IN THE SUPREME COURT OF IOWA

No. 21–1992

GERI L. WHITE,

Appellant,

vs.

MICHAEL HARKRIDER, CITY OF IOWA CITY, CHRIS WISEMAN and JOHNSON COUNTY,

Appellees.

Appeal from the Iowa District Court for Johnson County
Chad Kepros, District Judge

BRIEF OF AMICUS CURIAE STATE OF IOWA SUPPORTING APPELLEES

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INTEREST AND FUNDING OF AMICUS CURIAE

The Attorney General has a statutory duty to participate in appellate court proceedings in which the State is interested. *See* Iowa Code § 13.2(1)(*a*). The issues raised in this appeal include whether to extend the principle announced in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), to municipal defendants; and if so, whether a plaintiff can bring a direct claim for damages under article I, §§ 1 or 8 of the Iowa Constitution. The State has a direct interest in this appeal, as it is a named party in numerous cases where these issues have been raised. And expanding constitutional tort liability beyond what was previously recognized in *Godfrey* would have significant consequences for the State and its employees.

No party's counsel authored this brief in whole or in part. No party's counsel contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief, except to the extent that all Iowa taxpayers fund the Iowa Attorney General's Office.

ARGUMENT

I. The Court should not extend *Godfrey* liability to municipalities because *Godfrey* was wrongly decided.

The district court properly dismissed Appellant's constitutional tort claims. Appellant's tort claims should not lie against the municipal Appellees because no constitutional tort claims should lie against government defendants without authorizing legislation. Because constitutional tort liability as required by *Godfrey* and its progeny is demonstrably erroneous, it should not be extended here. And in the appropriate case, *Godfrey* should be directly overturned.

A. *Godfrey* misread the Iowa Constitution, misapplied Iowa precedent, and rested heavily on uncertain federal precedent.

Godfrey misread the Iowa Constitution. *See Godfrey v. State*, 898 N.W.2d 844, 868–70 (Iowa 2017). Our framers were explicit that our Constitution is not self-executing, instead instructing "[t]he general assembly shall pass all laws necessary to carry this Constitution into effect." Iowa Const. art. XII, § 1. Article XII, § 1 is not a transitional clause, but an allocation of power—the body charged with creating constitutional causes of action is the Legislature, not the Judiciary. *See also Bandoni v. State*, 715 A.2d 580, 595 (R.I. 1998); *Roberts v. Millikin*, 93 P.2d 393, 398 (Wash. 1939) ("The express mandate that the legislature should, without delay, pass the necessary laws to carry out the provisions of the

constitution and facilitate its operation, implies that this provision was not deemed self-executing, but required legislation to make it operative."). The Legislature may, at any time, enact its own version of 42 U.S.C. § 1983 and authorize damages for violating the Iowa Constitution. Rescinding *Godfrey* would thus not indelibly prohibit constitutional tort claims, but merely return the issue of whether to authorize such claims, and under what circumstances, to the proper body.

Godfrey also misapplied Iowa precedent. The plurality "cited no Iowa precedent for a direct constitutional claim for damages against the State or state officials. In fact, Iowa precedent was to the contrary." *Wagner v. State*, 952 N.W.2d 843, 857 (Iowa 2020). "In the one hundred and sixty years between the adoption of the constitution and *Godfrey*, this court had never recognized a constitutional tort claim. And for good reason: there was and is no such cause of action." *Lennette v. State*, 975 N.W.2d 380, 402 (Iowa 2022) (McDonald, J., concurring). When a century's worth cases must be overturned or contorted just to sustain one case, the case is worth revisiting. *Post v. Davis Cnty.*, 191 N.W. 129, 135 (Iowa 1922) (overturning case because adhering to its precedent required "overturning principles which have been universally recognized as fundamental").

And *Godfrey* rested heavily on uncertain federal precedent. The decision places substantial weight on *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Godfrey*, 898 N.W.2d at 851–56, 65–67, 75–77 (relying on *Bivens* reasoning when creating the claim and repeatedly framing it as a "*Bivens*-type" claim). While *Godfrey* acknowledged the federal trend against recognizing *Bivens* claims, it nevertheless instructed that "the continuing viability of federal *Bivens* claims would be important only if later cases cast doubt on the reasoning of the original opinion." 898 N.W.2d at 855.

Later cases have now cast doubt on the reasoning of the original *Bivens* opinion. In *Ziglar v. Abbasi*, the Supreme Court cautioned that since *Bivens*, "the arguments for recognizing implied causes of action for damages began to lose their force." 137 S. Ct. 1843, 1855 (2017). When implying a cause of action, the guiding principle is "one of statutory intent." *Id.* Yet "[w]ith respect to the Constitution, . . . there is no single, specific congressional action to consider and interpret." *Id.* at 1856. Moreover, it was a "significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* Creating such a cause of action requires balancing "economic and governmental

concerns." *Id.* "Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Id.* Given these concerns, "the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.*

And this past term, the Supreme Court again refused to extend *Bivens*, this time in a search-and-seizure case materially akin to *Bivens* itself. *Egbert v. Boule*, 142 S. Ct. 1793 (2022). The Court explained it had "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Id.* at 1802 (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020)). "At bottom, creating a cause of action is a legislative endeavor. . . . Unsurprisingly, Congress is 'far more competent than the Judiciary' to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain." *Id.* at 1802–03 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)) (internal citation omitted).

