**IN THE IOWA SUPREME COURT**
**S.C. No. 21-0909**
**Polk County No. LACL148061**

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JASON CARTER,
Appellant,

vs.

STATE OF IOWA, MARK D. LUDWICK, Special Agent of the Iowa Dept. of Public Safety, and MARK D. LUDWICK, in his Individual Capacity,
Appellees.

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APPEAL FROM THE DISTRICT COURT
FOR POLK COUNTY
HON. WILLIAM P. KELLY

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# APPELLANT'S FINAL REPLY BRIEF

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## ARGUMENT

An adage provides: When law isn't on your side, argue facts. When facts aren't on your side, argue law. When neither are on your side, pound the table. Jason[1] has the facts. Jason has the law. The State pounded the table to the point of distraction.

Appropriate law does not support the state's position and "careful reading" invited by the State itself does not support the state's position.

### I. State's Arguments Regarding Count I

a. Sovereign Immunity Does Not Bar Count I

A legislature is without power to change constitutional provisions without proper constitutional amendment. The legislature cannot withdraw of a waiver of sovereign immunity through self-executing constitutional language. *See* 72 Am. Jur. 2d. States, Etc. § 122. In *Godfrey*, this court recognized Article I, sections 8 and 9 are self-executing and require no other legislative action to enforce constitutional language and protections. *Godfrey v. State,* 878 N.W.2d 844, 871 (Iowa 2017); *see also id.* at 846-47; 898 N.W.2d at 880 (Cady, J., concurring) (recognizing a tort claim under the Iowa Constitution when no other adequate remedy exists).

[1] Because multiple Carters are addressed, first names are used for clarity.

The State appears to argue the legislature may pull back the very waiver of sovereign immunity this Court determined was constitutionally granted. The State cites *Boyer v Iowa High Sch. Athletic Ass'n,* 127 N.W.2d 606 (Iowa 1964), for the premise the legislature, not courts, determine immunities. *Boyer* and its cited cases all address municipal immunity and governmental subdivisions, NOT state sovereign immunity. *Id.* at 609, 610. *Boyer* is inapposite to case at bar. In general, ample case law and treatises provide the legislature is without power to *sua sponte* amend constitutional provisions. Specifically, case law and treatises provide the legislature is without power to *sua sponte* undo waivers of sovereign immunity granted in self-executing constitutional provisions. *See* 72 Am. Jur. 2d. States, Etc. § 122.

The State argues *Godfrey* exists in a vacuum and prior contrary cases remain good law. Without a belabored argument about the meaning of *Godfrey*, clear case law relating to constitutional supremacy overrules prior case law, at least to the extent it is inconsistent with *Godfrey* and inconsistent with subsequent case law recognizing constitutional waivers of sovereign immunity in tort actions.

The State points to a June 2021 legislative amendment to chapter 669 regarding immunities. (State's Br. at 23-24). Foremost, this amendment was not enacted either at the time of Ludwick's actions, at the time Jason's Petition

was filed, or even at the time the district court penned the dismissal. (Appx. at 94.) New laws are presumed to be prospective-only. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015). *See also* Iowa Code § 4.5. The chapter 669 amendment does not express retroactive application nor do any considerations weighing towards retroactive application exist. Therefore, this amendment has no effect on this determination.

Even if this new code section were considered, the plain language of the amendment does not defeat Jason's claim. The amendment merely provides chapter 669 itself "shall not be construed as a waiver of sovereign immunity for a claim for money damages under the Constitution of the State of Iowa." Iowa Code § 669.26. The amendment provides no legislative attempt to amend prior decisions by this court or otherwise reverse waivers of sovereign immunity already recognized under Article I, sections 8 and 9 of the Iowa Constitution. *Godfrey,* 878 N.W.2d at 846-47, 871. Nor could it, due to the supremacy clause of the Iowa Constitution. Further, the amendment only applies to employees of the State, and not the State itself, and only relates to claims under chapter 669. Iowa Code § 669.26. This amendment does not provide immunity from free-standing constitutional tort claims. The State's citation to section 669.26 is a red herring to throw back.

