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IN THE IOWA SUPREME COURT

No. 21-1992

GERI L. WHITE,

Plaintiff-Appellant,

v.

MICHAEL HARKRIDER, CITY OF IOWA CITY, CHRIS WISMAN and **JOHNSON COUNTY**,

Defendants/Appellees/Cross Appellants

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE CHAD KEPROS, JUDGE

DEFENDANTS/APPELLEES/CROSS APPELLANTS' FINAL BRIEF

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ROUTING STATEMENT

Defendants agree with White that the Iowa Supreme Court should retain this case. It presents substantial issues of first impression (Iowa R. App. P. 6.1101(2)(c)) related to the expansion of direct constitutional tort claims from the State to municipalities and municipal employees, and relatedly, the expansion of direct constitutional tort claims to include alleged violations of Iowa's Inalienable Rights Clause and Search and Seizure Clause.

STATEMENT OF THE CASE

A. Nature of the Case

This interlocutory appeal arises from the district court's ruling granting in part, and denying in part, two local law enforcement officers' and their employing municipalities' motion to dismiss Plaintiff Geri White's Iowa constitutional tort and common law claims. White's claims arise from a multi-agency law enforcement response to 911 calls reporting a driver (Geri White's husband, Daniel White) who left the scene of a one-vehicle rollover car accident and sped recklessly on the rims of his crushed vehicle toward Iowa City, leaving behind ammunition, vehicle parts, and an empty beer can at the scene of the crash. The severely damaged vehicle was found at the White home, where officers were informed by dispatch that a person associated with the address had a warrant out for assault, was known to have violent tendencies, and the officers should "use

caution." As part of their response, the officers formed an armed perimeter around the White property and ordered all occupants out of the house via loudspeaker. Geri White came out onto the front step and, after initially refusing to do so, eventually spoke with a deputy. She was never physically touched, was never criminally charged, and eventually brought deputies into the home to speak with her husband, Daniel. Following an investigation, Daniel was charged with O.W.I. Six weeks and two days after Daniel's criminal case concluded with a plea agreement, Geri White filed this civil action seeking money damages for the alleged violation of her rights under the Inalienable Rights Clause and Search and Seizure Clause of the Iowa Constitution and for alleged intentional infliction of emotional distress, trespass, and assault.

B. Relevant Events of the Prior Proceedings and Disposition in District Court

Defendants agree with White's recitation of the relevant events of prior proceedings in this lawsuit.

STATEMENT OF FACTS

The following facts, alleged by White, are taken as true. *Karon v. Elliott Aviation*, 937 N.W.2d 334, 335 (Iowa 2020) (stating "[b]ecause we are reviewing the grant of a motion to dismiss, we take as true the plaintiffs' factual allegations.").

On June 1, 2019 Iowa City Police Officer Michael Harkrider and Johnson County Deputy Sergeant Chris Wisman were investigating a report of a single-vehicle accident. (App. pp. 4-5; Amended Pet., ¶ 2, 4, 6). It was reported by 911 callers that a male driver was going at an excessive speed and had substantial damage to his vehicle, including the loss of a tire. (App. p. 5; Amended Pet., ¶ 9). At the scene of the accident Sgt. Wisman found a beer can on the road and unused rifle ammunition in the ditch. (App. p. 5; Amended Pet., ¶ 10). Sgt. Wisman suspected the driver had lost control due to the use of alcohol and left the scene to avoid detection. (App. p. 5; Amended Pet., ¶ 11). The vehicle was tracked to Plaintiff Geri White's home in Iowa City, and law enforcement converged on the home. (App. p. 5; Amended Pet., ¶¶ 7, 13). Iowa City Officer Harkrider, Sgt. Wisman, and other law enforcement officers formed a perimeter around the home. (App. p. 5; Amended Pet. ¶¶ 12-14). Instead of knocking on the door, Officer Harkrider used a public address system (i.e., a loudspeaker) to tell the occupants of the home to come out. (App. pp. 5-6; Amended Pet., ¶ 16, 17, 19). Officer Harkrider told the occupants of the house to slowly open the door, come out with their hands empty and in the air, and slowly step outside. (App. p. 6; Amended Pet., ¶ 19). Plaintiff Geri White came out of the house and when she opened the front door the officers had their weapons drawn and pointed at her. (App. p. 6; Amended Pet., ¶ 20). White initially refused to leave her step, wanting "an

explanation for the army in front of her home." (App. p. 6; Amended Pet., ¶ 22). Officer Harkrider demanded that she leave the step. *Id.* At Officer Harkrider and Sgt. Wisman's order, White then came off her front stoop and talked to Sgt. Wisman in her driveway. (App. p. 6; Amended Pet., ¶ 23, 24). After speaking with White, the officers "disbanded" and White was "permitted to return home." (App. p. 6; Amended Pet., ¶ 25). White was never arrested. (App. p. 6; Amended Pet., ¶ 26). Her husband, Daniel White, was arrested for O.W.I. (App. p. 7; Amended Pet., ¶ 27).

Daniel's O.W.I. case was captioned *State v. Daniel Dean White*, OWCR122719 (Iowa District Court in Johnson County). Daniel filed a motion to suppress, claiming that he was seized in violation of both the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Iowa Constitution.[1]

[1] Geri White referred to and block-quoted the district associate court's ruling on her husband's unsuccessful Motion to Suppress but did not attach the full ruling to her Amended Petition. (App. p. 6; Amended Pet., ¶ 18). Defendants attached the full ruling as an exhibit during the motion to dismiss proceedings. (Defendants' Joint Reply to Plaintiff's Resistance to Motion to Dismiss, Attachment 1, filed 10/1/21; Defendants' Motion to Dismiss Trespass Claim, Attachment 1, filed 10/1/21). "[I]n ruling on a motion to dismiss, courts must ordinarily consider documents incorporated into the complaint by reference." *King v. State*, 818 N.W.2d 1, 6 n.1 (Iowa 2012) (considering reports and studies referred to in plaintiffs' petition, though not attached); *Karon*, 937 N.W.2d at 336 n.2 (noting that a contract filed by defendants as an exhibit in their motion to dismiss for failure to state a claim was part of the record because although plaintiffs did not attach the document to their petition, their petition referred to "written documents" that documented "the final transaction" and the plaintiffs did not dispute that the contract was the parties' written purchase agreement); *Martin v. Espinoza*, 2022 WL 1100219, *1 (Iowa Ct.

(Attachment 1 to Motion to Dismiss Trespass Claim (OWCR122719, Ruling on Daniel White's Motion to Suppress Evidence, filed 1/3/20)). Daniel also claimed that Geri White's consent for the officers to enter their home was involuntary. *Id.* at 5.

The district associate court entered its ruling denying Daniel's motion to suppress on January 3, 2020. *Id.* The court noted that at the time of the incident, the officers had learned that a male associated with the residence had an active warrant for his arrest for an assault charge and the wanted person was flagged as "violent tendencies – use caution." *Id.* at 2. It ruled that Daniel's rights were not violated because the seizure was justified by the circumstances, and that Geri White voluntarily gave consent for the officers to enter the home. *Id.* at 5. The court reasoned as follows:

> The Court finds that officers were inside the residence with the consent of the defendant's wife. Such consent was given voluntarily, as [Geri White] was the one who offered to take officers inside to make contact with the defendant. When the officers directed the defendant to step outside, he was seized by officers. Given the totality of the circumstances, officers were justified in seizing the defendant as they had reasonable suspicion that a crime had occurred. Officers were at the defendant's residence a short time after the crash. He drove a completely totaled vehicle at a high rate of speed and drove only upon the metal rims as the tires were destroyed. A beer can was located at the crash site. Upon making contact with the defendant, he was consuming alcohol. All of these facts were known to the officers

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App. April 13, 2022) ("[W]hen a petition references a document, the document can be considered in ruling on a motion to dismiss even when the document is not attached to the petition.").

> when they directed him outside. Such information is sufficient for a reasonable officer to believe the suspect had committed a crime.

Id. at 5.

Daniel entered a plea agreement on April 5, 2021 wherein he pled guilty to two simple misdemeanors (failure to maintain control and movement of an unsafe or improperly equipped vehicle) and the State dismissed the O.W.I. charge at Daniel's cost.[2] (OWCR122719, Guilty Plea, filed 4/5/21—available on EDMS). The district court entered its judgment and sentencing order on April 7, 2021. (OWCR122719, Judgment/Sentencing Order, 4/7/21—available on EDMS).