"The doctrine of 'stare decisis' is, of course, founded on reason, but it should not be applied in such a manner as to banish reason from the law." Buell McCash, *Ex-Delicto Liability of Counties in Iowa*, 10 Iowa L. Bull. 16, 36 (1924), *available at* https://perma.cc/A5MZ-5FYV. While this Court does not "overturn

[its] precedents lightly," it will do so when "the prior decision was clearly erroneous." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005).

If we give meaning to article XII, § 1 of the Iowa Constitution, follow our common law precedent, and recognize that *Bivens* is no longer a load-bearing wall, little of *Godfrey* survives. In the appropriate case—now or in the future—*Godfrey* should be overturned.

B. "Thus far and no farther."

Turning to whether to extend *Godfrey's* erroneous precedent, this Court has been in a similar position before. In 1862, the Iowa Supreme Court allowed a county to be sued for damages arising out of a purported failure to maintain county bridges, despite no legislation authorizing such damages. *Wilson v. Jefferson Cnty.*, 13 Iowa 181, 184–85 (1862). The *Wilson* decision was unprecedented—counties had long been recognized as involuntary divisions of the state whose creation and liabilities were exclusively statutory. *See generally* McCash, 10 Iowa L. Bull. 16.

Opening the door to governmental liability placed the Court "in an unenviable position; it was being constantly importuned to overrule the doctrine it had so long adhered, on the basis of *stare decisis* though indefensible in principle, and with the same frequency it was being beseeched to extend the rule which with

equal reason should attach to other negligent acts of public servants." *Id.* at 29.

But the Court eventually recognized its error and refused to extend *Wilson* beyond the strict facts of the case. Even when factual distinctions were "not very plain nor easily demonstrated," the Court refused "to carry the doctrine further than is necessary to sustain the [prior] decisions of the court." *Kincaid v. Hardin Cnty.*, 5 N.W. 589, 592 (Iowa 1880) (declining to extend liability for courthouse maintenance, "unwilling as we are to extend the liability of these *quasi* corporations further than already obtains, which, if done, must inevitably lead to inextricable complications arising in actions for all possible negligent acts"); *see also, e.g.*, *Soper v. Henry Cnty.*, 26 Iowa 264, 270 (1868) (declining to extend liability for "small bridges"); *Greene v. Harrison Cnty.*, 16 N.W. 136, 136 (Iowa 1883) (declining to extend liability for drainage ditch maintenance, explaining *Wilson* was "[a]gainst the decided weight of authority"); *Lindley v. Polk Cnty.*, 50 N.W. 975, 975 (Iowa 1892) (declining to extend liability for jail maintenance, explaining "[w]e are still of the opinion that there is no consideration of right or public policy which would authorize this court to open the way to all manner of actions against counties based upon the negligence of its officers"); *Packard v. Voltz*, 62 N.W. 757, 758 (Iowa 1895) (declining to extend liability to highway maintenance, explaining

"[b]ut for the rule announced in [*Wilson*] and the cases adhering to it, the one now contended for would have no authoritative support in this state. The rule of that case has been doubted, and the doubt, on common–law authority, has recognition in the holding of this court"); *Snethen v. Harrison Cnty.*, 152 N.W. 12, 13 (Iowa 1915) (declining to extend liability to highway maintenance even though "the analogy is quite close," because "this court, in adopting the rule of liability for defective bridges, did not follow the general rule then existing in other jurisdictions, and has since its adoption persistently and consistently refused to enlarge the same").

Rather than extend erroneous precedent, the Court waited until a case provided the appropriate opportunity to revisit the holding. And in *Post v. Davis County*, the Court was presented with such an opportunity—the legislature amended a statute relating to county control of bridges. 191 N.W. 129, 130 (Iowa 1922). Surveying both the change in factual circumstances and the considerable flaws of the *Wilson* decision, the Court overruled *Wilson*, "formally "return[ing] to the fundamental principle of nonliability of the county in the absence of legislation creating liability." *Id.* at 135. Significantly, the Court explained it was "unable to follow [*Wilson*] to its logical consequences without overturning principles which have been universally recognized as fundamental." *Id.*

So there is precedent for this Court, facing erroneous government-liability precedent, to say "[t]hus far and no farther." *Id.* at 133. If the Court finds this appeal inapt to revisit *Godfrey*, the Court should still "refuse[] to extend the operation of [its] rule beyond that class of cases which involve in all strictness" the limited claim recognized in *Godfrey*. *Wilson v. Wapello*, 105 N.W. 363, 366 (Iowa 1905). Because *Godfrey*, in all strictness, did not recognize a claim against a municipality, nor a claim arising under article I, §§ 1 or 8 of the Iowa Constitution, Appellant's claims should be dismissed.