The state cites *Baldwin v. Estherville* (*Baldwin II*), 929 N.W.2d 691, 697-98 (Iowa 2019) for the premise the legislature is empowered to prohibit certain classes of torts when exercising authority to waive or retain sovereign immunity. *Baldwin II*, however, is a municipal tort case interpreting Iowa Code chapter 670, not a constitutional tort claim, and not a State tort claim under chapter 669. Further, *Baldwin II* did not limit the actual tort claim against a municipality; it merely provided punitive damages and attorney fees were not available for constitutional torts; and it provided chapter 670 procedures must be followed for constitutional tort claims. *Baldwin II*, 929 N.W.2d at 697-98. This limited holding is a far-cry from the State's asserted interpretation that sovereign immunity for constitutional torts may be completely re-asserted following the self-executing waiver recognized in *Godfrey*. The State's interpretation of *Baldwin II* is at odds with its clear language.

Overall, the State is incorrect. Public policy considerations weigh in favor of granting Jason access to the courts. Sovereign immunity does not bar Jason's claims against the State as Iowa waived sovereign immunity for the claims raised.

b. Section 669.14(4) Does Not Bar Count I

The State continues to assert Count I is a false arrest claim and asserts the claim is barred as the functional equivalent of Iowa Code section 669.14(4). The facts asserted in the Petition belie this characterization. The facts in the Petition, while overlapping 669, assert actions "far broader" than any excepted claim in chapter 669. *See Smith v. Iowa State. Univ. of Science and Technology*, 851 N.W.2d 1, 21-27 (Iowa 2014); *see also Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003). None of the "overlap" or excepted actions in section 669.14(4) are "essential" to Jason's claims. *Id.* Therefore, Section 669.14(4) does not bar Jason's claims.

The State's citation to *Greene v. Friend of Court of Polk County*, 406 N.W.2d 433 (Iowa 1987) is unavailing to the State for this very reason. As the State admits, *Greene* only involves a claim of false imprisonment, that Greene was jailed in violation of the constitution. (State's Br. at 26-27.) Jason asserted myriad facts that are far broader than a simple false arrest claim or than any other excepted claim under chapter 669. (Appx. at 22, 24, 25, 26-35, 37, 38, 45.) Moreover, *Greene* was decided at the summary judgment stage, not the dismissal stage. *Greene*, 406 N.W.2d at 434. Overall, *Greene* is inapposite to the present case.

The State's citation to *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020) is unavailing. *Wagner* simply applies chapter 669 procedural requirements to constitutional tort claims, limiting punitive damages for excessive force claims *where this is already an adequate remedy*. *Id.* at 862-63 (emphasis added). Moreover, *Wagner* involved certified questions from a federal court, instead of an appeal from an Iowa district court. *Id.* at 847. The procedural standing of Jason's case and the stark differences in the questions presented show *Wagner* is not controlling. There is no constitutional provision granting punitive damages for constitutional torts, so legislative limitation of punitive damages in constitutional tort cases has no bearing on waiver of sovereign immunity for actual constitutional torts. *Wagner* does not in any manner limit Jason's right to assert independent constitutional claims completely outside exceptions in chapter 669, as long as procedural processes of chapter 669 were adhered to (which they were). (Appx. at 5-6.)

The State's reliance on *Baldwin II*, 929 N.W.2d 691 (Iowa 2019) is misguided. First *Baldwin II* specifies questions of the application of qualified immunity based on exercise of all due care involves the application of law to fact. *Baldwin II*, 929 N.W.2d at 698. Therefore, questions of all due care immunity and qualified immunity are inappropriate to address at this early dismissal stage. Second, *Baldwin II* only limits certain types of damages due

to an available adequate remedy. *Baldwin II*, 929 N.W.2d at 697-98. *Baldwin II* does not wholesale limit constitutional torts where sovereign immunity has been waived. *Id.* The State's reading of *Baldwin II* is strained, especially considering the broadly pled misdeeds. Note *Smith*, 851 N.W.2d 1, 21-27, and *Trobaugh*, 668 N.W.2d at 584 provide for constitutional torts if allegations are broader than excepted chapter 669 claims.