Geri White filed her lawsuit against the officers and municipalities on May 21, 2021—44 days after her husband's criminal case concluded.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED *GODFREY* CLAIMS DO NOT APPLY TO MUNICIPALITIES AND THEIR EMPLOYEES.

A. Preservation of Error

The officers agree with White's statements on preservation of error. The officers raised the issue of whether *Godfrey* claims apply to municipalities, and the district court decided they do not. (App. p. 91; Ruling, p. 6 ¶ 4 "[T]he Court does

[2] Geri White refers to her husband's O.W.I. arrest, charge, and dismissal in her amended petition. (App. p. 7; Amended Pet., ¶ 27). Again, this Court may therefore consider these records. *See Daniels v. Holtz*, 957 N.W.2d 280, *2 (Iowa

not read any of the cases in the *Godfrey* line, as discussed in *Wagner*, as permitting direct constitutional claims against municipalities or municipal employees. Rather, these cases make clear that the only direct constitutional claims that have been authorized are against the State of Iowa and its employees."). The issue is therefore preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Scope and Standard of Review

Defendants agree with White's statement of the standard of review. Appellate review of a ruling on a motion to dismiss is for the correction of legal error. *Venckus v. City of Iowa City*, 930 N.W.2d 792, 798 (Iowa 2019). To the extent that review is of constitutional claims, the standard of review is de novo. *Id.*

C. Discussion

White argues it is "clear" Iowa Constitutional tort claims, known as *Godfrey* claims, apply to municipalities and municipal employees. (White Proof Brief, p. 24); *see Godfrey v. State*, 898 N.W.2d 844 ("*Godfrey II"*) (Iowa 2017). The officers and municipalities disagree. The Iowa Supreme Court has never directly held *Godfrey* claims apply to municipalities or their employees, though it has

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2021) (documents referenced in a petition may be considered even if they are not

decided ancillary issues in cases involving municipalities and municipal employees where the basic premise of such claims was not challenged. The district court therefore correctly dismissed White's Iowa constitutional tort claims for failure to state a claim upon which relief may be granted. Further, this Court should decline to expand *Godfrey* claims to municipalities and their employees.

1. The Iowa Supreme Court has never found an Iowa constitutional tort claim exists against municipalities or municipal employees.

As a starting point, there is no provision of the Iowa Constitution that independently authorizes an Iowa constitutional tort damage claim against municipalities or municipal employees. Further, the legislature is the creator of Iowa's political subdivisions and it has not statutorily authorized Iowa constitutional tort claims against municipalities. *Bd. of Water Works Trustees of City of Des Moines v. Sac County Bd. of Supervisors*, 890 N.W.2d 50, 60 (Iowa 2017) ("Counties and other municipal corporations are, of course, the creatures of the legislature . . . .") (quoting *Charles Hewitt & Sons Co. v. Keller*, 223 Iowa 1372, 1377, 275 N.W. 94, 97 (1937). In 2021 the Iowa legislature made explicit that it has not waived governmental immunity for municipalities for claims for money damages under the Constitution of the State of Iowa. Iowa Code § 670.14

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attached).

("This chapter shall not be construed to be a waiver of sovereign immunity for a claim for money damages under the Constitution of the State of Iowa.").

Therefore, it is no surprise that Iowa's highest court has not, on its own initiative, expanded civil damage liability to Iowa's 944 cities, 99 counties and thousands of municipal employees for alleged violations of the Iowa Constitution. *See https://iowaleague.org/cities-in-iowa/* (listing Iowa cities, site last visited June 28, 2022).[3] Doing so would invade the province of the legislature. Iowa Const. Art. XII, § 1 ("The general assembly shall pass all laws necessary to carry this constitution into effect."); Art. III, § 1 ("The powers of the government of Iowa shall be divided into three separate departments – the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.")); *see also Godfrey II*, 898 N.W.2d at 884 (Mansfield, J. dissenting) ("Under our form of government, . . . the function of adjusting remedies to rights is a legislative responsibility rather than a judicial task . . . .") (quoting *Bandoni v. State*, 715 A.2d 580, 595—96 (R.I. 1998)).

[3] Cities and counties are of course not the only local government entities potentially impacted by the expansion of *Godfrey* claims beyond the State of Iowa to municipalities. Iowa Code Section 670.1(2) defines Iowa townships, school districts, chapter 28E entities, and "any other unit of local government except soil

Nor do constitutional torts against municipalities find support in Iowa common law. *Lough v. City of Estherville*, 122 Iowa 479, 485, 98 N.W. 308, 310 (1904) (affirming dismissal of money damage claims against mayor and city council members for alleged constitutional violation related to municipal debt, and stating "While a violation of the Constitution in the respect in question is to be condemned, and the courts should interfere to prevent such violation whenever called upon so to do, yet we are not prepared to adopt the suggestion that an action for damages may be resorted to . . . ."); *cf. Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996) (affirming dismissal of damage claim against City of Des Moines and its employees based upon Iowa's equal protection clause).

Common law tort damage claims have of course been permitted against municipal employees—but those claims rest on a different footing than a money damage action based solely upon the alleged violation of Iowa constitutional rights. *See McClurg v. Brenton*, 123 Iowa 368, 369, 98 N.W. 881, 881—82 (1904) (trespass action against the mayor of Des Moines and "quite a retinue of followers" for a nighttime search without a warrant); *see also Lennette v. State*, 975 N.W.2d 380, 407—08 (Iowa 2022) (McDonald, J., concurring) (collecting cases where traditional common law tort claims such as trespass, conversion, malicious prosecution, and abuse of process were asserted against government officials).

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and water conservation districts" as municipalities under the Iowa Municipal Tort

Post-*Godfrey II*, the proposition that direct constitutional tort claims are available against municipalities and municipal employees in the same way they are against the State has not been explicitly accepted by the Iowa Supreme Court. *Godfrey II* concerned "whether the equal protection and due process provisions of the Iowa Constitution provide a direct action for damages in the context of an employment dispute between an Iowa Workers' Compensation Commissioner and various state officials . . . ." *Id.* at 845. The parties in *Godfrey II* did not include municipalities or municipal employees. *Id.* at 845. Given this factual posture, *Godfrey II* naturally gave no consideration to whether an implied direct constitutional claim should be recognized against municipalities or municipal employees. Instead, perhaps recognizing the magnitude of its decision permitting a new type of constitutional tort claim against the State, even the plurality opinion in *Godfrey II* suggested its new judicial remedy would be circumscribed by the facts of the *Godfrey* case itself. *Id.* ("We emphasize our holding is based solely on the legal contentions presented by the parties."). *Id.* at 860. Therefore, municipalities and their employees cannot conveniently be lumped in with the State, in entirely different factual circumstances, when it comes to expanding constitutional tort claims. *Cf. Thomas v. Gavin*, 838 N.W.2d 518 (Iowa 2013) (rejecting attempt to sweep municipalities and their employees into the ambit of Iowa Tort Claims Act

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Claims Act.

in order to give municipal actors access to the intentional tort exemptions in the ITCA which do not exist in the IMTCA) (citing *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966) ("We are satisfied political subdivisions such as cities, school district and counties are neither agencies of the state nor corporations as those terms are employed and defined in the [Iowa Tort Claims Act] and are not included within its clear intent and purpose.")).

Post-*Godfrey II* Iowa constitutional tort cases suggest the classes of defendants subject to *Godfrey* claims do not include *all* government entities and employees. Like this case, *Venckus* involved Iowa constitutional tort claims against the City of Iowa City and Johnson County. 930 N.W.2d at 798. The defendants in *Venckus* sought dismissal of the plaintiff's direct constitutional tort claims, arguing dismissal was warranted under various immunity doctrines, statute of limitations, and because adequate nonconstitutional remedies existed. *Id.* The supreme court limited its decision to the issues raised and argued by the parties, as it is constrained to do on appellate review. Iowa Const. Art. V, § 4; Iowa Code §§ 602.4102, .5103; *Meier*, 641 N.W.2d at 537. However, in dicta, the supreme court pointed out *sua sponte* that the parties had not addressed certain predicate questions going to the viability of the plaintiff's Iowa constitutional tort claims against the municipalities:

> In *Godfrey v. State*, this court held the State of Iowa and state officials acting in their official capacities could be sued directly for violations of the equal protection and due process clauses of the Iowa Constitution but only where state law does not otherwise provide an adequate damage remedy. 898 N.W.2d at 846–47; *id.* at 880–81 (Cady, C.J., concurring in part and dissenting in part). **The parties have not asked us** to reconsider *Godfrey*, to consider whether a *Godfrey*-type claim can be asserted for alleged violations of the Iowa Constitution other than those recognized in *Godfrey*, or to determine **whether *Godfrey*-type claims can be asserted against municipalities. In the absence of any argument on these issues, we assume without deciding Venckus has asserted cognizable constitutional claims for damages.**

Venckus, 930 N.W.2d at 799 n.1 (emphasis added).

