IN THE SUPREME COURT FOR THE STATE OF IOWA
No. 22-1727

SILAS RICHARDSON, Plaintiff/Appellee,

vs.

GINA JOHNSON, individually and in their official capacity with the Muscatine County Sheriff's Office; JANE DOE, individually and in their official capacity with the Muscatine County Sheriff's Office; JORDAN RABON, individually and in their official capacity with the Polk County Sheriff's Office; RANDALL RODISH, individually and in their official capacity with the Polk County Sheriff's Office; C.J. RYAN, individually and in their official capacity as Muscatine County Sheriff; DEAN NAYLOR, individually and in their official capacity as Muscatine County Jail Administrator; MATT MCCLEARY, individually and in their official capacity as Muscatine County Jail Administrator; KEVIN SCHNEIDER, individually and in their official capacity as Polk County Sheriff; MUSCATINE COUNTY, IOWA; POLK COUNTY, IOWA, Defendants/Appellants.

Certified Question from the Honorable Rebecca Goodgame Ebinger, United States District Court for the Southern District of Iowa, Central Division

Appellant's Final Brief and Oral Argument Request

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I hereby certify on May 4, 2023, the Plaintiff/Appellant's Final Brief was served on Appellants.

/s/ *Adam C. Witosky*
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ROUTING STATEMENT

This case presents a substantial issue of first impression which should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

I. Nature of the Case

This case presents four certified questions, submitted by Judge Rebecca Goodgame Ebinger of the U.S. District Court for the Southern District of Iowa, to the Iowa Supreme Court:

1. Does a direct cause of action exist under Article I, §17 of the Iowa Constitution for an alleged failure to protect an inmate from assault by another inmate?

2. Can municipal officers be sued in their individual capacities for a claimed violation of Article I, §17 of the Iowa Constitution?

3. Is qualified immunity or "all due care" immunity applicable to alleged violations of Article I, §17 of the Iowa Constitution for individual officers?

4. Is qualified immunity or "all due care" immunity applicable to alleged violations of Article I, §17 of the Iowa Constitution for municipalities?

(Appx.6-11.)

II. Procedural History

Following removal from the Iowa District Court for Polk County to federal court, Silas filed an Amended Complaint and Jury Demand. (Appx.16-52.) Both Appellees filed Motions to Dismiss. (Appx.53-55, 86-99.) Silas resisted. (Appx.133-171.) Ruling on the dismissal motions, Judge Rebecca Goodgame Ebinger granted in part, denied in part, and reserved ruling in part. Dismissal was granted as to Counts III, IV, VI, and XII of the Amended Complaint. (Appx.190.) Dismissal was denied as to Counts I, II, IX, X, XI, and XIII. (Appx.191.) Ruling was reserved as to Counts VII, VIII, and XIV, which assert violations of the Iowa Constitution and state tort law. (Appx.190-191.) The parties were directed to submit proposed questions for certification, and timely proposed four questions. (Appx.12-15, 191.) The questions were certified to the Iowa Supreme Court. (Appx.6-11.)

FACTUAL BACKGROUND

As alleged in the Amended Complaint, Silas was an inmate of the Muscatine County Jail. (Appx.18, ¶15-16.) A "Keep Separate"

order was issued between Silas and another inmate, Kelly Mitchell, to protect Silas from Kelly. (Appx.19, ¶¶19-21.)

Silas and Kelly were both transferred to the Polk County Jail transported from the Muscatine County Jail, and transported on the same bus. (Appx.18, ¶17; p.16, ¶27.) Muscatine Deputies Gina Johnson and Jane Doe were present and heard Kelly threaten Silas during transport. (Appx.20, ¶27.) Both were aware of the "Keep Separate" order and the threat Kelly posed to Silas. (Appx.19, ¶¶23, 25-26.) Both failed to keep Silas separate from Kelly, putting him at risk of harm. (Appx.20, ¶28.)

The transport arrived at the Polk County Jail at approximately 12:05 p.m. (Appx.20, ¶29.) Defendant Jordan Rabon was present at the Polk County Jail, serving as the Supervisor when the transport arrived. (Appx.20, ¶38.) Defendant Randall Rodish was the Reporting Officer on duty at the Polk County Jail when the transport arrived. (Appx.20, ¶39.) Supervisor Rabon and Officer Rodish were responsible for the inmates transferred to the Polk County Jail. (Appx.21, ¶40.) During the transfer, Deputies Johnson and Doe failed to inform Supervisor Rabon or Officer

Rodish about the "Keep Separate" order or the threat Kelly posed to Silas. (Appx.21, ¶41.) Alternatively, Supervisor Rabon and Officer Rodish were told, and then disregarded the information. (Appx.21, ¶42.)

