IN THE IOWA SUPREME COURT

SUPREME COURT NO. 20-1037

THE ESTATE OF SUSAN FARRELL, by its administrator, JESSE FARRELL, and as Representative for the claims of JESSE FARRELL, individually, JESSE FARRELL, as next friend of R.F., a minor, PEGGY MASCHKE, individually, and STEPHEN MICHALSKI, individually,

Plaintiffs-Appellees,

v.

STATE OF IOWA; CITY OF WAUKEE, IOWA; and CITY OF WEST DES MOINES, IOWA,

Defendants-Appellants,

and

PETERSON CONTRACTORS, INC.; ROADSAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC.; MIDAMERICAN ENERGY COMPANY; and KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

Interlocutory Appeal from the Iowa District Court for Polk County
Case Number LACL140694,
Judge Heather Lauber

APPLICATION FOR FURTHER REVIEW
(Date of Filing of the Court of Appeals Decision: November 23, 2021)

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court's current public-duty doctrine cases be overruled and the doctrine abandoned?

2. Even if the doctrine is not abandoned, does it apply to this case?

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STATEMENT SUPPORTING FURTHER REVIEW

This Court should grant further review because:

1. Defendants-Appellants ("Government-Defendants") previously urged this Court to retain the case for three reasons: (1) to clarify and enunciate principles of the public-duty doctrine ("Doctrine") in cases involving nonfeasance versus misfeasance; (2) because the case presents an issue of broad public importance; and (3) because the district court's Order conflicts with this Court's published decisions. Plaintiffs-Appellees ("Farrell") agreed with this retention request, but for a fourth reason: (4) the case involves the question of whether this Court's current Doctrine cases should be overruled and the Doctrine abandoned. These four reasons still justify further review, except for the Government-Defendant's third stated reason, which would if modified to read as follows: the ~~district court Order~~ court of appeals' decision conflicts with this Court's published decisions. The four reasons enunciated in Iowa Rule of App. P. 6.1103(1)(b) also support further review.

    a. Rule 6.1103(1)(b)(1). The court of appeals' decision directly conflicts with and overrules this Court's decisions on an important matter involving the Doctrine. The court of appeals created a new "instrumentality of harm" test, purportedly based on *Fulps v. City of Urbandale*, 956 N.W.2d 469 (Iowa 2021), that discards this Court's

misfeasance/nonfeasance test whenever a government-defendant alleges that a third-party "directly caused or inflicted" plaintiff's injuries. *Estate of Farrell v. State*, 2021 WL 5458077, at *3 (Iowa Ct. App. 2021) ("If the answers to these questions [which do not include misfeasance/ nonfeasance] are yes, then the public-duty doctrine applies. . . . Here the instrumentality starts and ends with an intoxicated Beary driving on the wrong side of the road into Farrell's vehicle, ultimately killing her."). This new test is directly contrary to and overrules two of this Court's line of cases: **(1)** *Johnson* and its misfeasance/nonfeasance progeny, *Johnson v. Humboldt County*, 913 N.W.2d 256, 266-267 (Iowa 2018) ("**G. Nonfeasance vs. Misfeasance**. . . .") (bold font in original); *Breese v. City of Burlington*, 945 N.W.2d 12, 19-20 (Iowa 2020) ("In *Johnson*, we noted the distinction between nonfeasance and misfeasance. . . ."); *Fulps*, 956 N.W.2d at 475 ("We explained what we meant by the nonfeasance vs. misfeasance distinction in *Johnson* and *Breese*. . . ."); and **(2)** *Johnson v. Baker*, 120 N.W.2d 502, 505-506 (Iowa 1963), and *Summy v. City of Des Moines*, 708 N.W.2d 333 (Iowa 2006), where this Court rejected application of the Doctrine notwithstanding the fact third-parties "directly caused or inflicted" plaintiff's injuries in each case.

b. Rule 6.1103(1)(b)(3). As the Government Defendants concede, the court of appeals has decided important questions of changing legal principles. The import of *Fulps* is that it *narrowed* the nonfeasance category thereby *narrowing* the Doctrine's application. 956 N.W.2d at 475 ("We now clarify that 'nonfeasance' in the context of the public-duty doctrine does not mean that the City can install a sidewalk and never worry about maintaining it. . . ."). In contrast, the court of appeals' new instrumentality of harm test *expands* the Doctrine's application by making the absence of any third-party involvement in the causation chain a *sine qua non* of escaping the Doctrine's shadow. This Court needs to correct the court of appeals' precedent-wrecking detour before it causes more damage.

