corum*, this Court should recognize that the state only acts through its agents and officials, and therefore only when a person is acting in an official capacity are they capable of, and correspondingly liable for, violating the constitution.

Beyond the fact that a private individual is not obligated to conform her conduct to the requirements of the Constitution, additional policy considerations counsel against recognizing a direct cause of action against a state employee in her individual capacity. As Professor Fallon has recently articulated,

> [i]n systems of private-law rights and remedies, we largely rely on invisible-hand principles, which assume that if people and businesses seek to advance their own welfare, the pursuit of private economic benefit will normally have socially desirable consequences. With the government and those who act on its behalf, matters are different. We hope and expect that public officials will internalize the values that their offices exist to serve and that they will act accordingly. In cases in which rights are not clearly established, selfless action in the public interest may involve speculation and risk-taking about what a court might

> later decide. Absent indemnification, overdeterrence of official action to protect public interests would likely occur. Moreover, depending on the available schemes of immunity and indemnification, individual officer liability could be unfair to the officer in many instances. Of equal significance, a pattern of official violations of constitutional norms would raise worries that inadequate training or supervision was at least partly responsible. All of these considerations militate in favor of a system in which governmental entities are subject to liability (if anyone is liable in damages) for constitutional violations committed by their officials.

Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Calif. L. Rev. 933, 978 (2019).

Because there is no valid claim under the Iowa Constitution pending in the certifying court, any further development of the doctrine through these questions would have no bearing on this matter when it returns to federal court. Accordingly, this Court should decline to answer the questions certified by the United States District Court in this matter.

II. IF THE COURT NEVERTHELESS DECIDES TO ANSWER THE QUESTIONS, THE IOWA TORT CLAIMS ACT AND ALL OF ITS PROCEDURAL AND JURISDICTIONAL REQUIREMENTS APPLY TO IOWA CONSTITUTIONAL TORTS.

If this Court nevertheless decides (1) to reach the issue of whether a state official can be sued in his individual capacity for violating the Iowa Constitution; and (2) that individual capacity constitutional tort claims in fact

exist, then the Court may consider the certified questions and find that the ITCA applies to direct claims under the Iowa Constitution.[3]

A. The Only Way to Reconcile This Court's Sovereign Immunity and *Godfrey* Caselaw is to Find that State Constitutional Tort Claims Must Be Brought Pursuant to the Iowa Tort Claims Act.

"Prior to the passage of the Iowa Tort Claims Act in 1965, the maxim that 'the King can do no wrong' prevailed in Iowa." *Hook v. Trevino*, 839 N.W.2d 434, 439 (Iowa 2013) (quoting Don R. Bennett, *Handling Tort Claims and Suits Against the State of Iowa: Part 1*, 17 Drake L. Rev. 189, 189 (1968)). Following the ITCA's passage, the state became amenable to suit, but "only in the manner and to the extent to which consent has been given *by the legislature*." *Hansen v. State*, 298 N.W.2d 263, 265 (Iowa 1980) (emphasis added).

It is well established that only the legislature is authorized to waive state sovereign immunity. In 1964, prior to the ITCA, this Court was confronted with the continued viability of state sovereign immunity in light of significant criticism and growing sentiment that the doctrine was "outmoded, harsh, and not in keeping with the modern trend of the law." *Boyer v. Iowa High School*

[3] As noted above, certified questions are typically not appropriate vehicles to challenge precedent. *Foley*, 688 N.W.2d at 248. Thus, we assume for the purpose of this certified-question action the viability of the *Godfrey II* decision.

Athletic Ass'n, 127 N.W.2d 606, 607 (Iowa 1964). The Court explained it had "held many times that if the doctrine of governmental immunity is to be changed it should be done by the legislature." *Id.* at 609. The Court noted that two states, Illinois and Minnesota, had attempted to judicially abrogate sovereign immunity, and both situations "indicat[ed] legislative action is a better solution." *Id.* Indeed, the Court found "whether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state." *Id.* at 612.