The State focuses on sixteen words from a single paragraph in a 562 paragraph Petition. This misses the proverbial forest of Ludwick's misdeeds for one tree. Claims against Ludwick and the State, including the unconstitutional acts alleged, are far broader than a simple false arrest claim. Jason's Petition alleges, non-exhaustively: others confessed to the crime, Appx. at 22, 24, 25, 26-35, 37, 38, 45), but law enforcement failed to investigate or waited years to investigate, (*see, e.g.*, Appx. at 11, 30), (and under oath provided false information about alibi witnesses' statements, (*see* Appx. at 25, 34), and Ludwick intimidated witnesses who possessed information exculpatory to Jason by stating Jason would try to pin the homicide on those witnesses if they came forward with information, (*see* Appx. at 22, 24). Just those few allegations demonstrate Jason's Petition far exceeds any asserted immunities.

c. Allegations in the Petition Demonstrate Probable Cause is Utterly Lacking

This Court is aware of rules and case law surrounding warrants. Jason alleged ample facts to establish a lack of probable cause.

First, the state wholly ignores case law and argument providing conclusory statements which are unsupported by facts within a warrant application may not be relied upon to support a probable cause finding. *See State v. Spier*, 173 N.W.2d 854, 858–59 (Iowa 1970). Based on this case law alone, the warrant application is insufficient to support a probable cause finding given the numerous unsupported conclusions in that warrant application.

Second, Jason's Petition is replete with asserted facts contrary to the warrant application, including myriad allegations Ludwick omitted information he possessed *for years when* he swore to contrary information in the warrant application. (Appx. at 11, 22, 24, 25, 26-35, 37, 38, 45.) The district court accepted, for purposes of the facts in addressing the motion to dismiss, that Ludwick knew Jason assembled the gun safe years before the murder. (Appx. at 96.) Facts provided by a district court are binding on an appellate court. *Wilson v. Ribbens*, 678 N.W.2d 417, 418 (Iowa 2004). The facts in the Petition, and information known to Ludwick prior to authoring the

warrant application but which Ludwick knowingly, and either intentionally or recklessly, failed to include in the warrant application, weigh against probable cause.[2] (Appx. at 11, 22, 24, 25, 26-35, 37, 38, 45.) *See also Carter v. Carter*, 957 N.W.2d 623, 643 (Iowa 2020).

The State's appellate tunnel vison reflects the tunnel vision of the investigation. Jason's Petition details the investigation and DCI file contained leads, information, and other facts Ludwick knew and which weighed against probable cause, but Ludwick focused on minutia. The State ignores broad facts and a depth of law, but argues minutia within one isolated petition paragraph. The facts pled regarding failed investigation and ignored leads were known to law enforcement and to Ludwick. Those facts weighed against

[2] It is important to note the State's argument that Jason's fingerprints on the safe show he "accessed" it (State. Br. at 34) is contrary both the pled facts and contrary to judicial facts and findings of courts, both available to the State at the time it wrote its brief. The State is aware Jason's fingerprints located on the safe were located behind locking mechanisms, in hard-to-reach places, next to tiny fingerprints of Jason's son left years prior to the murder, and a photo exists of Jason assembling the gun safe many years prior. There are no facts asserted in the petition, or that exist in the case overall, that Jason's fingerprints were on any part of the safe that would be touched if opening the safe to retrieve a gun. Each of these facts, again known to the State at the time the State authored its brief, weigh heavily against Ludwick's conclusions and statements in the warrant application. *See, e.g.*, *State v. Spier*, 173 N.W.2d 854, 858-59 (Iowa 1970). Each of these facts is also a metaphorical block of salt that should be taken with any of the State's arguments. If the State is misstates the record and prior cases, what else is misstated?

probable cause. Ludwick recklessly or intentionally failed to tell the court those facts when requesting a warrant. Ludwick recklessly or intentionally failed to tell the court those facts at preliminary hearing. Because those facts *have never been before a judicial officer when weighing probable cause,* the State's arguments relying on the issued warrant and the preliminary hearing order carry less weight than the printed paper. The district court erred in dismissing Jason's claim based on erroneous prior probable cause findings when Jason alleged facts to overcome probable cause.