c. Rule 6.1103(1)(b)(2). As the Government Defendants again concede, the court of appeals has decided a substantial and important question of law that has not been, but should be, settled by this Court. Specifically, should this Court's current Doctrine cases be overruled and the Doctrine abandoned? Since the resurrection of the Doctrine in *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001), this case presents the first opportunity for the Court to directly address and finally decide this important question. *Compare Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016) ("The

plaintiffs . . . do not ask us to overrule *Raas* and *Kolbe* and abandon the public-duty doctrine. We do not ordinarily overrule our precedent sua sponte.").

d. Rule 6.1103(1)(b)(4). As the Government Defendants yet again concede, this case presents an issue of broad public importance that this Court should ultimately determine. Should the Doctrine stay or should it go? If it stays, should its application be limited and tied to its foundational rationale, namely "'the limited resources of governmental entities,'" *Fulps*, 956 N.W.2d at 476 (citation omitted), which would preclude application of the Doctrine in this case where Farrell is suing the Government Defendants for their actions as owners of a construction project? *See Fulps*, 956 N.W.2d at 475 ("[T]he City is liable for its sidewalk to the same extent a private property owner doing the same thing would be."). Or should its application be broadened so that it applies whenever causation disputes exist so that appellate judges displace juries in deciding such disputes, which is exactly what the court of appeals did here?

BRIEF

The court of appeals erred on the law (both substantively and procedurally) and on the facts. Its errors applied the Doctrine to immunize the Government Defendants from liability for their affirmative acts of misfeasance taken in their corporate/private capacity, which is contrary to the "public versus corporate" distinction this Court created in its *very first* Doctrine case and to which it has consistently adhered up through *Fulps*. *Calwell v. City of Boone*, 2 N.W. 614 (Iowa 1879) (distinguishing between "public" and "corporate" actions of government); *Fulps*, 956 N.W.2d at 475 ("[T]he City is liable for its sidewalk to the same extent a private property owner doing the same thing would be."); *see also Star Equip., Ltd. v. State*, 843 N.W.2d 446, 462 (Iowa 2014).

I. PROCEDURAL LAW AND FACTS

It is necessary to address the court of appeals' procedural and factual missteps before tackling its substantive-law errors. After reading the court of appeals' decision, one would be left with at least three incorrect factual impressions. First, one would never know that this case involves the Government Defendants' role as owners of an ongoing and unfinished Interchange construction project; that the Government Defendants, in their role as project owners, publicly opened the Interchange project (with the removal of barricades and signage, and the other actions it entails) while knowing their project and its contractually-required safety features were uncompleted and still

under construction; and that the Government Defendants kept their Interchange project open in its uncompleted state despite actual knowledge (based on, among other things, their receipt of multiple driver complaints) that doing so created confusing and dangerous conditions. All of these facts are alleged in and reasonably conceivable from the First Amended Petition, and they serve as fundamental and essential parts of Farrell's claims. Yet the court of appeals glossed over, ignored, and otherwise misstated them, and other crucial facts.

Second, the court of appeals' decision would cause one to believe that Farrell's First Amended Petition includes allegations of the alleged intoxicated state of Benjamin Beary and the alleged speed of his vehicle when it collided with Susan Farrell's police vehicle, and that Farrell alleges Beary (not the Government Defendants) was the sole cause of Susan Farrell's death. *Farrell*, 2021 WL 5458077, at *1 & n.4, *3-*4. None of these factual statements are found in the First Amended Petition, but instead were improperly alleged and inserted into the Motion for Judgment on the Pleadings by the Government Defendants. **District Court Docket, Motion for Judgment on the Pleadings pp. 1-2.** The district court correctly refused to consider these government-injected, unproven, and unalleged facts or any other alleged facts outside the First Amended Petition. **App. 314, n.1**. Undaunted, the Government Defendants asked the court of appeals to consider these same "facts," **Government Defendants' Final Brief pp. 27-28**, and the court of appeals obliged.