Since 1964, this Court has repeatedly affirmed that it is the legislature—not the courts—that decides whether the state is susceptible to tort liability and under what terms. *See, e.g.*, *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 20 (Iowa 2014); *Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 727 (Iowa 2013); *Hook*, 839 N.W.2d at 439; *McGill v. Fish*, 790 N.W.2d 113, 117 (Iowa 2010); *Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003); *Dickerson v. Mertz*, 547 N.W.2d 208, 213 (Iowa 1996); *Drahaus v. State*, 584 N.W.2d 270, 272 (Iowa 1998); *Swanger v. State*, 445 N.W.2d 344, 346 (Iowa 1989); *Cook v. State*, 431 N.W.2d 800, 802 (Iowa 1988); *Hyde v. Buckalew*, 393 N.W.2d 800, 802 (Iowa 1986); *Hansen*, 298 N.W.2d at 265; *Lloyd v. State*, 251 N.W.2d 551, 555 (Iowa 1977); *Graham v. Worthington*,

146 N.W.2d 626, 635 (Iowa 1966). Indeed, the plain language of the ITCA instructs that state sovereign immunity is waived only "to the extent provided in [chapter 669]." Iowa Code § 669.4(3).

This Court has already considered the interplay between the ITCA and constitutional torts, and has concluded that sovereign immunity barred certain federal constitutional tort claims against the state. In *Greene*, this Court considered whether a § 1983 action could lie against the state in state court, in light of the inapplicability of the Eleventh Amendment. *Greene v. Friend of Court of Polk Cty.*, 406 N.W.2d 433, 435–36 (Iowa 1987). The Court, relying on traditional concepts of sovereign immunity, found that the action was in fact barred absent a waiver by the state, but that the Iowa Tort Claims Act could constitute a limited waiver of immunity for § 1983 claims. *Id.* However, in that case, the plaintiff's § 1983 claim alleging he was jailed in violation of the Due Process Clause of the Fourteenth Amendment was the "functional equivalent" of false imprisonment, and the ITCA preserved the state's sovereign immunity against such claims. *Id.* at 436. Accordingly, the federal constitutional tort action was barred by the ITCA. *Id.*

"Constitutional torts are torts." *Baldwin II*, 915 N.W.2d at 281. "The doctrine of sovereign immunity dictates that a tort claim against the state or an employee acting within the scope of his office or employment with the state

must be brought, if at all, pursuant to chapter 669." *Dickerson*, 547 N.W.2d at 213. As established in *Greene*, that these torts are of constitutional station does not justify invading the legislature's exclusive jurisdiction to determine the scope of the state's sovereign immunity, nor does it permit this court to simply bypass decades of precedent. It is squarely within the province of the legislature to determine when and under what terms the state may be called upon to answer for the torts of its officers, regardless of how "outmoded, harsh, [or] not in keeping with the modern trend of the law" some may find that result. *Boyer*, 127 N.W.2d at 607.

Like *Bivens*, *Godfrey II* did not address sovereign immunity or the waiver thereof. However, *Bivens* did not seek to impose damages against the federal government, and thus its omission was no bar to the continuation of the doctrine. *Godfrey II*, however, permits monetary damages against the state and state officials in their official capacities if there is no other adequate remedy at law. *See* 898 N.W.2d at 881 (Cady, C.J., concurring in part and dissenting in part). Thus, unlike in *Bivens*, continuation of the doctrine requires the court to reconcile the *Godfrey II* pronouncement with decades of caselaw instructing that the state cannot be sued for monetary damages unless the legislature waives sovereign immunity.

The ITCA provides a solution. By finding that *Godfrey*-type claims are subject to the ITCA, the constitutional tort action created by *Godfrey II* remains available to plaintiffs and the legislature's authority to determine the nature and terms of state sovereign immunity is preserved.

B. The Plain Language of the ITCA Encompasses Iowa Constitutional Tort Claims.

Beyond resolving the sovereign immunity dilemma, applying the ITCA to constitutional tort actions is consistent with the plain language of the statute. When interpreting a statute, this Court must "first consider the plain meaning of its language." *Rilea v. Iowa Dep't of Transp.*, 919 N.W.2d 380, 389 (Iowa 2018) (quoting *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017)). Statutes must be read as a whole, "rather than just looking at words and phrases in isolation." *Id.* (quoting *Iowa Ins. Inst. v. Core Grp. Of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015)).

The state is liable in Iowa district court for "claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances," unless otherwise provided in chapter 669. Iowa Code § 669.4(2). A "claim" is defined as:

> *a*. Any claim against the state of Iowa 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, under circumstances where

> the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.
>
> *b*. 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.

Id. § 669.2(3). An employee's act or omission that rises to the level of a constitutional deprivation would necessarily be wrongful, and thus readily fall within the definition of a "claim." *See also Godfrey II*, 898 N.W.2d at 897 (Mansfield, J., dissenting) ("Godfrey's constitutional damage claims are still 'claims' against State officials within the meaning of Iowa Code chapter 669."); *McCabe v. Macaulay*, 551 F.Supp.2d 771, (N.D. Iowa 2007) (predicting Iowa would recognize a constitutional tort claim and finding that such actions would be "claims" under the ITCA).