d. Qualified Immunity Does Not Apply to Count I

The State's interpretation of *Baldwin I* (much like its interpretation of Jason's Petition) is corrected by the actual language of the case (or Petition). *See Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018). *Baldwin I* fully addresses multiple Iowa cases in which constitutional claims *were and may be brought* against government actors, *Id.* at 275-278, before applying all due care immunity to Iowa constitutional tort claims. *Id.* at 279-81. *Baldwin I requires* a government official sued in constitutional tort "pleads and proves" the affirmative defense of all due care. *Id.* at 281. Notably, the State *has not even filed an answer* to Jason's claims, let alone provided sufficient information to support an all due care affirmative defense. *Baldwin I* supports

Jason's position, and not the State's. The State failed to sufficiently Answer or provide facts into the record to support an assertion of immunity.

Second, the State improperly meshes principles of statutory qualified immunity, such as those in chapter 669, which the constitutional all due care immunity recognized by *Baldwin I*, 915 N.W.2d at 280-81. *Baldwin I* repeatedly clarifies, "[t]he issue is what a defendant to a constitutional damages action under article I, section[ ] . . . 8 must show to obtain qualified immunity for his or her own conduct." *Baldwin I*, 915 N.W.2d at 280 n.8. While statutory qualified immunity may be a question for the courts, constitutional all due care immunity clearly requires a government official sued in constitutional tort "pleads and proves" the affirmative defense of all due care prior to court determination. *Id.* at 281.

Even the State's brief citation to *Baldwin I*, 915 N.W.2d at 279-81 points to sections of the decision that are contrary to its own arguments. (*See* State's Br. at 40 (citing *Baldwin I*, 915 N.W.2d at 279-81).) While the State seems to wish the *Baldwin I* Court adopted the federal qualified immunity standard which *would have* allowed the State to avoid the "plead and prove" standard for all due care, this Court did not adopt the federal qualified immunity standard. *See Baldwin I*, 915 N.W.2d at 280-81. The State's request, less than four years after *Baldwin I*, is akin to a request to ignore a recent

holding. The State is required to actually plead and actually prove any due care immunity to the asserted constitutional tort claims. That, however, is for a different day.

Ample assertions in the Petition support Jason's constitutional tort claim at this motion to dismiss stage and rise above allegations of negligence. While the Petition confirms Ludwick knew about other leads, suspects, statements, and tips; nothing in the Petition supports the State's wrong assertion "Agent Ludwick and his team were actively investigating the murder". (State's Br. at 43.) The Petition starkly shows Ludwick and law enforcement under his command: begrudgingly collected tips and leads and threw them (sometimes literally) in a box while failing to do even the first step of follow-up (Appx. at 11, 22, 24, 25, 26-35, 37, 38, 45); delayed interviews until their hand was forced, and wrote reports that recklessly or purposefully misstated interviews, each misstatement obfuscated exculpatory evidence; actively manipulated Bill Carter and Jason's siblings through word and deed, misdirecting them into believing the State had evidence against Jason, (Appx. at 7, 8, 19-21); and wholly failed to follow up on exculpatory leads by and about other suspects (who had motive and opportunity), (Appx. at 11, 14, 28, 29, 32, 37, 38, 39, 41-42, 45, 57). When a law enforcement officer fails to "do better" to support probable cause to arrest, even when provided ample

opportunities, constitutional torts lie. *See, e.g.*, *Wilson v. Lawrence Cty.*, 260 F.3d 946 (8th Cir. 2001), and *Neal v. St. Louis County Board of Police Commissioners,* 217 F.3d 955, 958 (8th Cir.2000) (addressing law enforcement failures and constitutional torts under a different, but similar, theory).

Ultimately, the question of qualified immunity or all due care immunity is just not before this Court. The State failed to sufficiently answer and failed to provide sufficient facts into the record to support its claimed affirmative defense.

## II. Count III was Improperly Dismissed

The State's arguments in support of the district court's dismissal are unavailing. The district court erred in dismissing Count III.