Third, the court of appeals' opinion would lead a person to understand Farrell's misfeasance claim as based on defective construction and design of a public road with the underlying complaint being that such defective construction and design failed to protect Susan Farrell from a drunk driver. *Farrell*, 2021 WL 5458077, at *1 ("[T]he Farrell family alleged that the . . . Interchange was unsafely designed and constructed."); *id.* at *3 (""[T]he Farrell family argues the roadway design directly caused the accident. They contend the Governmental Parties should have protected Farrell from Beary's actions by designing and constructing a safe Interchange, which they allege did not happen here."); *id.* at *4 ("The Farrell family labels the affirmative act of constructing the 'first-of-its-kind' diverging-diamond Interchange without the proper safety protections as the misfeasance to be considered."); *id.* ("[T]he petition frames the failure of the Governmental Parties as neglecting to protect a member of the general public from a third-party's instrumentality of harm because of the Governmental Parties' design and construction of the Interchange and the installation of safety markings and signage."); *id.* ("[T]he Farrell family's complaints depend upon a foreseeability determination that the design of the Interchange lead to the collision with the drunk driver."). These straw man claims and theories are creations of the Government Defendants and the court of appeals, not Farrell.

As the First Amended Petition says and as Farrell has explicitly explained in the district court and appellate briefing, Farrell's claims and theories, as

summarized, are that the Government Defendants, as owners of their ongoing and uncompleted Interchange construction project, failed to comply with their non-discretionary contractual duties, including but not limited to the duty to install contractually-required safety and design features on the Interchange, and, despite knowledge of the unfinished nature of these mandatory features of their Interchange project, they publicly and affirmatively opened[1] their ongoing and unfinished project. These affirmative acts of misfeasance created a causational chain of events that allowed Benjamin Beary to enter the unfinished and, therefore, dangerous Interchange project, access Interstate 80 in the wrong direction via the Interchange project's off-ramp, and collide with the police vehicle killing Officer Susan Farrell. These actual claims and theories are evident, not from the court of appeals' decision, but from the First Amended Petition and Farrell's district court and appellate briefing.

These court of appeals' factual errors were hardly harmless because it *admitted* that its (erroneous) recitation of facts and its (erroneous) transformation of Farrell's claims and theories, in conjunction with its newly announced

[1] The court of appeals asserted as fact that the Interchange had been opened "for years" prior to the accident. *Farrell*, 2021 WL 5458077, at *1. That assertion is *directly contrary* to the allegations in the First Amended Petition, which state that it had been opened for less than four months before the accident. **District Court Docket, First Amended Petition pp. 5-6 ¶¶36, 46-49.** This, along with the bevy of other fact-related errors committed by the court of appeals, makes its factual recitations unreliable thereby infecting and making unreliable its Doctrine analysis and ultimate decision.

instrumentality of harm test, served as the foundation for its decision. *Farrell*, 2021 WL 5458077, at *3 ("Here the instrumentality starts and ends with an intoxicated Beary driving on the wrong side of the road into Farrell's vehicle, ultimately killing her. Unlike *Breese*, . . . third-party Beary's behavior caused the death of Farrell."). These prejudicial factual errors are particularly indefensible because of the procedural context in which they were committed: a motion for judgment on the pleadings based on an affirmative defense.

Motions for judgment on the pleadings (which are treated similarly to motions to dismiss for failure to state a claim) are disfavored. *Cutler v. Klass, Whicher & Mishne,* 473 N.W.2d 178, 181 (Iowa 1991) ("Both the filing and the sustaining [of motions to dismiss] are poor ideas."); *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987); *Benskin, Inv. v. West Bank*, 952 NW.2d 292, 296 (Iowa 2020). The disfavor is heightened when such a motion is based on an affirmative defense. *Harrison v. Allied Mut. Cas. Co.*, 113 N.W.2d 701, 731 (Iowa 1962) ("A motion to dismiss assumes the truth of facts well pleaded in the pleading attacked but is not a proper vehicle for the submission of affirmative defenses."). The reason for the heightened disfavor is because a plaintiff can only "plead himself out of court by alleging facts that provide the [defendant] with a *bulletproof* defense. . . ." *Benskin*, 952 N.W.2d at 299 (citation omitted). The Doctrine is an affirmative defense, as the Government Defendants conceded by asserting the Doctrine as an affirmative defense in their Answers to the First