Additionally, the ITCA expressly contemplates claims alleging constitutional violations. The ITCA requires the state to defend, indemnify, and hold harmless any employee "against any claim as defined in section 669.2, subsection 3, paragraph '*b*', including claims arising under the Constitution, statutes, or rules of the United States or of any state." Iowa Code § 669.21(1). A *Godfrey*-type claim is a claim arising under the Iowa Constitution, which is a claim arising under the constitution of any state. *Id.*

In *Baldwin V*, this Court found that the Iowa Municipal Tort Claims Act ("IMTCA") applied to constitutional torts brought against municipalities. 929 N.W.2d at 697. Because the definition of "tort" included "denial or impairment of any right under any constitutional provision," the IMTCA is the exclusive avenue for redress for municipal constitutional torts. *Id.* While the legislature used different phrasing in each Act, the different wording does not foreclose the same conclusion with respect to the ITCA.

"The term 'claim' in the ITCA is *broadly defined* to include any damages 'caused by the negligent or wrongful act or omission of any employee of the state.'" *Madden v. City of Iowa City*, 848 N.W.2d 40, 53 (Iowa 2014) (emphasis added). The broad definition of "claim" is alone sufficient to find that Iowa constitutional torts fall within the ITCA. Indeed, the expansive definition likely obviated the need to clarify that constitutional deprivations were included, as unconstitutional acts or omissions are plainly "wrongful." Iowa Code § 669.2(3).

Moreover, any ambiguity as to whether a constitutional violation is a "wrongful act or omission" is resolved further in Chapter 669. The legislature specifically instructed that employees shall be indemnified and held harmless against "any claim as defined in section [669.2(3)(*b*)], *including claims* arising under the Constitution, statutes, or rules of . . . any state." *Id.*

§ 669.21(1) (emphasis added). Thus, considering chapter 669 as a whole, the legislature expressly contemplated constitutional tort actions falling within the terms of the ITCA.

Contrary to Wagner's assertions, this reading of the ITCA would not relegate the Iowa Constitution to something less than the supreme law of the land. "The right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself." *Baldwin II*, 915 N.W.2d at 278. Instead, this scheme recognizes that when tort liability, rather than the state's ability to convict, is at issue, the reasonableness of the officer's conduct is the gravamen of the action. And applying traditional tort principles to constitutional torts "does not imply a redefinition of the rights themselves nor any limitation of their traditional application." John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich. L. Rev. 82, 100 (1989).

Several other states that have recognized constitutional torts similarly found that tort claims against the state and state employees must be brought pursuant to state tort claims acts. *See, e.g.*, *Newell v. City of Elgin*, 340 N.E.2d 344, 347–48 (Ill. 1976); *Cooper v. Rodriguez*, 118 A.3d 829, 844–45 (Md. 2015); *Lee v. Cline*, 863 A.2d 297, 303–10 (Md. 2004); *City of Jackson v.*

Sutton, 797 So.2d 977, 980–81 (Miss. 2001); *Brown v. State*, 674 N.E.2d 1129, 1138–39 (N.Y. 1996).

Finally, although the ITCA was initially modeled after the Federal Tort Claims Act (FTCA), *see Minor v. State*, 819 N.W.2d 383, 406 (Iowa 2012), such modeling does not preclude a finding that the ITCA applies to Iowa constitutional tort claims. In *Carlson v. Green*, the United States Supreme Court held that the 1974 amendments to the FTCA, which created a cause of action against the United States for certain intentional torts committed by federal officers, did not preempt a *Bivens* action under the Constitution. 446 U.S. 14, 20–23 (1980). The Court relied on several considerations.

First, the legislative history of the amendments demonstrated that Congress intended the new cause of action to be an additional, rather than replacement, cause of action to *Bivens*. *Id.* at 20. Second, "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." *Id.* at 21. Third, punitive damages may be awarded against an individual state officer under § 1983, and "the 'constitutional design' would be stood on its head if federal officers did not face at least the same liability as state officials guilty of the same constitutional transgression." *Id.* (quoting *Butz*, 438 U.S. at 504). Fourth, the FTCA did not allow for a jury trial. *Id.* at 22. Finally, FTCA

liability is tied to state liability, and "[t]he question whether respondent's action for violations by federal officials of federal constitutional rights should [not] be left to the vagaries of the laws of the several States." *Id.* at 23.