### a. Count III is Not a Functional Equivalent of a Chapter 669 Excepted Claim

The State claims (in a single sentence) that Jason's Count III is "plainly" the functional equivalent of an abuse of process claim and excepted under section 669.14(4).

"To prove a claim of abuse of process, a plaintiff must show (1) use of the legal process, (2) in an improper or unauthorized manner, and (3) that damages were sustained as a result of the abuse." *Iowa Supreme Court Attorney Disciplinary Bd. v. Barnhill*, 885 N.W.2d 408, 419–20 (Iowa 2016). Count III is not the functional equivalent of abuse of process and therefore the claim in Count III is not excepted.

The law requires us to look at "the nature of the function performed" by law enforcement to determine whether it is excepted conduct. *Forrester v. White*, 484 U.S. 219, 229 (1988). Here, the "nature of the function performed" by Ludwick was far broader than just use of a civil proceeding to which the State was not a party, or more than simply use the legal process to damage Jason, Ludwick embedded himself with Bill Carter months before the civil suit against Jason was contemplated (at least by Bill). Ludwick lied to the Carter family and divided it, misrepresented the investigation to them, even when faced with direct questions. At every step, Ludwick indoctrinated Bill Carter with assertions Jason committed the homicide and the State had definite proof (which it did not). (Appx. at 7, 8, 19, 20, 21.) The State manipulated the discovery process once the civil suit was filed, guiding discovery, obtaining information in violation of the Constitution, and providing targeted evidence to the civil plaintiffs. (Appx. at 48, 54, 60, 63.)

The exception for abuse of process provided in section 669.14 was intended to prevent exonerated defendants from suing the State for matters such as the State charging the defendant with homicide (and thereby "abusing" the legal process). Here, the State did not "use" the legal process in that sense because it was not a party. It benefited from and coordinated with the civil plaintiffs to "use" the civil process.

Clearly, this is not a "governmental function [ ] . . . historically viewed as so important . . . that some form of absolute immunity from civil liability [is] needed to ensure [it is] performed 'with independence and without fear of legal consequences." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012). The drafters of the Iowa Constitution and the legislature clearly did not intend for State actors to be able to violate constitutional rights with impunity if it is done in a civil setting. Indeed, there *should* be fear of legal consequences with unconstitutional meddling.

A due process claim may *feel* similar to certain abuse of process claims. However, the Iowa legislature is precluded from excepting these claims due to the supremacy of the Iowa Constitution and the law in *Godfrey*. Jason sufficiently pled facts far broader than a simple abuse of process claim

b. Not a Collateral Attack on Prior Civil Judgment

As a preliminary matter and as recognized by the State, this question is not properly preserved for appellate review as the district court did not decide this issue. (State's Br. at 47.) *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002).

However, if this Court reaches this issue, the State is simply incorrect; Count III (and Count IV) is not a collateral attack on the prior $10 million civil judgment.

> A collateral attack on a judgment is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success then the attack upon the judgment is collateral.

*In re Davidson*, 860 N.W.2d 343, 2014 WL 6977276, at *5 (Iowa Ct. App. 2014) (internal citations and quotations omitted).

Jason's claims neither seek nor require the prior $10 million judgment be vacated, amended, defeated, or evaded. In fact, Jason's claims exist independently of the $10 million judgment. At most, the prior judgment is a damages factor.

Tangentially, principles of collateral estoppel show the stark differences between Jason's current claims and the prior civil case.

> A party claiming issue preclusion or collateral estoppel, must establish: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

*George v. D.W. Zinser Co.*, 762 N.W.2d 865, 868 (Iowa 2009) (internal citation omitted).

"Iowa law is clear that issue preclusion requires that the issue was 'actually litigated' in the prior proceeding." *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 57, 572 (Iowa 2006). "Whatever the differences among courts and commentators as to the 'actually litigated' requirement for issue preclusion, there has been general agreement-to the point of convention- that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate 'to the hilt' the issues in question." *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 295-96 (Iowa 1982).