Amended Petition. *McFarlin*, 881 N.W.2d at 62 ("In *Adam*, we rejected the State's public-duty *defense*. . . .) (second italics added); *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998); *Zander v. Condon*, 1999 WL 45241, at *1 n.1 (Wash. Ct. App. 1999); *Taylor v. City of Shreveport*, 653 So.2d 232, 235 (La. Ct. App. 1995). Therefore, the relevant question answered by the court of appeals should have been whether Farrell's First Amended Petition provides the Government Defendants' with a "bulletproof" defense based on the Doctrine.

To answer this question, at this stage of the case and in this procedural posture, the facts considered by the court of appeals should have been only those alleged in the First Amended Petition and those plaintiff-friendly ones that can reasonably be imagined from the First Amended Petition. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994) ("We uphold such a dismissal only if we can conclude that no state of facts is conceivable under which a plaintiff might show a right of recovery."). It should not have considered any facts alleged by the Government Defendants, unless they were actually and explicitly found in the First Amended Petition. *Berger v. Gen. United Group, Inc.*, 268 N.W.2d 630, 634 (Iowa 1978) ("The motion may not sustain itself by its own allegations of fact not appearing in the challenged pleading. We have said such averments are no proper part of the motion and must be ignored.") (citations omitted); *Stearns v. Stearns*, 187 N.W.2d 733, 734 (Iowa 1971) ("Perhaps we should say, as we did in *Harrison v. Allied Mutual Casualty Co., supra*, that we cannot 'sanction disregard of

proper methods in determining controverted facts' even though such a course brings the case to an early conclusion."); *see Stanton v. City of Des Moines*, 420 N.W.2d 480, 482 (Iowa 1988) ("If there are any material facts disputed in the pleadings, a judgment on the pleadings is not appropriate."); *Kester v. Bruns*, 326 N.W.2d 279, 284 (Iowa 1982).

These standards and rules should virtually immunize a plaintiff's claims against the government from a Doctrine-based dismissal at the pleading stage because they require the Petition to contain allegations which provide a *bulletproof* application of the Doctrine. Therefore, the answer to the only relevant question before the court of appeals—whether Farrell's First Amended Petition provides the Government Defendants with a "bulletproof" defense based on the Doctrine—should have been answered with a resounding "No," especially under Iowa's notice-pleading rules, *Benskin*, 952 N.W.2d at 296 ("Iowa is a notice pleading state."), where a plaintiff is not required to anticipate and plead around the Doctrine or any other potential affirmative defense. *Id.* at 302 n.3 ("Courts applying federal notice pleading standards recognize that . . . 'complaints need not anticipate or meet potential affirmative defenses. . . .'") (citation omitted); *see Breese*, 945 N.W.2d at 23.

Discussion of a couple conceivable sets of facts lay bare the court of appeals' factual and procedural errors. What if the Government Defendants placed a blinking sign in the Interchange directing motorists to enter into the

Interchange project, continue down the off-ramp, and drive in the wrong direction on Interstate 80? What if the only means of exit from the Interchange project after entering it was the off-ramp that led motorists to the wrong side of Interstate 80? According to the court of appeals, the Doctrine would still apply to save the Government Defendants from liability. Whatever the current state of the Doctrine's law, it is not that.

Some might be tempted to ask, "Did either of those two conceivable sets of facts actually happen?" Such a question is not appropriate because, at this stage and in this procedural posture, the facts are what Farrell alleges in the First Amended Petition *and* those that reasonably can be conceived and imagined from those allegations. Is it conceivable that the Government Defendants could have placed such a blinking sign in the Interchange project? Or that they made the off-ramp the only available means to exit the Interchange project after entering it? The answer is "Yes" because it is not impossible for such acts to happen, and the allegations in the First Amended Petition do not provide a "bulletproof" defense against such a factual scenario.