None of these reasons are applicable to the ITCA. First, there is no legislative history demonstrating that the legislature intended for constitutional torts to exist outside the confines of the ITCA. Second, *Godfrey* remedies, unlike *Bivens* remedies, are not recoverable against individuals. Third, there is no liability imbalance that would render applying the ITCA inappropriate—in fact, given the applicability of the IMTCA, any failure to apply the ITCA would surely result in a liability imbalance favoring municipalities. Fourth, although prior versions of the ITCA did not allow for a jury trial, the express bar on jury trials has since been removed. *Compare* Iowa Code § 669.4(1) (2019) *with* Iowa Code § 25A.4 (1975). Finally, liability under the ITCA is not tied to any other federal or state regime, but rather determined by the scope of liability that would be assigned to a private litigant. Iowa Code § 669.4(2). Thus, although the ITCA was initially drafted in the image of the FTCA, the reasoning in *Carlson* is entirely inapplicable to the ITCA and *Godfrey*-type actions, and is therefore no bar to finding that the ITCA governs constitutional torts.

In sum, because the definition of "claim" encompasses unconstitutional acts or omissions, and the indemnification provision expressly contemplates claims arising from constitutional violations, this Court should find that the ITCA applies to *Godfrey*-type claims and answer the first certified question in the affirmative.

C. The ITCA is a Waiver of Sovereign Immunity, Subject to the Conditions and Terms Established Therein, and the Court May Not Cherry-Pick Which Conditions of Waiver Apply to Constitutional Torts.

As discussed above, principles of both sovereign immunity and statutory construction require that constitutional tort claims be brought pursuant to the terms of the ITCA. Thus, the applicability of the ITCA is not resolved as a matter of policy, but rather as a matter of law.

The final three certified questions ask whether punitive damages should nevertheless be available to plaintiffs, whether the administrative exhaustion requirement should apply, and whether Iowa district courts should have exclusive jurisdiction. Yet, if the court answers the first question in the affirmative, which it must, then the answers to the remaining three questions are easily resolved: the terms of the ITCA apply. *See Baldwin V*, 929 N.W.2d at 701 (finding the IMTCA governed constitutional tort actions against municipalities and applying the Act's terms accordingly).

Constitutional torts are torts, and it is for the legislature, not the courts, to dictate the terms by which a state or state employee may be amenable to tort liability for official actions. *Boyer*, 127 N.W.2d at 609; *Hansen*, 298 N.W.2d at 265. For instance, "*[a]s a condition to waiving its immunity*, the legislature established an administrative procedure for litigants to follow prior to commencing an action in the district court." *McGill*, 790 N.W.2d at 117 (emphasis added). While the administrative procedure has been amended over time, "the Act has always required a claim to be filed with an agency or department of the state before the lawsuit could be filed in district court." *Id.* This Court has "interpreted these provisions to mean that the state appeal board has exclusive jurisdiction over all tort claims against the state." *Minor*, 819 N.W.2d at 405. Therefore, this Court may not simply override a condition of the state's waiver of sovereign immunity and substitute a process that it determines to be a better public policy. If constitutional torts fall within the ITCA, then constitutional tort plaintiffs must abide by the administrative process like any other tort plaintiff.

Additionally, as another condition of its waiver of sovereign immunity, the legislature instructed that the state shall be amenable to suit exclusively in state courts. Iowa Code § 669.4(1). Federal courts therefore lack subject matter jurisdiction over Iowa constitutional tort claims. Indeed, federal

district courts consistently recognize this jurisdictional defect. *See, e.g.*, *Barrett v. Schwab*, No. 6:18-cv-2090, 2019 WL 4888575 at *6 (N.D. Iowa Oct. 3, 2019) (dismissing tort claims brought against the State of Iowa in federal court, finding "the ITCA waives Iowa's sovereign immunity only as it applies to suit in its own state courts").

Wagner argues, without citing any authority, that this Court should invoke its "inherent authority" to expressly waive Iowa's Eleventh Amendment immunity and make the state answerable to state constitutional tort claims in federal court. It is a striking proposition. Of course, Eleventh Amendment immunity may only be "waived by consent or a voluntary appearance, *by statute*, or by the state's conduct in the suit." *Shumaker v. Iowa Dep't of Transp.*, 541 N.W.2d 850, 853 (Iowa 1995) (emphasis added). This Court is simply without authority to unilaterally waive Iowa's Eleventh Amendment immunity on a claim-by-claim basis. Until the legislature enacts otherwise, it is left to the State in the course of litigation to decide whether to consent to suit in federal court.