The test to establish issue preclusion or collateral estoppel fails on multiple prongs. The present case presents different parties, different

remedies, different allegations, different facts, and different judicial decisions. This is not, as the State attempts to frame it, a discovery dispute about the State withholding evidence in the prior case. The State again finds one tree (the subpoena in the prior case) and ignores the forest of Ludwick's actions dividing the Carter family, encouraging the civil case, directing the civil discovery, and cherry-picking evidence for one side of litigation. (Appx. at 7, 8, 13, 19, 20, 21, 49, 51, 56, 59, 67.) This case is completely distinct from the prior $10 million civil judgment and based on myriad affirmative actions by the State in initiating and propelling the civil suit against Jason. Should this court address this argument (though not properly preserved), Count III is not a collateral attack on the prior civil judgment.

c. Judicial Process Immunity Does Not Apply

The State incorrectly focuses on Ludwick testifying in the prior civil case when asserting judicial process immunity. "[I]n determining whether absolute immunity applies, the focus is on the nature of the function performed, not on the identity or title of the particular actor. *Muzingo v. St. Luke's Hosp.*, 518 N.W.2d 776, 777 (Iowa 1994).

> [Iowa courts] grant absolute immunity for only. . . those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation

> that some form of absolute immunity from civil liability was needed to ensure that they are performed with independence and without fear of consequences.
>
> The functional approach demonstrates the immunity ... is not for the protection of the official personally, but for the benefit of the public. The immunity benefits the public by protecting government officials involved in the judicial process from the harassment and intimidation associated with litigation.

*Venckus v. City of Iowa City*, 930 N.W.2d 792, 801 (Iowa 2019) (internal citations, quotations, and brackets omitted).

Defendants' actions in the civil suit are outside the area of judicial process immunity. Ludwick's choice to involve himself in private litigation with his secret coercive actions to sway that litigation are beyond the pale. It borders on absurd to label these actions as among "those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed with independence and without fear of consequences." *Venckus*, 930 N.W.2d at 801 (internal quotation omitted). Ludwick's myriad actions were those of a plaintiff in the civil suit, and not those of a mere "police officer . . . testifying as an ordinary witness." *Id.* at 806. There is no benefit to the public in condoning Ludwick's actions; instead, harm would occur by immunizing blatant unconstitutional

behavior. Judicial process immunity does protect egregious invasive actions by the State and by Ludwick during the related civil suit.

A simple review of the Petition, prior briefing, or any arguments on the record show Jason's claim is not grounded in Ludwick's testimony (though it was demonstrable perjury). Count III is grounded in Ludwick's actions in lying to and dividing the Carter family, coaxing, actively encouraging Bill Carter to initiate the civil case, sharing misleading evidence supporting one side of the litigation, and actively working with Bill Carter to plan discovery and deposition questions to ask Jason under oath (to circumvent constitutional protections). None of these actions are protected by judicial process immunity, nor should they be.

d. Ludwick's Actions Shock the Conscience

Try as it might, the State cannot sever Ludwick's actions from the misinformation fed to the Carter family by law enforcement and the resulting division of the Carter family. Ludwick conceived and drove a civil suit for impermissible purposes. At the same time, Ludwick ignored, covered up, redirected, and obfuscated exculpatory leads. The State cannot sever Ludwick = because he is at the heart of the Carter family schism and the ill-founded civil suit.

The State asserts there no cases establish the complained-of actions were unconstitutional. However, the State cites an on-point case. *Wilson v. Lawrence Cty.*, 260 F.3d 946 (8th Cir. 2001) recognizes a government actor's "intentional acts of failing to investigate other leads would violate due process", which "right was clearly established" at the time of the acts set forth in the Petition. *Id.* at 955. *Wilson* recognizes coercive state action which invades a person's constitutional rights offends substantive due process principles. *Id.* This is because, as least in part, "in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly." *Wilson*, 260 F.3d at 956 (citing *Neal v. St. Louis County Board of Police Commissioners,* 217 F.3d 955, 958 (8th Cir. 2000)).