II. THE LAW

The court of appeals erred on the substantive law too. Its main mistake was overruling this Court's precedent through creation of a new "instrumentality of harm" test that applies the Doctrine whenever a government-defendant alleges that a third-party "directly caused or inflicted" plaintiff's injuries. *Farrell*,

2021 WL 5458077, at *3 & *5. The new test overrules *Johnson, Breese, Fulps*, and their misfeasance/nonfeasance test, *Johnson*, 913 N.W.2d at 266-267 ("**G. Nonfeasance vs. Misfeasance**. . . .") (bold font in original); *Breese*, 945 N.W.2d at 19-20 ("In *Johnson*, we noted the distinction between nonfeasance and misfeasance. . . ."); *Fulps*, 956 N.W.2d at 475 ("We explained what we meant by the nonfeasance vs. misfeasance distinction in *Johnson* and *Breese*. . . ."), and it is in direct contravention of and overrules *Baker*, 120 N.W.2d at 505-506, and *Summy*, 708 N.W.2d 333, where this Court refused to apply the Doctrine despite third-parties "directly caus[ing] or inflict[ing]" plaintiffs' injuries. Because *Summy* is a post-*Kolbe* case, it especially cannot be reconciled with the court of appeals' new test where this Court held the Doctrine inapplicable in a claim against the government for injuries directly caused by a third-party golfer's errant tee shot. *Id.*

The new test wreaks even more havoc than overruling this Court's cases. It makes Iowa appellate courts causation-deciding juries *required* to resolve any causation dispute against a plaintiff whenever a government-defendant alleges that a third-party is involved in causing a plaintiff's injuries. The court of appeals donned its jury hat in this very case and, without hearing a shred of evidence, decided, as a matter of law and directly contrary to the allegations in the First Amended Petition, that Benjamin Beary was the sole cause of Susan Farrell's death. *Farrell*, 2021 WL 5458077, at *3. If left uncorrected, the new test will

eviscerate public citizens' sacrosanct jury-trial right whenever the government causes damage. *Miller v. Mathis*, 8 N.W.2d 744, 747 (Iowa 1943); *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 345 (Iowa 2020) (Appel, J., dissenting). This Court, in *Baker,* expressly prohibited using the Doctrine in this way. 120 N.W.2d at 505-506 ("[T]here may be more than one proximate cause of any action and damage. . . . '[W]here the evidence shows that an injury results from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.'") (citation omitted).

The court of appeals' new test is also unworkable, as the following hypothetical illustrates: (1) the government builds a concrete barrier in the middle of a road, without adequate lighting, signs, or paint markings to warn approaching drivers; (2) an adult allows a 12 year-old to drive the family car; (3) the car collides with the government's concrete barrier at ten miles per hour over the speed limit; (4) the car is missing one headlight because of a mechanic's negligent failure to install it; (5) the car's airbags do not deploy because they are defective; (6) the car's defective seatbelts tear on impact; and (7) experts testify that if either the seatbelts or airbags functioned properly, the child would have sustained no injuries. What is the "instrumentality of harm?" Are there more than one? There is no reasoned way for a court to decide such a thorny causation issue, but the court of appeals' new test would apply the Doctrine and dismiss the claims. This is nothing but judicial fiat. Causation disputes are better left to a

jury who can hear all the evidence and reach a reasoned decision, based on the evidence, through careful deliberations.

The irony in all of this is that the court of appeals justified its actions as mandated by *Fulps*. *Farrell*, 2021 WL 5458077, at *2, *3, & *5. This was a fundamental misreading of *Fulps*. The import of *Fulps* is that it *narrowed* the nonfeasance category thereby *narrowing* the Doctrine's application. 956 N.W.2d at 475 ("[W]ith only *Johnson* and its predecessors to guide it, the [district] court took a rather broad view of the public-duty doctrine. . . . We now clarify that 'nonfeasance' in the context of the public-duty doctrine does not mean that the City can install a sidewalk and never worry about maintaining it. . . ."). Therefore, *Fulps* did not discard the misfeasance/nonfeasance test. It reaffirmed it, and it clarified it so that the Doctrine's application would be more limited. So how did the court of appeals so fundamentally misread *Fulps*? By defective deductive reasoning.

In *Fulps*, this Court stated,

> But the public-duty doctrine *generally* comes into play *only* when there is a confluence of two factors. First, the injury to the plaintiff was directly caused or inflicted by a third party or other independent force. Second, the plaintiff alleges a governmental entity or actor breached a uniquely governmental duty, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force.