White has relied almost exclusively on the *Baldwin* decisions to support her claim that the Iowa Supreme Court has already recognized direct constitutional tort claims against municipalities and municipal employees, arguing that the creation of qualified immunity would be pointless if there is no claim against a municipality. (White Brief, p. 21). But neither *Baldwin* case directly decided the foundational issue of whether these types of claims apply to parties other than the State of Iowa and state officials acting in their official capacities. There was one certified question in *Baldwin I*: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, section 1 and section 8 of the Iowa Constitution?" *Baldwin v. City of Estherville, ("Baldwin I")*, 915 N.W.2d, 259, 265 (Iowa 2018). The court held qualified immunity is available and formulated a test. *Id.* Likewise, in *Baldwin II*, though six certified questions were

presented to the supreme court, the applicability of a *Godfrey* claim against a municipal defendant was neither addressed nor decided. *Baldwin v. City of Estherville ("Baldwin II")*, 929 N.W.2d 691, 701 (Iowa 2019). Once again, the procedural posture of these cases matters—as certified question cases, the supreme court was obligated to restrict its answers to the facts provided by the certifying court. *Baldwin II*, 929 N.W.2d at 693.

Notably, the supreme court decided *Venckus* two weeks after the *Baldwin II* decision (and nearly one year after *Baldwin I*). And yet, the court itself posed the question of whether *Godfrey* claims could be made against municipalities, indicating that neither *Baldwin* case represents a holding that there is, in fact, a cognizable direct constitutional damage claim against municipalities or their employees.

Finally, *Wagner v. State*, 952 N.W.2d 843, 857 (Iowa 2020), involved claims against the State and State officials. In that case the supreme court reiterated its holding in *Godfrey II*, stating: "In *Godfrey II*, we held that under certain circumstances, an aggrieved party could bring a constitutional claim against the State even though the legislature had not enacted a damages remedy for violation of that constitutional provision." The *Wagner* court also construed its prior constitutional tort cases narrowly, noting that it had never held previously

that an individual capacity claim could be brought under the Iowa Constitution. *Id.* at 850.

White ignores the factual and procedural contexts of the Iowa Supreme Court's constitutional tort cases, preferring broad stroke liability for all government officials. She also ignores the text of the Iowa Constitution and its command that the legislature be the branch to make our state's laws. Given the lack of either legislative authorization or common law precedent permitting Iowa constitutional tort claims against municipalities or municipal employees, the district court correctly ruled that White failed to state a claim against the officers and municipalities in this case for money damages under the Iowa Constitution.

2. This Court should not expand the *Godfrey* remedy to municipalities and municipal employees.

There are numerous reasons this Court should decline to expand *Godfrey II* to allow direct constitutional tort claims against municipalities or municipal employees.

a. Preliminarily, *Godfrey II* was unprecedented and should be cabined by the facts and procedural posture considered by the *Godfrey II* court.

For over 160 years, no direct constitutional damage claim was recognized in Iowa's courts. *Godfrey II*, 898 N.W.2d at 884 (Mansfield, J. dissenting). The *Godfrey II* decision was supported by a plurality of the Iowa Supreme Court, and

Justice Cady's key concurrence in part did not open the floodgates to all direct constitutional tort claims. It provided a narrow opening for certain employment discrimination claims against State of Iowa officials to proceed. *Id.* at 880. But the *Godfrey II* decision nonetheless set Iowa courts down a path to make numerous additional policy decisions. Between the *Baldwin* and *Wagner* cases, there have been eleven certified questions decided by the Iowa Supreme Court to say what Iowa law is regarding implied constitutional tort claims. A sampling of those policy choices includes: Are punitive damages available against the State in *Godfrey* claims? What statute of limitations applies? Are Iowa's tort claims acts applicable to *Godfrey* claims? What parts of Iowa's tort claims acts apply—the substantive or procedural portions? What about attorney fees? Are there both individual capacity and official capacity claims? There is no end in sight to the court's policymaking obligations if it continues down this road, expanding the *Godfrey* remedy to new constitutional provisions and new classes of defendants. The Iowa Supreme Court has previously declined to create rights and remedies when doing so implicates policy considerations more appropriate for the legislature. *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678 (Iowa 2013) (declining to imply a punitive damage remedy into the Iowa Civil Rights Act and recognizing "the issue is injected with public policy considerations, making it an issue particularly appropriate for legislative consideration. . . ."); *Boyer v. Iowa*

High Sch. Athletic Ass'n, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (1964) (declining plaintiffs' request to judicially abrogate the doctrine of governmental immunity, and stating that "whether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state."); *cf. Garrison v. New Fashion Pork, LLP*, 2022 WL 2347783 (Iowa June 30, 2022) ("The people, then, have vested *the* legislative authority, *inherent in them*, in the general assembly.") (quoting *Steward v. Bd. Of Supervisors*, 30 Iowa 9, 18—19 (1870)) (emphasis in original).

Recently the United States Supreme Court refused to expand *Bivens* to include a new class of defendants (border patrol agents) and also refused to expand *Bivens* to include a new constitutional right (the First Amendment).[4] *Egbert v. Boule*, 142 S.Ct. 1793 (2022). The Court reasoned as follows:

[4] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) authorized an implied money damage claim under the Fourth Amendment against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. Amicus IAJ acknowledges that "The *Godfrey* Court rested its holding in large part upon the rationale of *Bivens* . . . ." (Conditional Amicus Brief of the Iowa Association for Justice, p. 10).

> [W]e have come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power." At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a "range of policy considerations . . . at least as broad as the range . . . a legislature would consider." Those factors include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide." 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 1797 (citations omitted).

In *Egbert* the Supreme Court even declined to extend the *Bivens* remedy to a fact pattern that it recognized was "parallel" to the *Bivens* facts—noting that even though *Bivens* was an excessive force claim under the Fourth Amendment and the *Egbert* case also presented an excessive force claim under the Fourth Amendment, that the judiciary remained unsuited to decide whether such a claim, in this particular context, was appropriate. *Id.* at 1799.

White claims the court should ignore the policy concerns that counsel against constitutional tort claims against municipalities. But the weighing of policy concerns is the very reason we elect lawmakers and require laws to be made through the people's representatives. *Id.* at 1809—10 (Gorsuch, J. concurring) ("When might a court ever be 'better equipped' than the people's elected representatives to weigh the 'costs and benefits' of creating a cause of action? It seems to me that to ask the question is to answer it. To create a new cause of

action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation."). For the reasons set forth below, this Court should decline to extend *Godfrey II* to municipalities and their employees. The legislature is better suited to weigh the policy considerations associated with this significant expansion of constitutional tort liability to local governments.

b. There are strong policy reasons to leave the creation of a constitutional tort claim against municipalities to the legislature instead of judicially "discovering" this remedy.

First, the Iowa Supreme Court itself has recognized that municipalities are different than the State. "Municipalities operate under greater fiscal constraints than the state does and municipalities have special problems with respect to formulating and implementing budgets." *Venckus*, 930 N.W.2d at 809 (citations omitted). For example, in *Venckus* the plaintiff argued that the application of the statute of limitations in Iowa Code § 670.5 should not apply to Iowa Constitutional tort claims because the statute of limitations would then be different against the State and municipalities. *Id.* The supreme court was "nonplussed regarding the distinction," and recognized the policy reasons that undergird differences in the way the State and municipalities are treated under Iowa law. *Id.* Expanding municipal liability necessarily impacts municipal planning and budgets, making budgets less predictable and subject to depletion by money judgments resulting from this new class of claims. Municipal staffing, programming, and services

depend upon municipal budgets. Municipal services span the spectrum of civic life, from parks and recreation, police, fire, public works, transportation, libraries, and housing assistance —the bread and butter of local governance.