Here, instead of doing his job, Ludwick coerced Jason's own father and family into believing Jason committed the murder. Ludwick divided the Carter family, hid and manufactured evidence, directed those under his command to ignore leads pointing away from Jason, and instead used the civil litigation he coerced Bill Carter into bringing to attempt to gain evidence from Jason. (Appx. at 7, 8, 11, 14, 19-21, 28, 29, 32, 37, 38, 39, 41-42, 45, 57.) Ludwick's actions were clear violations of substantive due process principles.

The State cites *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 550 (Iowa 2019) in support of dismissal. *Behm,* however, is an appellate decision following summary judgment, not a dismissal. *Id.* at 533. *Behm* stands at a different procedural posture than the present case, limiting the State's reliance on its holding.[3] Moreover, *Behm* affirms principles which support Jason's claim of conscience-shocking behavior. *Behm* recognizes government action that is "offensive to human dignity" is conscience-shocking. *Id.* at 554. *Behm* provides "outrageous utilization of physical force; state-sponsored imposition of uncalled-for embarrassment or ridicule; or intolerable, disreputable, and underhanded tactics that may arise from government action deliberately designed to" sever or penetrate recognized and protected relationships each also rise to the level of conscience-shocking. *Id. Behm* is not limiting case, and a close reading of the case supports Jason's substantive due process claims.

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." *Rochin v. California*, 342 U.S. 165, 172 (1952). The use of coercion to collect evidence

[3] The same procedural differences hold true for numerous other cases cited by the State. *See, e.g.*, *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (cited by the State, also a summary judgment case).

> offend[s] the community's sense of fair play and decency. So here, to sanction the brutal conduct. . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

*Id.* at 173-74.

Here, the Petition lays bare numerous factual assertions of coercion on the part of the State, purposeful misrepresentations meant to (and which succeeded in) severing close family ties, causing a father to accuse and bring suit against a son based solely on the lies of law enforcement. (Appx. at 7, 8, 13, 19, 20, 21, 49, 51, 56, 59, 67.) Caselaw makes clear this behavior certainly rises to the level necessary to shock the contemporary conscience.

These facts have never seen the light of a courtroom. The State continues to work to keep the actual facts of Ludwick's misdeeds from ever coming in front of a factfinder. The State does not get to kick open every door, arrest every person, strong-arm a confession, or manipulate a family merely because it pretends to attempt to solve a crime: "the mere incantation of the abracadabra of public safety" does not permit constitutional violations. *Behm*, 922 N.W.2d at 555.

Protecting Jason's right to his family, his right to be free from coercive law enforcement tactics, his right to be free from the baseless abuse he suffered at the will of Ludwick and the State is certainly the sort of rights that are "'implicit in the concept of ordered liberty.' " *Atwood v. Vilsack*, 725

N.W.2d 641, 648 (Iowa 2006) (quoting *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697, 708 (1987)).

e. All Due Care Immunity Does Not Apply to Count III

As discussed above, the State has neither pled nor proven what is needed for all due care immunity. *Baldwin I*, 915 N.W.2d at 281; *Baldwin II*, 929 N.W.2d at 698. The State's passing reference to it relating to Count III should be passed by.

## III. Count IV Dismissal was Incorrect

As discussed above, the State has neither pled nor proven what is needed for all due care immunity. *Baldwin I*, 915 N.W.2d at 281; *Baldwin II*, 929 N.W.2d at 698. The State's passing reference to it relating to Count III should be passed by.

a. Count IV is Subject to Sovereign Immunity or Chapter 669 Exceptions

The State (incorrectly) casts Count IV as a due process violation based solely on Jason being taken into custody. Yet again, the State closes its eyes

to the actual facts in the petition, and the actual allegations of this claim. Sovereign immunity has been waived for substantive due process claims as Article I, section 9 of the Iowa Constitution is self-executing. *Godfrey,* 878 N.W.2d at 846-47, 871.