956 N.W.2d at 473-474 (italics added). The court of appeals quoted this portion of *Fulps* as follows:

> As *Fulps* confirmed, the public-duty doctrine "comes into play only when there is a confluence of two factors." 956 N.W.2d at 473.
>
> > First, the injury to the plaintiff was directly caused or inflicted by a third party or other independent force. Second, the plaintiff alleges a governmental entity or actor breached a uniquely governmental duty, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force.
>
> *Id.* at 473–74.

2021 WL 5458077, at *3. The court of appeals omitted the word "generally" before the phrase "comes into play." So what is the big deal? Only one word is missing. The big deal is shown in court of appeals' very next sentence: "If the answers to these questions are yes, then the public-duty doctrine applies." *Id.* The one-word omission caused the court of appeals to misread the premise of *Fulps*, thereby leading to defective deductive reasoning.

The actual *Fulps* Court's quote was simply an observation of some of the common circumstances where past cases have applied the Doctrine. It was not, as the court of appeals read it, the creation of a new rigid test that mandates the Doctrine's application whenever those circumstances exist. This is confirmed by the context in which the quote was made. It is located in the part of the opinion where this Court attempted to synthesize the Doctrine with the long-standing "principle of municipal [sidewalk] liability." 956 N.W.2d at 472. Immediately after quoting the Doctrine-based colloquialism, "a duty [owed by the

government] to all is a duty to none," this Court rejected the accuracy of the colloquialism because it "does not get to the heart of the doctrine and may suggest a broader scope to the doctrine than our cases indicate it actually has." *Id.* at 473. After a one-sentence aspirational statement about government comes the part that the court of appeals misquoted and misread. If this Court were going to create the new, precedent-wrecking, and rigid test attributed to it by the court of appeals, it would not have plopped it squarely in the middle of a discussion about how the Doctrine has been too broadly applied and should be more limited in its breadth.[2]

Even if the court of appeals' new test is consistent with this Court's Doctrine jurisprudence, the court of appeals still erred by finding that the second element of its new test was satisfied: that the duty breached by the Government Defendants was a "uniquely governmental duty." Consistent with its other fact and procedural-based errors, the court of appeals mis-framed the question as whether "the construction of safe roadways [is] a 'uniquely governmental duty to protect [Farrell] from the third party or other independent force." 2021 WL

[2] The court of appeals' defective deductive reasoning can be shown by the following. The premise, "All ravens are black birds," does not support the (factually incorrect) statement that whenever a person sees a black bird then the bird must be a raven. Similarly, *Fulps'* statement that the Doctrine generally applies only in certain limited circumstances (i.e., when a third-party directly causes the injury), does not support the court of appeals' (factually incorrect) reading of *Fulps* as saying that whenever a third-party directly causes the injury, the Doctrine applies.

5458077, at *3. As discussed above, those are not Farrell's allegations, claims, or theories against the Government Defendants. Farrell's claims are premised on the Government Defendants' role as owners of an ongoing and uncompleted Interchange construction project. There is nothing "uniquely governmental" about that. In fact, if all the facts were the same except that the construction project were a private one owned by a non-government entity, the claims would be the same and would still be made against the owner of the construction project. So, contrary to the court of appeals, the Government Defendants are not being sued for actions taken in their "public/government" capacity. They are being sued for actions they took in their "corporate/private" capacity, where this Court says the Doctrine is inapplicable. *Fulps*, 956 N.W.2d at 475. The Doctrine's public versus corporate distinction has existed since this Court's very first Doctrine cases, *Calwell*, 2 N.W. 614; *Jones v. Sioux City*, 170 N.W. 445 (Iowa 1919), and it still exists today. *Fulps*, 956 N.W.2d at 475; *see Star Equip.*, 843 N.W.2d at 462. The court of appeals' failure to recognize the distinction in this case and rule accordingly was error.