Second, municipalities are *already* subject to liability for a broader range of common law intentional tort claims than the State. *Compare* Iowa Code § 669.14(4) (maintaining sovereign immunity for the State for claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights) *with* Iowa Code § 670.4 (listing exceptions to the rule of liability imposed by section 670.2 for municipal actors—and not categorically exempting any intentional torts); *see also Thomas*, 838 N.W.2d at 522 ("[T]here is no counterpart in section 670.4 to the ITCA's exception for claims based on assault, battery, false arrest, or malicious prosecution."). Therefore, municipalities are both potentially liable for torts that state actors are not liable for and deterred from committing intentional torts that may violate the Iowa Constitution to a degree that the State is not deterred. In fact, in White's case, she has brought the common law claims of assault, trespass, and intentional infliction of emotional distress—causes of action which all cover the same ground as her Iowa constitutional claims. The nonconstitutional remedies that are available through the IMTCA are robust and do not create a need for a direct constitutional tort action against municipalities. Expanding the *Godfrey*

remedy to municipalities is therefore unnecessary and creates a duplicative and confusing system of dual-track liability for municipal actors.

Third, the judicial creation of unpredictable liability could have a chilling effect on the zeal with which municipalities and their employees undertake their responsibilities. *See Egbert*, 596 U.S. at 14 ("[A]ny new *Bivens* action 'entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). As the Iowa Supreme Court has recognized, "the line between good police work and overzealous police work can be razor thin. It is certainly fair to exclude the evidence from any ensuing criminal proceeding whenever the line is crossed, even slightly. But if the law enforcement officer also is subject to a damage action, this could lead him or her to be reluctant to act at all in a gray area." *Baldwin II*, 915 N.W.2d at 277. And for other types of municipal employees there is a similar cloud of liability that is formed by the unpredictable possibilities related to a potential *Godfrey* claim. *Cf. Thomas*, 838 N.W.2d at 527 (recognizing practical problems of lumping municipal employees in with state employees for purposes of applying the ITCA, stating the principle would confuse the liability of not only "law enforcement officers but could affect numerous other municipal employees who in some way carry out state laws, such as animal control workers, school

teachers, street maintenance workers, and parks and recreation workers."). Without a statute describing the conduct that is actionable, municipalities cannot predict the parameters of constitutional tort causes of action.

The determination of whether municipalities and municipal employees should be liable in money damages for alleged violations of the Iowa Constitution is a policy decision that should be left to the elected branch of Iowa's government. The false dichotomy presented by White and her amicus is transparent. Iowa's judiciary of course has a vital role in enforcing the Iowa Constitution as the supreme law of the land and as a negative check on unconstitutional government action. But the judiciary should not use its power to *make* law, a task that is exclusively the province of the legislative branch.

II. THE DISTRICT COURT CORRECTLY RULED CONSTITUTIONAL TORT CLAIMS UNDER THE INALIENABLE RIGHTS CLAUSE AND SEARCH AND SEIZURE CLAUSE HAVE NOT BEEN RECOGNIZED BY THE IOWA SUPREME COURT.

A. Preservation of Error

The officers agree with White's statements on preservation of error. The officers raised the issue of whether the Iowa Supreme Court has recognized constitutional damage claims under article I, sections 1 and 8 in their motion to dismiss. (App. p. 16; Defendants Harkrider and City of Iowa City's Motion to Dismiss, p. 8). The district court decided there is not "any Iowa authority that

supports a conclusion that either of these sections is self-executing." (App. p. 15; Ruling, p. 7). The issue is therefore preserved for review. *Meier*, 641 N.W.2d at 537.

B. Scope and Standard of Review

The officers also agree with White's statement of the standard of review. Appellate review of a ruling on a motion to dismiss is for the correction of legal error. *Venckus*, 930 N.W.2d at 798. To the extent that review is of constitutional claims, the standard of review is de novo. *Id.*

C. Discussion

In *Godfrey II*, the Iowa Supreme Court did not hold that every alleged constitutional deprivation created a private cause of action for money damages. *Id.* at 881. *Godfrey II* only involved alleged violations of the Iowa Constitution's due process clause and equal protection clause, and the only direct constitutional claims that survived appeal were the plaintiff's claims under the due process clause. *Id.* Though the *Baldwin*, *Venckus*, and *Wagner* decisions went on to decide subsidiary issues related to the supreme court's new constitutional tort money damage remedy, none directly grappled with the issue of whether *Godfrey II* claims should be expanded to constitutional provisions beyond the equal protection clause or due process clause. *Baldwin* was filed in federal district court before the *Godfrey II* case was even decided. And the *Venckus* court was well

aware of the *Baldwin* case, which involved a claim under Iowa's search and seizure clause, but still noted there were fundamental questions about *Godfrey* claims that remained unsettled, including "whether a *Godfrey*-type claim can be asserted for alleged violations of the Iowa Constitution other than those recognized in *Godfrey* . . . ." *Venckus*, 930 N.W.2d at 799 n. 1 (emphasis added). None of the seven certified questions that were presented to the Iowa Supreme Court in *Baldwin* addressed the expansion of the *Godfrey* remedy beyond the due process or equal protection clause. And in reviewing the federal district court proceedings in *Baldwin*, the defendants never raised that issue, either. *See of Baldwin v. Estherville,* No. C 15-3168-MWB, 2017 WL 10290551, at *1 (N.D. Iowa Oct. 2, 2017), certified question answered sub nom. *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018).

Finally, *Wagner* also concerned limited certified questions and did not reach the issue of whether *Godfrey* claims were viable beyond the due process clause or equal protection clause.

Whether the inalienable rights clause and search and seizure clause are "self-executing" such that those clauses can independently support a money damage claim for their alleged violation is therefore a matter of first impression. In *Godfrey II* the plurality held that "[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 is not self-executing when it merely indicated principles. . . . In short, if [it is] complete in itself, it executes itself." *Id.* at 870 (quoting *David v. Burke*, 179 U.S. 399, 403, 21 S. Ct. 210, 212 (1900)). The *Godfrey II* plurality determined that article I, sections 6 (the equal protection clause) and 9 (the due process clause) were self-executing in the context of an employment discrimination case. *Godfrey II*, 898 N.W.2d at 870—72. The plurality relied upon the *Bivens* rationale for judicially crafting a cause of action for money damages under these constitutional provisions. *Id.* *Bivens* has been all but officially overturned by the U.S. Supreme Court. *See Egbert*, 142 S.Ct. at 1809 ("[I]f we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution."); *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1848 (2017). And although the language in *Bivens* creating a federal remedy for alleged constitutional violations was broad, *Bivens* never evolved into a federal equivalent of a Section 1983 claim. Instead, the U.S. Supreme Court steadily contracted the availability of the *Bivens* judicial remedy. *See Bush v. Lucas*, 462 U.S. 367, 368 (1983) (a comprehensive remedial scheme precludes an implied First Amendment cause of action); *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007) (rejecting expansion of *Bivens* remedy to a new Fourth Amendment context because allowing the suit could lead to a wave of

litigation and because of the difficulty of proving whether federal officers were acting with a retaliatory motive).

Likewise, this Court should not expand the availability of the *Godfrey* remedy beyond its precise original scope. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) (Scalia and Thomas, JJ., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be "implied" by the mere existence of a statutory or constitutional prohibition. As the Court points out . . . we have abandoned that power to invent "implications" in the statutory field. There is even greater reason to abandon it in the constitutional field, since an "implication" imagined in the Constitution can presumably not even be repudiated by Congress. I would limit *Bivens* and its two follow-on cases to the precise circumstances they involved.").

With this background in mind, the officers and municipalities contend the district court correctly dismissed White's claims under the Inalienable Rights Clause and Search and Seizure clause for the following reasons.

1. The Inalienable Rights Clause is not self-executing.

The Inalienable Rights Clause of the Iowa Constitution 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.

Iowa Const. art. I, § 1; *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 348 (Iowa 2015) (upholding automatic traffic enforcement speeding citation against challenge that ordinance offended the Inalienable Rights Clause).

While the Iowa Supreme Court has stated that this clause "is not a mere glittering generality without substance and meaning," the Court has struggled to articulate its contours and principles over the last one hundred and fifty years. *Jacobsma*, 862 N.W.2d at 349 (quoting *State v. Osborne*, 171 Iowa 678, 693 154 N.W. 294, 300 (1915)). At most, Article I, § 1 has been invoked to challenge legislation. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (applying Article I, § 1 to determine whether legislation was a reasonable exercise of the State's police power) *overruled by Garrison*, 2022 WL 2347783 at *22. In *Garrison*, Justice Mansfield noted that the clause is "very generally worded and aspirational" and "could be invoked for practically any purpose by a court in search of previously undiscovered rights." *Garrison*, No. 21-0652, *40 (Mansfield., J. concurring). For example, in the context of a constitutional tort damage claim, what actions by a government official interfere with an individual "enjoying and defending life and liberty"? Or "pursuing and obtaining safety and happiness"? There are of course endless possibilities, potentially worthy and unworthy of a money damage claim under the Iowa Constitution, depending on who you ask.