Wagner further urges that the State should be cautious in its advocacy in this matter, asserting that applying the ITCA's administrative and jurisdictional requirements will result in duplicative litigation in both state and federal court. However, Wagner overlooks that had she participated in the

state tort administrative process, she would have had the opportunity to be made fully whole without having had to file suit in *any* court, let alone two. *See McFadden v. Dep't of Transp.*, 877 N.W.2d 119, 122 (Iowa 2016) (noting the ITCA administrative procedure "has in some cases made it 'unnecessary to participate in lengthy and expensive litigation'" (quoting Bennett, *Handling Tort Claims and Suits Against the State of Iowa*, 17 Drake L. Rev. at 191)); *Matter of Estate of Voss*, 553 N.W.2d 878, (Iowa 1996) ("The administrative process set forth in chapter 669 is intended to allow a prompt investigation of claims against the State and facilitate an early settlement when possible.").

Finally, Wagner asserts that applying the ITCA is inappropriate because punitive damages are necessary to fully vindicate constitutional rights. *Baldwin V* forecloses this line of reasoning entirely. If punitive damages were in fact necessary to vindicate constitutional rights, they would have been deemed necessary for plaintiffs whose constitutional rights are harmed by municipalities. However, this Court declined to permit constitutional tort plaintiffs to seek punitive damages because the IMTCA expressly prohibits imposing such damages. *Baldwin V*, 929 N.W.2d at 698. Importantly, there is no qualifying language in *Baldwin V* to suggest that certain transgressions could warrant punitive damages in extraordinary circumstances—the IMTCA prohibits such damages no matter the situation.

Accordingly, as in *Baldwin V*, because the ITCA applies to constitutional tort actions against the state and state employees, and the ITCA's terms are conditions of waiver of sovereign immunity that cannot be dissevered, this Court must answer the final three certified questions in the following manner:

Question 2: The ITCA's prohibition on punitive damages applies to Iowa constitutional tort claims;

Question 3: The ITCA's administrative exhaustion requirements apply to Iowa constitutional tort claims; and

Question 4: The ITCA's jurisdictional requirement that claims against the state and state employees be brought in Iowa district court applies to Iowa constitutional tort claims.

CONCLUSION

Whether to answer a certified question lies within the informed discretion of this Court. If a certified-question action is the inappropriate vehicle to announce a new principle of law, or if the underlying federal action would be unaffected by the resolution of the legal questions, this Court may decline to answer the questions. *Eley*, 500 N.W.2d at 63. "The purpose of certification is to ascertain what the state law is," and here, the state law is that there is currently no direct claim for damages under the Iowa Constitution against a state officer in his individual capacity. *Foley*, 688 N.W.2d at 248.

Because there is no viable state constitutional claim pending in the certifying court, reaching these questions would have no bearing on this matter when it returns to federal district court, and thus reaching the four questions is unnecessary.

If the Court nevertheless reaches the issue of whether individual-capacity constitutional torts are viable claims in Iowa, this Court should decline to recognize the cause of action. The rationales for individual damages liability in *Bivens* and § 1983 actions turn on the historical context of § 1983 and the jurisdictional limitations of federal courts, and therefore are wholly inapplicable in state courts. And more fundamentally, only when a person is acting in an official capacity is she capable of, and thus correspondingly liable for, violating the constitution.

Finally, if the Court reaches the four certified questions, it should hold that the ITCA applies to state constitutional torts, and plaintiffs must abide by all of its procedural and jurisdictional requirements. Currently, *Godfrey II* is contrary to this Court's well-established sovereign immunity precedent. Applying the ITCA is necessary to reconcile the state's sovereign immunity with *Godfrey*'s damages liability. Additionally, interpreting Chapter 669 as a whole, constitutional tort actions are "claims" that are subject to the ITCA and all of its conditions of waiving sovereign immunity. As it did in *Baldwin V*,

if this Court finds that the ITCA applies, then it must wholesale apply its provisions, rather than considering the desirability of each provision separately.

REQUEST FOR ORAL SUBMISSION

Defendants–Appellees request that they be heard at the time of final submission of this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and (1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font, and contains 7,368 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF SERVICE

I, Jeffrey C. Peterzalek, hereby certify that on the 15th day of November, 2019, I, or a person on my behalf, did serve Appellee's Final Brief and Request for Oral Submission on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Jeffrey C. Peterzalek, hereby certify that on the 15th day of November, 2019, I, or a person on my behalf, did file Appellee's Final Brief and Request for Oral Submission with the Clerk of the Iowa Supreme Court by EDMS.

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