Or this Court could adopt the inquiry used by the United States Supreme Court in extending *Bivens* claims in new contexts. In *Egbert*, rather than dispose of *Bivens*, the Court announced it would not extend the claim when "there is any reason to think that Congress might be better equipped to create a damages remedy." 142 S. Ct. at 1803. "Put another way, the most important question is who should decide whether to provide for a damages remedy, Congress or the courts? If there is a rational reason to think that the answer is "Congress"—as it will be in most every case—no *Bivens* action may lie." *Id.* (cleaned up).

Here, there are rational reasons to think the Legislature is in a better position to assess the need for damages remedies against municipalities (and the State) in the context of this suit. The

Legislature has indeed already engaged in cost-benefit analysis for municipal tort liability, waiving and retaining tort immunity based on the claim or circumstances—often to a different degree than State liability. *See generally* Iowa Code §§ 670.4; 670.14. And as set forth by the Appellees, accommodating the unique fiscal constraints of municipalities requires balancing many policy factors, which strongly counsels in favor of placing the decision in the hands of the Legislature. *See* Appellee Brief, at 34–37. Thus, there are reasons to think the Legislature is better equipped to craft a damages remedy in this context, and the district court did not err in dismissing Appellant's constitutional tort claims.

II. The *Baldwin* cases did not conduct a self-execution analysis for article I, sections 1 and 8 of the Iowa Constitution.

In arguing that this Court has already extended *Godfrey* liability to municipalities under article I, sections 1 and 8, Appellant extends the *Baldwin* cases too far. *See generally Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) ("*Baldwin I*"); *Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019) ("*Baldwin II*"). In *Godfrey*, the Court adopted the federal *Davis* test for determining whether a constitutional provision is self-executing. 989 N.W.2d at 870; *Davis v. Burke*, 179 U.S. 399, 403 (1900).

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, . . . and it is not self-executing when it merely indicates principles. . . . In short, if [it is] complete in itself, it executes itself." *Godfrey*, 898 N.W.2d at 870 (quoting *Davis*, 179 U.S. at 403). Thus, to authorize a direct cause of action under a constitutional provision, the Court must find that the provision provides a workable standard capable of uniform judicial enforcement.

Nowhere in either *Baldwin* decision does the Court engage in the *Davis* analysis to determine whether either article I, sections 1 or 8 supply "a sufficient rule by means of which the right given may be enjoyed and protected." *Davis*, 179 U.S. at 403; *see generally Baldwin I*, 915 N.W.2d 259; *Baldwin II*, 929 N.W.2d 691. And it is unlikely the Court, had it conducted a self-execution analysis, would have found both provisions to be self-executing.

For instance, article I, § 1 provides, "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Although the inalienable rights clause "is not a mere glittering generality without substance and meaning," the Court has noted that "these principles . . . tell us little

about the substance of the constitutional guarantees or how they should be applied in a given case." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 351 (Iowa 2015). It is hard to conceive of a standard that would guarantee uniform judicial enforcement of a right to happiness. *Cf. Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 92 (Iowa 2022) (Mansfield, J., concurring).

In the *Baldwin* cases, the Court was presented with discrete certified questions of law. 915 N.W.2d at 260; 929 N.W.2d at 695. The federal district court did not ask the Court to assess whether the provisions were self-executing. Nor did the parties or amici in their briefs, which are publicly available, analyze whether either section was self-executing. It is unsurprising then, that the Court did not reach an issue that neither the parties nor certifying court asked it to reach. *Cf. Stevens v. Stearns*, 833 A.2d 835, 841–42 (Vt. 2003) (adopting qualified immunity standard without deciding whether plaintiff's state constitutional tort claim was actionable). Rather, the Court answered the specific questions posed and no more.[1]

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[1] Notably, the Court did resolve the outstanding issue of the interplay between municipal sovereign immunity and constitutional tort claims, finding no tension between the two doctrines and instructing that the Iowa Municipal Tort Claims Act could apply to constitutional tort claims. *Baldwin II*, 929 N.W.2d at 701. An amicus brief by the Iowa Association for Justice spends

Constitutional provisions should not be made self-executing by implication, accident, or acquiescence. Creating new constitutional causes of action should instead be "a disfavored judicial activity." *Ziglar*, 137 S. Ct. at 1857. Only upon finding that a constitutional provision provides "a sufficient rule" enabling uniform judicial enforcement should a claim be recognized. *Davis*, 179 U.S. at 403. But neither *Baldwin* opinion made that finding, and the Court should not read the decisions so broadly as to allow the creation of novel constitutional causes of action without a threshold *Davis* analysis.

CONCLUSION

The district court correctly dismissed Appellant's *Godfrey*-type claims. Because the claims are not cognizable, nor should they be brought against the municipal defendants, the district court should be affirmed.

Respectfully submitted,

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significant time advocating that sovereign immunity is inconsistent with constitutional requirements, but that issue has already been resolved and need not be revisited here.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(g)(1), and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,821 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
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CERTIFICATE OF FILING AND SERVICE

I certify that on August 8, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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