States with similar "inalienable rights" provisions find them too vague to enforce individual rights. *See, e.g.*, *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949) (finding the clause was "addressed . . . to the general assembly by way of advice and direction, [rather] than to the courts, by way of enforcing restraint upon lawmaking power."). Even in states where the clause does have more substantive meaning, courts have widely found Natural or Inalienable Rights Clauses to be too aspirational and unspecific to be self-executing. *See Blea v. Espanola*, 870 P.2d 755, 759 (N.M. Ct. App. 1994), cert. denied 871 P.2d 984 (1994) (finding the Natural Rights Clause unenforceable because it was too vague to form the basis for a private cause of action); *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000) (holding that the Natural Rights Clause is not self-executing and comparing the clause to the "precatory" words of the Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness"); *Tompkins v. Hepp*, No. 08-CV-155-BBC, 2008 WL 2002663, at *2 (W.D. Wis. May 6, 2008) ("No cause of action exists for 'infringement' of the Declaration of Independence."); *Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995) (holding that Vermont's Natural Rights Clause "expresses fundamental, general principles" and is not self-executing). Though Article I, section 1 expresses our State's aspirations and ideals, it is not "complete in itself"

or self-executing. The district court correctly ruled that there is no independent money damage action available to White under the Inalienable Rights Clause because it is not self-executing.

2. The Search and Seizure Clause

Similar to Plaintiff's Article I, § 1 claim, the Iowa Supreme Court has not found that the Search and Seizure Clause is self-executing such that it gives rise to a direct constitutional tort action. Article I, § 8 is entitled "Personal security—searches and seizures," and provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized." Plainly, the language of article I, section 8 does not authorize a direct tort claim for its violation. While the clause certainly is "self-executing" in the sense that it is judicially enforceable, whether it is "self-executing" in the sense of permitting a damage claim is a different question. The California Supreme Court has considered this subtlety, observing "[o]ccasionally the argument over damages is cast in terms of whether the clause is 'self-executing.' However, [the 'self-executing' issue] truly concerns the question whether a clause is *judicially* enforceable at all, and does not automatically answer

the question whether damages are available for enforceable clauses." *Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 307, 58 P.3d 339, 343 (2002).

Certainly, the Iowa Supreme Court embraces a strong, independent interpretation of the Iowa Constitution's search and seizure clause for the purpose of protecting individual rights. *See State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021). But as set forth above, the *Godfrey II* plurality relied upon prior cases that it interpreted as establishing that article I, Section 8 had previously been held to be self-executing in the sense of permitting a direct damage claim. *See Godfrey II*, 898 N.W.2d at 862—63. The *Godfrey II* dissent and the majority in *Wagner* has since criticized the *Godfrey II* plurality's legal analysis on this point. *See Godfrey II*, 898 N.W.2d at 887 (Mansfield, J., dissenting) ("The majority asserts that we have previously allowed damage lawsuits for violations of the Iowa Constitution to proceed without legislative authorization. The majority is mistaken. What we have permitted are traditional common law tort claims, such as trespass, conversion, malicious prosecution, and abuse of process."); *Wagner*, 952 N.W.2d at 857; *see also Lennette*, 975 N.W.2d at 402 (McDonald, J. concurring) ("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.").

Other states have explored this issue, some finding no basis to hold their state search and seizure clauses self-executing such that a damage cause of action should be implied. In *Jones v. Philadelphia*, 890 A.2d 1188, 1213—1215 (Pa. Commw. Ct. 2006) (appeal denied Oct. 25, 2006), the Commonwealth Court of Pennsylvania considered the following policy considerations in rejecting a private cause of action under the Pennsylvania Constitution under its search and seizure clause: (1) an alternative remedy under 42 U.S.C. § 1983 for violation of Plaintiff's right to be free from unreasonable search and seizure under the Fourth Amendment, (2) that the legislature is in a better position to analyze and address the diverse policy considerations involved in crafting such a cause of action, such as defining elements, defenses, and immunities; the legislature is better able to guide planning, training and incentives for "institutional reform"; better able to permit participation by parties likely to be directly affected; able to perform a "unique educative function that can never be duplicated by the world of judicial review"; and (3) "the potential financial burden for state, local and municipal government entities" by exposing them to monetary damages in the absence of a defined statutory scheme. More recently, in *Fields v. Mellinger*, the West Virginia Supreme Court held that there is no private right of action for money damages recognized under that state's search and seizure clause, which is substantially similar to Iowa's. 851 S.E.2d 789, 792 (W. Va. 2020). The West Virginia court

noted that: "Patently absent from this provision is any allowance for a private right of action for money damages." *Id.* It went on to state that "Clearly, reasonable alternative remedies are available for a violation of [the search and seizure clause]. This is evidenced in the instant matter by the fact that [Plaintiff] has asserted state law claims for negligence in the hiring, retention, and/or supervision of employees; battery; and outrageous conduct/intentional infliction of mental, physical, and emotional distress. He also has asserted federal claims for excessive force under United States Code title 42 section 1983 . . . ." *Id.* at 799. *See also Tutt v. City of Abilene*, 877 S.W.2d 86, 89 (Tex. App. 1994), writ denied (Feb. 16, 1995) (no private cause of action under Texas Constitution search and seizure clause); *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997) (declining to recognize private cause of action for money damages for violation of Missouri's search and seizure clause and stating "[a money damages action for the federal search and seizure clause] is cognizable only because Congress enacted that legislation authorizing suits for federal constitutional violations. The Missouri General Assembly has not enacted similar legislation. Whether such a cause of action should be permitted is best left to the discretion of the General Assembly.").

Further, there are certainly policy reasons not to expand the *Godfrey* remedy to claims under Iowa's search and seizure clause. The Iowa Supreme Court has already recognized that the threat of personal damages liability can hamper

officials in the discharge of their duties. *Baldwin II*, 915 N.W.2d at 277; *cf. Egbert*, 596 U.S. at *15 (declining to expand *Bivens* to recognize First Amendment retaliation claim because of the chilling effect on government officials). There is of course, also, significant expense associated with any litigation. *Egbert*, 596 U.S. at *15. The legislature is in a better position to weigh these policy concerns and decide whether a money damage remedy is appropriate for alleged violations of the Iowa Constitution's search and seizure clause.

There is no precedent under Iowa law to allow a constitutional tort claim to proceed directly under article I, section 8. The district court ruling that Iowa's search and seizure clause can support a money damage claim should be affirmed.

III. EVEN IF WHITE'S IOWA CONSTITUTIONAL TORT CLAIMS ARE VIABLE, THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL BECAUSE WHITE HAS ADEQUATE COMMON LAW REMEDIES, AND THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

A. Preservation of Error

The officers preserved the issues of whether White has adequate nonconstitutional remedies and whether they are entitled to qualified immunity on White's Iowa constitutional claims by raising these issues in their motion to dismiss. (App. pp. 21 – 22; Defendants Harkrider and City of Iowa City's Motion to Dismiss, pp. 13, 14). The district court agreed that White has adequate common law remedies such that a direct constitutional claim is unavailable, ruling that "The

common law tort claims will give Plaintiff her right to pursue damages against Defendants." (App. p. 15; Ruling, p. 7). The Court did not reach the question of qualified immunity. (App. p. 14; Ruling, p. 6).

Because these issues were both raised below, they provide additional bases upon which this Court can affirm dismissal of White's Iowa constitutional tort claims. *Meier*, 641 N.W.2d at 540 n.1 ("A prevailing party may support the district court judgment on any ground contained in the record, provided that the affirmance on that ground does not alter the rights of the parties established in the judgment.").

B. Scope and Standard of Review

Appellate review of a ruling on a motion to dismiss is for the correction of legal error. *Venckus*, 930 N.W.2d at 798. To the extent that review is of constitutional claims, the standard of review is de novo. *Id.*

C. Discussion

1. The district court's ruling that White has adequate nonconstitutional remedies provides an alternative basis to affirm the dismissal of her Iowa constitutional tort claims.