III. DISCARD THE DOCTRINE

Even if this Court countenances the court of appeals' new test as consistent with its precedent, the court of appeals should still be reversed because *Kolbe* and its progeny should be overruled and the Doctrine discarded. This case presents the first opportunity for the Court to directly address and finally decide

this important question. *Compare McFarlin*, 881 N.W.2d at 59. Farrell's Final Brief spends about 38 pages exhaustively discussing, analyzing, and arguing this question, starting with Iowa's first Doctrine case in *Calwell* up to this Court's most recent Doctrine case in *Fulps*. The Brief addresses important and difficult related questions and issues, such as

1. The two irreconcilable lines of Doctrine cases. *Cf. Symmonds v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 242 N.W.2d 262 (Iowa 1976), *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977), *overruled on non-public-duty-doctrine grounds by Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776 (Iowa 1986); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (en banc), and *Adam v. State*, 380 N.W.2d 716 (Iowa 1986) line of cases, *with Koble* lines of cases.

2. How does the *Kolbe* line of cases' holding that the Tort Claims Act did not abrogate and eliminate the Doctrine, based on the reasoning that the Doctrine is not an immunity analysis but rather a duty analysis under a negligence tort claim's first element, square with the fact that the Doctrine is an affirmative defense, *McFarlin*, 881 N.W.2d at 62, meaning that the Doctrine allows the government to "avoid liability although admitting the allegations of the petition," *Ziel v. Engery Panel Structures, Inc.*, 2020 WL 4498064, at *7 (Iowa Ct. App. 2020), which would include admission that the government owes a duty under a negligence tort claim's first element?

3. The unworkability of the Doctrine, as evidenced by many inconsistent and arbitrary case outcomes:

    a. Counties liable for defective county bridges, but not defective roads or courthouses, *Kincaid v. Hardin Cty.*, 5 N.W. 589 (Iowa 1880);

    b. Government liable for injuries "resulting from a defect in the condition of the street," but not for injuries resulting from dangerous street conditions caused by the government declaring a street closed to allow children to play in the street but then failing to actually close the street, *Harris*, 209 N.W. 454;

c. State liable for injuries caused by escaped prisoner to a person in the prison's parking lot but not to a person outside the parking lot, *Raas*, 729 N.W.2d 444;

d. Recovery allowed for dangerous condition on government-owned golf course because person paid to use the course, *Summy*, 708 N.W.2d 333, but recovery denied for dangerous condition on a government-owned lake because it was free of charge to the boating public, notwithstanding boater having paid required boat registration fee, *McFarlin*, 881 N.W.2d 51; and now

e. Recovery denied for claim against government as owner of an *ongoing* construction project, *Farrell*, 2021 WL 5458077, but recovery allowed for claim against City as owner of a *completed* sidewalk project, *Fulps*, 956 N.W.2d 469; and

f. Recovery denied for claim against government because third-party car driver was "instrumentality of harm," *Farrell*, 2021 WL 5458077, but recovery allowed for claim against City where third-party car driver was "instrumentality of harm," *Baker*, 120 N.W.2d 502, and recovery allowed for claim against City where third-party golfer errant tee shot was "instrumentality of harm." *Summy*, 708 N.W.2d 333.

The list of arbitrary and inconsistent cases will only continue to grow because the Doctrine is, at its core, a public-policy pronouncement that is the bailiwick of the political branches. The two non-judicial branches of Iowa government are the ones tasked with addressing these public-policy issues and creating, passing, and signing legislation. This Court should extricate itself from the Doctrine's morass and let the political branches wrestle with it. *See Rollins v. Petersen*, 813 P.2d 1156, 1166 (Utah 1991) (Durham, J., concurring), *overruled by Scott v. Universal Sales, Inc.*, 356 P.3d 1172 (Utah 2015).

CONCLUSION

The Court should grant further review, reverse the court of appeals, affirm the district court, and remand for further proceedings.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiff-Appellees' Application for Further Review was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on December 13, 2021, pursuant to Iowa R. App. P. 6.902(2) and Iowa R. Elec. P. 16.101(1).

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Plaintiff-Appellees' Application for Further Review was filed with the Iowa Supreme Court by electronically filing the same on December 13, 2021, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

/s/ Lisa R. Jones

CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Plaintiffs-Appellee's Final Brief is $ 0.00.

s/ Lisa R. Jones

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Plaintiffs-Appellees' Application for Further Review complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Garamond 14-point font and contains 5,014 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Lisa R. Jones December 13, 2021
Date