Count IV is a substantive due process claim based on Ludwick's actions of hiding evidence, purposefully failing to investigate leads and admissions relating to the homicide of Shirley Carter, manipulating evidence and reports to hide evidence helpful to Jason, and directing those under his supervision and control to likewise ignore evidence and fail to follow up on leads or perform investigation. These allegations set forth a patent due process violation, and violation of Jason's right to judicial access. *See, e.g.*, *Bell v. City of Milwaukee*, 746 F.3d 1205 (7th Cir. 1984), and *Rossi v. City of Chicago*, 790 F.3d 729 (7th Cir. 2015) (providing where a litigant's day in court is effectively denied due to investigation cover up and other salacious and egregious actions of law enforcement, a due process violation occurs). These allegations are far broader than any section 669.14 exceptions. *See Smith v. Iowa State. Univ. of Science and Technology*, 851 N.W.2d 1, 21-27 (Iowa 2014); *see also Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003). None of the excepted actions in section 669.14(4) are "essential" to Jason's

claims. *Id.* Therefore, neither sovereign immunity nor section 669.14(4) bars Count IV.

b. Not a Collateral Attack on Prior Civil Judgment

The State's minimization of both Ludwick's actions and Jason's claims is akin to describing a mountain as a molehill.

The State misapplies *Wilson v. Lawrence Cty.*, 260 F.3d 946 (8th Cir. 2001). Contrary to the State's limited reading, *Wilson* provides "reckless or intentional failure to investigate other leads offends a defendant's due process rights", and "intentional acts of failing to investigate other leads would violate due process", which "right was clearly established." *Id.* at 955. *Wilson* does not limit a substantive due process violation to those instances where a coerced confession exists. *Id.* Rather, *Wilson* and the case law cited within show where there is reckless or intentional failure to follow clear leads, coupled with coercive action by the State attempting to manufacture evidence of guilt or invade protected rights of a suspect, principles of substantive due process are offended. *See id.* This is illuminated when considering additional direction from the *Wilson* Court, which reaffirmed *Neal*, stating "in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done

recklessly." *Wilson*, 260 F.3d at 956 (citing *Neal v. St. Louis County Board of Police Commissioners,* 217 F.3d 955, 958 (8th Cir. 2000)).

Jason sufficiently pled a reckless investigation, an intentional failure to deliberate alternatives during extreme time delays on the part of the State, and coercive conduct which infringed on Jason's family, friends, property, liberty, and constitutional rights. (Appx. at 7, 8, 11, 14, 19-21, 28, 29, 32, 37, 38, 39, 41-42, 45, 57.) The district court erred in dismissing Count IV on this ground.

c. All Due Care Immunity Does Not Apply

Again, as discussed above, the State has neither pled nor proven what is needed for all due care immunity. *Baldwin I*, 915 N.W.2d at 281; *Baldwin II*, 929 N.W.2d at 698. The State's passing reference to it relating to Count IV should also be passed by.

## IV. CONCLUSION

The State complains Jason's brief "emotes but does not reason." This clever turn of phrase, like so much of the State's brief, is appealing at first blush but dissolves in the cleansing light of the pled facts and controlling caselaw.

Iowa case law is clear "[a] motion to dismiss should not be liberally granted." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). The district court failed to review the "petition in its most favorable light, resolving all doubts and ambiguities in [the plaintiff's] favor." *Schriner v. Scoville*, 410 N.W.2d 679, 680 (Iowa 1987). Because Jason's "right of access to the district court, not the merits of his allegations" is at issue, "[v]ery little is required in a petition to survive a motion to dismiss." *Rieff*, 630 N.W.2d at 284, 292. In fact, "[a] petition need not [even] allege ultimate facts that support each element of the cause of action". *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009).

On de novo review, the facts pled and controlling case law make clear: the district court erred in dismissing Jason's claims. Jason requests reversal and remand.

## REQUEST FOR ORAL ARGUMENT

Jason Carter maintains his request for oral argument.

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**CERTIFICATE OF FILING**

The undersigned certifies on April 25, 2022, I filed this Plaintiff/Appellant's Final Reply Brief via the Iowa Judicial Branch EDMS system.

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## CERTIFICATE OF SERVICE

The undersigned certifies on April 25, 2022, I served this Plaintiff/Appellant's Final Reply Brief via the Iowa Judicial Branch EDMS system to the attorneys of record.

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies :

1. This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this proof brief contains 6,133 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903 (1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word - Times New Roman 14 pt.

Dated: April 25, 2022

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