White's common law tort claims (intentional infliction of emotional distress, trespass, and assault) provide her adequate potential remedies such that a constitutional tort claim is unavailable to her. (App. p. 7; Amended Pet., p. 4, ¶ 1). In *Baldwin I*, the supreme court noted that some other states have only allowed

constitutional damage claims "when there is no analogous statutory or common-law cause of action." *Baldwin I,* 915 N.W.2d at 273—74 (citing *Salminen v. Morrison & Frampton, PLLP*, 377 Mont. 244, 339 P.3d 602, 611 (Mont. 2014) ("Since the Salminens have a basis in law for a claim to redress this allegation, they need not proceed under the Constitution.")); *Adams v. City of Raleigh*, 245 N.C.App. 330, 782 S.E.2d 108, 114–15 (N.C. Ct. App. 2016) (finding that common-law false arrest provided a sufficiently analogous remedy to preclude a constitutional claim, even if such a false arrest claim might not succeed in the particular case); *Davis v. Town of S. Pines*, 116 N.C.App. 663, 449 S.E.2d 240, 248 (N.C. Ct. App. 1994) (finding plaintiff's "constitutional right not to be unlawfully imprisoned and deprived of her liberty [was] adequately protected by her common law claim of false imprisonment," and she could thus not bring a constitutional tort claim); *see also Wilkerson v. Duke University*, 748 S.E.2d 154 (N.C. Ct. App. 2013) (dismissing plaintiff's constitutional tort claims where his constitutional claims were "based upon the same alleged conduct that underlies his state law claims," which included assault, battery, and false imprisonment); *Rousselo v. Starling*, 128 N.C. App. 439, 449, 495 S.E.2d 725, 732 (1998) (affirming dismissal of direct constitutional claim for unreasonable search where "the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches").

White's common law claims and purported Iowa constitutional claims are entirely duplicative, and she makes no effort to differentiate them from each other. White's trespass and assault claims would provide the opportunity to seek any damages she might seek under the search and seizure clause. Iowa Code section 670.2(1) provides that "every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." White has not alleged the remedies available to her under Chapter 670 are inadequate. Punitive damages against the individual officers are potentially available under the IMTCA. Iowa Code § 670.12. Because adequate common law remedies exist, an independent claim under the Iowa Constitution does not exist for White's alleged constitutional torts. *Godfrey II*, 898 N.W.2d at 881 (Cady, C.J., specially concurring).

2. Dismissal of White's constitutional tort claims was also proper because the officers are entitled to qualified immunity.

Further, the district court's dismissal of White's direct constitutional claims can be affirmed on the ground that the officers are entitled to qualified immunity under both *Baldwin I* and Iowa Code Section 670.4A. *See Baldwin I*, 915 N.W.2d at 279. In *Baldwin I* the Iowa Supreme Court held that "a government official whose conduct is being challenged will not be subject to damages liability if she or

he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law." *Id.* at 281.

The statutory version of qualified immunity is found at Iowa Code § 670.4A (2021). It provides that a municipal employee is immune to claims brought under Chapter 670 when:

> The right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.

Iowa Code Section 670.4A(1)(a).

Qualified immunity is an *immunity* from suit rather than a mere defense to liability and is effectively lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Accordingly, federal courts "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* Under either the *Baldwin* test or the statutory qualified immunity test, the officers are entitled to qualified immunity against White's constitutional tort claims and the district court's dismissal may be affirmed on this basis.

a. The seizure of White was reasonable as a matter of law.

Iowa courts "generally 'interpret the scope and purpose of the Iowa Constitution's search and seizure provisions to track with federal interpretations of

the Fourth Amendment because of their nearly identical language"—while reserving the right to apply the framework differently. *State v. Brown*, 930 N.W.2d 840, 847 (Iowa 2019), *quoting State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008).

Police have the right to secure a scene, and that is all that occurred in this case regarding Geri White's allegation that she was unconstitutionally seized. *See Brendlin v. California*, 551 U.S. 249, 258 (2007) (noting that passengers should expect "that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety"); *cf. Michigan v. Summers*, 452 U.S. 692, 700, 101 S.Ct. 2587, 2593, 69 L.Ed.2d 340 (1981) (the intrusion of requiring occupants of a home to remain in the house during the execution of a search warrant is a minimal intrusion and the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."); *State v. DeWitt*, 811 N.W.2d 460, 469 (Iowa 2012) (applying the rationale from *Summers* in the context of investigative detention and finding requiring an individual to leave a store to be reasonable); *Waters v. Madson*, 921 F.3d 725, 739 (8th Cir. 2019) (stating that "it is well-settled law in this circuit that both a passenger and a

driver are seized during a *Terry* stop of a vehicle . . . If an officer acts lawfully in detaining the driver, he acts lawfully in concurrently detaining the passenger."); *Am. Civ. Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (allowing police to take reasonable steps to maintain safety and control at a crime scene).

The Iowa Court of Appeals recently decided a case with a similar fact pattern in *State v. Torres*, 2022 WL 1658371, *3 (Iowa Ct. App. May 25, 2022) (further review granted 7/22/22). In *Torres*, the court of appeals held it was reasonable for officers exert control over a husband's interaction with his wife, who had been arrested at their home. *Id.* The court noted that "[i]t was reasonable for the officers to restrict Torres's movements while they finished their child-endangerment investigation [of his wife] . . . ." *Id.* The court of appeals noted that "a sensible person would not expect the officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing." *Id.* (quoting *Brendlin*, 551 U.S. at 257).

The district associate court in Daniel White's criminal case ruled that the officers acted lawfully in detaining Daniel White. (Ruling on Motion to Suppress). Further, as pled by Geri White in this civil action, Daniel had fled the scene of a serious car accident to the couple's home. 911 callers contacted law enforcement to report this incident and to report Daniel's vehicle driving at a high speed toward

Iowa City. The police had reason to believe they were dealing with a potentially intoxicated, armed, dangerous individual inside of the house. Additionally, the district associate court found that a citizen had reported to the officers that someone had exited the crushed vehicle and limped into the house. (Ruling on Motion to Suppress, p. 2).

Iowa courts have repeatedly held in similar situations that neither the Iowa Constitution's search and seizure clause nor the Fourth Amendment is violated where law enforcement enters the curtilage of a home without a warrant. *See State v. Pink*, 648 N.W.2d 107, 109 (Iowa 2002) (finding warrantless entry into screened-in porch complied with Fourth Amendment where officer was in pursuit of an individual reportedly violating traffic laws and suspected of O.W.I.); *State v. Legg*, 633 N.W.2d 763 (Iowa 2001) (warrantless search in an attached garage-a curtilage of defendant's home-by an officer in hot pursuit did not constitute a violation of the Fourth Amendment); *State v. Walshire*, 634 N.W.2d 625, 630 (Iowa 2001) (officer's hot pursuit triggered by informant who observed drunk driver); *cf. State v. O'Hara*, 705 N.W.2d 107 (Iowa Ct. App. 2005) (finding warrantless arrest of O.W.I. suspect in his home reasonable under both the federal and Iowa search and seizure clause where the officers briefly entered the home to arrest him) (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908, 918 (1966)).

White affirmatively pleads the facts that made the officers' actions ordering her (and any other occupant) out of the home reasonable: her husband left the scene of a serious motor vehicle accident; drove his vehicle at excessive speed and with substantial damage to the vehicle, including loss of a tire; and left a beer can and ammunition at the scene of the accident. (App. p. 5; Amended Pet. ¶¶ 6-10). She acknowledges the driver was inside of her home. (App. p. 5; Amended Pet. ¶ 7). These facts establish that the officers' brief seizure of Geri White upon being told to leave her house, as part of the officers' attempt to secure the scene and investigate the driver of the vehicle who was indisputably in her home, did not amount to a constitutional violation. She failed to allege a violation of her rights and the officers are therefore entitled to qualified immunity under both *Baldwin* and Iowa Code Section 670.4A.

b. The "force" used was objectively reasonable.

The officers are likewise entitled to qualified immunity on White's excessive force claim. White alleges excessive force in "numerous law enforcement officers" making a perimeter around her home and "train[ing]" their weapons on her as she walked out the door. (App. p. 6; Amended Pet., ¶ 20). Here again, officers have the right to control the scene and protect their safety and the safety of others during an investigation, and that includes the right to draw a weapon. *See DeWitt*, 811 N.W.2d at 469 ("the amount of force necessary to

investigate the crime that justified the stop, maintain the status quo, and ensure the officers' and others' safety will vary depending on the facts and circumstances of each case"); *Wilson v. Lamp*, 901 F.3d 981, 990 (8th Cir. 2018) ("The officers' drawing and pointing of weapons as they approached the truck, which they reasonably believed was being driven by [an individual who had just committed a crime, had arrest warrants, and had pictures of guns of Facebook], was not excessive."); *Williams v. Decker*, 767 F.3d 734, 740 (8th Cir. 2014) ("It is well established ... that when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety."); *United States v. Fisher*, 364 F.3d 970, 973 (8th Cir. 2004) (officers may brandish weapons when confronted with serious danger in the course of investigative stops); *McCoy v. City of Monticello*, 342 F.3d 842, 846–47 (8th Cir. 2003) (finding it was objectively reasonable for officer to draw his gun upon approaching a motorist who would not pull over, crashed his vehicle, and officers believed was driving while intoxicated); *Edwards v. Giles*, 51 F.3d 155, 157 (8th Cir.1995) (stating that where a plaintiff fled from the police, an officer's "conduct in drawing his gun and pointing it at [the plaintiff], without any indication that [the officer] intended or attempted to fire the gun, does not rise to the level of a constitutional violation"); *Baird v. Renbarger*, 576 F.3d 340, 346–47 (7th Cir.

2009) (stating that "courts do not find constitutional violations for gun pointing when there is a reasonable threat of danger or violence to police"); *Frison ex rel. Frison v. Zebro*, No. CIV.00–2688 PAM/JGL, CIV.02–523 PAM/JGL, 2002 WL 539069 (D. Minn. Apr. 5, 2002, *aff'd sub nom. Frison v. Zebro*, 339 F.3d 994 (8th Cir. 2003) (explaining that "[t]he mere pointing of a gun does not ... violate the Fourth Amendment ... [a]bsent some evidence that the officer held the gun on [the plaintiff] for longer than reasonable"); *Kaleta v. Johnson*, No. CIV. 12-170, 2013 WL 3448148, at *6 (D. Minn. July 9, 2013) (stating "[a]n officer is justified in drawing his weapon when he is justifiably concerned for his safety and has not yet been able to ascertain whether the person being seized is armed or poses a danger to himself or others" and finding it objectively reasonable for officer to draw his gun on an unarmed person involved in a parking lot accident where the person was yelling, acting strangely, and driving erratically).

Even if it was foreseeable that a non-offending party may also be occupying the home, that did not constrain the officers from taking necessary action to secure the situation. "Such a restriction would preclude an officer from protecting himself in dangerous situations." *Lawyer v. City of Council Bluffs*, 361 F.3d 1099, 1105 (8th Cir. 2004) (affirming summary judgment on excessive force claim where passenger of vehicle was accidentally sprayed with pepper spray aimed at the driver). White fails to allege any constitutional violation under Iowa's search and

seizure clause. Under *Baldwin* the officers are therefore entitled to qualified immunity, because if there is no constitutional violation, then as a matter of course, the officer acted with "due care."[5] They are also entitled to statutory qualified immunity under Iowa Code § 670.4A.

IV. THE DISTRICT COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS WHITE'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, TRESPASS, AND ASSAULT CLAIMS BECAUSE WHITE FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND THE CONDUCT THAT WHITE ALLEGES IS TORTIOUS WAS ALREADY FOUND TO BE REASONABLE BY AN IOWA COURT DURING HER HUSBAND'S O.W.I. CASE.

A. Preservation of Error

Error is preserved because Defendants raised the argument that White's common law claims should be dismissed in their initial motion to dismiss and their supplemental motion to dismiss. (App. pp. 31-36; Defendants Harkrider and City of Iowa City's Motion to Dismiss, pp. 23-28; App. pp. 72-79; Defendants' Supplemental Motion to Dismiss Trespass Claim). The district court denied Defendants' motions to dismiss the common law claims. (App. p. 93; Ruling, p. 8). Because this issue was both raised and decided below, error is preserved.

[5]White fails to distinguish any separate facts for her Article I, Section 1 claim, and therefore those claims should be dismissed on qualified immunity grounds, as well.

B. Scope and Standard of Review

Appellate review of a ruling on a motion to dismiss is for the correction of legal error. *Venckus*, 930 N.W.2d at 798.

C. Argument

White alleged three common law tort claims in addition to her constitutional tort claims: intentional infliction of emotional distress, assault, and trespass. The district court summarily denied the officers' motion to dismiss these claims. (App. p. 93; Exh. A, Ruling, p. 8, ¶ 4). Under the facts pled by White in her petition, her claims should have been dismissed as a matter of law.

1. IIED

For White to have a viable claim of intentional infliction of emotional distress, she must establish four elements: (1) outrageous conduct by the officers; (2) the officers intentionally caused, or recklessly disregarded the probability of causing, emotional distress; (3) she suffered severe or extreme emotional distress; and (4) the officers' outrageous conduct was the actual and proximate cause of the emotional distress. *Vinson v. Linn-Mar Comm. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1985). White argued below that outrageousness is a jury issue, but "it is for the court to determine in the first instance, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous." *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991). "For conduct to be

outrageous, it must be 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* (quoting Restatement (Second) of Torts § 46, cmt. d (1965)). Moreover, "[t]he outrageousness element requires substantial evidence of extreme conduct." *Vinson*, 360 N.W.2d at 118 (emphasis added). "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d).

A police officer's constitutionally authorized seizure and use of force cannot fall outside the bounds of decency which constrain a civilized community because the community has authorized the conduct by legislation. *See Lawyer v. City of Council Bluffs*, 240 F. Supp. 2d 941, 955 (S.D. Iowa 2002), *aff'd sub nom. Lawyer v. City of Council Bluffs*, 361 F.3d 1099 (8th Cir. 2004) (dismissing IIED claim where force held not to be excessive under the Fourth Amendment). In *Lawyer*, the district court held that where two brothers were detained in a vehicle, and the officer pepper-sprayed the driver and the passenger was accidentally sprayed, too, "[t]he circumstances of this case as a matter of law are far short of demonstrating

the requisite extremity, atrociousness or intolerableness" required for an IIED claim. *Id.*

The facts here are far less extreme than in *Lawyer*. Plaintiff was never touched, harmed, charged, or arrested. But even if the officers' conduct was unconstitutional (and Defendants in no way concede that it was), it is still not outrageous under the law. Geri White has never offered a case to support her claim that the officers' conduct was outrageous. As a matter of law, their conduct could not have been outrageous because the associate district court in Daniel's O.W.I. case found that the officers' conduct was justified because of the circumstances created by Daniel White. (Ruling on Motion to Suppress). Allowing Geri White to base an IIED claim on the same facts and circumstances that supported her husband's lawful arrest undermines the court's ruling by reopening the issues that were decided in Daniel's case. *Cf. Tate v. Derifield*, 510 N.W.2d 885, 888 (Iowa 1994) (affirming dismissal of wife's consortium claim on public policy grounds where wife's claim sought recovery based upon the alleged illegality of the warrant that led to her husband's lawful conviction and incarceration). The district court erred in denying the officers' motion to dismiss White's IIED claim.

2. Trespass

The district court also erred in not dismissing White's trespass claim, because the officers had the legal right to enter her curtilage due to the actions of Daniel White. To prove a civil trespass, a plaintiff must show that the defendant intentionally (a) entered the land in the possession of the other or caused a thing or a third person to do so, or (b) remained on the land. *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994); *Minch Family LLLP v. Buffalo-Red River Watershed Dist.*, 628 F.3d 960, 963 (8th Cir. 2010) (applying state elements for trespass). "A trespasser is one who has no legal right to be upon another's land and enters the land without the express or implied consent of the owner." *Thunder & Lighting, Inc. v. 435 Grand Ave, LLC*, 924 N.W.2d 876 (Table) (emphasis added) (Iowa Ct. App. 2018) (citing Restatement (Second) of Torts § 167 (1964)).

White argued below that under the holding of *State v. Wright*, the officers unlawfully trespassed on her private property. 961 N.W.2d 396 (Iowa 2021). *State v. Wright* is factually distinguishable. *Wright* involved a law enforcement search of trash bags that the defendant had set out for pick-up by the city. In this case, the underlying, core issue is the warrantless arrest of Daniel White. Officers were at Geri White's address not to search her person, property or effects, or as part of a

general investigation. They were there because of the urgent circumstances created by her husband, Daniel.

In his concurring opinion in *State v. Kilby*, issued the same day as Wright, Justice McDonald noted that "the power of warrantless arrest" is 'indispensable to the duties of a peace officer. The power is inherent. The exercise of it often becomes unavoidable.'" 961 N.W.2d 374, 384-85 (Iowa 2021) citation omitted; *see also State v. Post*, 123 N.W.2d 11, 16-17 (Iowa 1963) (It is "well settled in this state that a peace officer may arrest without a warrant when he has reasonable grounds for belief that a [crime] has been committed and that the person before him committed it."). Despite White's assertion to the contrary, *Wright* does not stand for the principle that law enforcement engage in unlawful trespassing every time they enter an individual's property without a warrant.

Indeed, Iowa law is replete with examples of situations where law enforcement may enter the private property of an individual without a warrant and such action does not violate either the Iowa or federal constitution.

In *State v. Lovig*, the Iowa Supreme Court addressed the issue of a warrantless arrest and home entry with very similar facts to this case. 675 N.W.2d 557 (Iowa 2004). In *Lovig*, around 9:00 pm, officers responded to the scene of a single-vehicle rollover accident where the driver of the overturned vehicle was not

present upon their arrival. *Id*. at 560. A witness reported to officers that the driver of the overturned vehicle smelled of alcohol and had left the scene in a Chevrolet Blazer. *Id*. Further investigation revealed that the overturned vehicle was registered to Ms. Lovig. *Id*. With this information in hand, Officer Spencer and another officer left the scene to locate the Chevrolet Blazer and its occupants. *Id*. Officer Tickle remained at the scene of the accident where he located an open bottle of beer. *Id*. Around 11:00 am, Officer Spencer eventually located Ms. Lovig at her cousin's apartment. *Id*. The cousin eventually let officers into the apartment where they located Ms. Lovig behind a locked bedroom door. *Id*. at 561. Ms. Lovig initially refused, but when officers threatened to force the door, Ms. Lovig opened the door and was arrested for operating while intoxicated. *Id*.

During her criminal case, Ms. Lovig filed a motion to suppress arguing in part that "a warrantless search of an apartment leased by [her cousin] resulting in the seizure and arrest of [Ms. Lovig] was an unconstitutional search in violation of the defendant's rights under the Fourth Amendment." *Id*. The district court denied the motion to suppress. *Id*. On appeal, the Iowa Supreme Court rejected Ms. Lovig's argument that law enforcement lacked probable cause to effectuate her arrest. *Id*. at 564. The Court rejected this argument highlighting several facts supporting probable case: (1) Ms. Lovig quickly left the scene of a single-vehicle accident involving a vehicle registered to her, (2) a witness had smelled alcohol on

Ms. Lovig's breath, and (3) beer bottles were found at the scene of the accident. *Id*. at 564-65. "Each of these facts "'viewed by a reasonable and prudent person would lead that person to believe that a crime' –OWI had been committed and that Lovig, the driver of the vehicle, had committed it." *Id*. *citation omitted*.

Turning to the warrantless entry of the apartment where Ms. Lovig was hiding, the Supreme Court analyzed *Welsh v. Wisconsin*, 446 U.S. 740 (1984), finding that the U.S. Supreme Court left it to the state courts to gauge the seriousness of each jurisdiction's OWI statutes and to use that determination in finding exigent circumstances. *Id*. at 565. In making this evaluation, the Iowa Supreme Court opined that an OWI is a serious misdemeanor under Iowa Law that can ultimately lead to a felony for subsequent convictions which certainly qualifies the offense as a "relatively serious crime." Id. "It is the type of crime that can support a warrantless entry into a home if probable cause and exigent circumstances are present." *Id.*

The Court then turned to whether exigent circumstances existed under the facts to justify the officers' warrantless entry to arrest Ms. Lovig. *Id.* at 566. The State argued that the destruction of evidence warranted the exigent circumstances. *Id.* The Court acknowledged that Iowa law recognizes destruction of evidence as a valid justification for exigent circumstances given that a suspect could ingest more alcohol and skew prior evidence or that blood alcohol naturally dissipated

overtime. *Id.* However, the Court ultimately held that no exigency existed in Lovig because there was evidence that Ms. Lovig had been in the apartment for almost two (2) hours; that there was no evidence law enforcement attempted to secure a warrant within that time; and there was no evidence that Ms. Lovig engaged in purposeful activity to destroy evidence. *Id.* at 567.

The Iowa Supreme Court's ruling in *Lovig* illustrates that officers can lawfully enter on to private property without a warrant to effectuate an arrest so long as the officers' entry falls under one of the exceptions to the Fourth Amendment's, or Iowa's Article 1, Section 8's, warrant requirement. In *Lovig*, the Iowa Supreme Court found that exigent circumstances were lacking to justify the officers' warrantless entry into the defendant's apartment room because of the passage of over two (2) hours' time between the accident and the officers locating the defendant at her cousin's apartment. *Lovig*, 675 N.W.2d at 567. By contrast, the facts of this case are much stronger than those that were present in *Lovig* and clearly establish the exigency of the officers' limited entry onto the perimeter of Ms. White's property.

As a matter of law, these facts unquestionably gave the responding law enforcement officers probable cause to believe that the driver of the Toyota FJ Cruiser had been operating the vehicle while intoxicated. *See Lovig*, 675 N.W.2d at 564-65. An officer has probable cause when "the totality of the circumstances at

the time of arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense." *Schaffer v. Beringer*, 842 F.3d 585, 592 (8th Cir. 2016) (quoting *Ulrich v. Pope Cty.*, 715 F.3d 1054, 1059 (8th Cir. 2013)).

Consequently, under the Iowa Code, the officers were legally authorized to effectuate a warrantless arrest of the driver of the Toyota FJ Cruiser. *See* Iowa Code § 804.7 (2021); *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (a warrantless arrest by law enforcement is "reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed"). Like *Lovig*, the driver of the Toyota FJ Cruiser in this case fled the scene of the accident. But unlike *Lovig*, law enforcement in this case located the wrecked Toyota FJ Cruiser within minutes of the vehicle parking behind White's residence. (Ruling on Defendant's Motion to Suppress Evidence, p. 4-5 – OWCR122719).

Based off this information coupled with law enforcement's reasonable belief that the driver of the vehicle was armed and may have posed a risk to themselves or the occupants of White's home, sufficient exigency was present to justify law enforcements' warrantless entry of White's home. *See Lovig*, 675 N.W.2d at 566. However, law enforcement did not immediately enter Ms. White's home, but

instead made a minimal intrusion upon her property to setup a protective perimeter around the home.

In summary, due to the probable cause and exigent circumstances clearly present in this case, the City and County Defendants were authorized to make a lawful, warrantless incursion onto Ms. White's property. Nothing about Defendants' limited entry onto Ms. White's property was wrongful and therefore the Defendants cannot be held liable for trespass as a matter of law. Further, because White's trespass claim relies upon the same facts and circumstances that supported the lawful arrest of her husband, her claim should be barred by public policy. *Tate*, 510 N.W.2d at 888.

3. Assault

Finally, White's assault claim should have been dismissed as a matter of law.

Iowa Code § 804.8 states in pertinent part:

> A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest.

Iowa Code § 804.8.

Over thirty years ago, the Iowa Supreme Court concluded that, in light of this statute, "an assault only occurs if the peace officer does not reasonably believe the particular force was necessary in the circumstances." *Johnson v. Civil Serv.*

Comm'n of City of Clinton, 352 N.W.2d 252, 257 (Iowa 1984). Ten years later, the Iowa Supreme Court recognized that this statute establishes an "objective reasonableness" standard for the use of force by arresting officers, finding support for that reading in the United States Supreme Court's "qualified immunity" standard for "excessive force" claims in *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *See Chelf v. Civil Serv. Comm'n of City of Davenport*, 515 N.W.2d 353, 355–56 (Iowa App. 1994). White's assault claim is a reiteration of her excessive force claim and should be dismissed for the reasons stated in Part III.C.2. That is, the officers' actions were justified because they were attempting to secure the scene where there was a concern for both officer safety and the safety of others.

CONCLUSION

The district court correctly dismissed Geri White's Iowa constitutional tort claims as lacking a legal basis and its decision should be affirmed. The Iowa Supreme Court has never explicitly recognized direct constitutional tort claims against municipalities or their employees, and it should not expand such claims to reach municipalities. Doing so would invade the province of the legislature. Additionally, expanding direct constitutional tort claims to include new contexts and new clauses of the Iowa Constitution would further invade the province of the legislature.

However, the district court's judgment denying the officers' motion to dismiss White's common law claims was in error and should be reversed. The facts pled by White, coupled with the ruling by the associate district court on Daniel White's motion to suppress, make the officers' conduct reasonable as a matter of law, foreclosing all three of her common law claims.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument in this matter.

Respectfully submitted,

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