At the Polk County Jail, Silas made multiple statements about the threat Kelly posed to him, with Kelly making threatening statements toward Silas. (Appx.21, ¶¶43-44.) Supervisor Rabon and Officer Rodish observed and knew of these statements, as well as the threat of harm Kelly posed to Silas. (Appx.21, ¶¶43-46.)

After these statements, Silas and Kelly were placed together in a holding cell with the other transported inmates. (Appx.20, ¶30.) All inmates, including Silas and Kelly, had their handcuffs removed and left without supervision. (Appx.20, ¶31.) Kelly assaulted Silas in the holding cell with no officers present. (Appx.20, ¶¶32-33.) No Polk County officer responded to the assault for upwards of twenty minutes. (Appx.20, ¶34.) Silas suffered physical, mental, and emotional injuries due to the failure to protect him from assault. (Appx.22, ¶¶51-53.)

ISSUES

I. A Direct Cause of Action Exists under Art. I, §17 of the Iowa Constitution for Failure to Protect Inmate from Assault by Another Inmate

A. Error Preservation

This matter is before the Court pursuant to a question of law certified to this Court by the U.S. District Court for the Southern District of Iowa pursuant to Iowa Code §§ 684A.1 and 684A.2.

B. Standard of Review

This Court is empowered to answer "questions of law certified to it by…a United States district court…when requested by the certifying court[.]" Iowa Code §684A.1. The question needs to be one which "may be determinative of the cause then pending" and "it appears to the certifying court there is no controlling precedent[.]" *Id*. If the question is 1) certified by a proper court; 2) involves a matter of Iowa law; 3) is potentially determinative of the cause; and 4) appears to the certifying court there is no controlling precedent, this Court may answer it. *Baldwin v. City of Estherville*, 929 N.W.2d 691, 695 (Iowa 2019) [*Baldwin V*]. In answering certified

questions, the Court relies on the facts provided with the certified question and restricts the answers to those facts. *Id.* at 693.

C. Argument

This Court has determined a provision of the Iowa Constitution is self-executing "…if it supplies a sufficient rule by means of which the right given may be enjoyed and protected... In short, if [it is] complete in itself, it executes itself." *Godfrey v. State*, 898 N.W.2d 844, 870 (Iowa 2017) (*quoting Davis v. Burke*, 179 U.S. 399, 403 (1900)). A self-executing provision does not contain a directive to the legislature for further action. *Godfrey*, 898 N.W.2d at 870 (*citing Convention Ctr. Referendum Comm. v. Bd. of Elections & Ethics*, 399 A.2d 550, 552 (D.C. 1979)). Self-executing provisions take effect immediately "without the necessity for supplementary or enabling legislation." *Godfrey*, 898 N.W.2d at 870 (*quoting Brown v. State*, 674 N.E.2d 1129, 1137 (N.Y. 1996)).

For the rights afforded by Article I of the Iowa Constitution "to be meaningful, they must be effectively enforced." *Godfrey*, 898 N.W.2d at 865. Effective enforcement does not and cannot depend on the legislative action:

> It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement. It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens.

Id.

Article I, §17 is self-executing: "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." Iowa Const. Article I, §17. This language sets clear rules for enjoyment and protection, with nothing more necessary to enable the Iowa Courts to vindicate an individual's rights. *See Godfrey*, 898 N.W.2d at 869-70 ("It would be a remarkable development…to eviscerate the power of courts to provide remedies for violations of the people's rights established in article I, the article which the framers plainly thought, bar none, contained the most important provisions in the Iowa Constitution.")

Where legislative relief is afforded for the conduct underlying a constitutional violation, the legislative relief controls unless it "is inadequate to vindicate [the] constitutional rights." *Id*. at 880 (Cady, CJ., concurring). No statutory relief exists for an inmate

injured through a failure of jail or prison officials to protect him from assault. "[N]either the ITCA [Iowa Tort Claims Act] nor the IMTCA [Iowa Municipal Tort Claims Act] itself creates a cause of action." *Wagner v. State*, 952 N.W.2d 843, 853 (Iowa 2020).

That an Art. I, §17 violation gives rise to a civil claim for damages was anticipated by the Court: "But now an inmate can bring a direct claim for damages under…article I, section 17 (cruel and unusual punishment)." *Godfrey*, 898 N.W.2d at 988 (Mansfield, J., dissenting). Several jurisdictions recognize a prohibition against infliction of cruel and unusual punishments is self-executing. This includes a direct cause of action against federal officials under the Eighth Amendment. *Carlson v. Green*, 446 U.S. 14, 21 (1980). No "special factors" worked against such a claim, as prison officials lack any special status "in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 19. *See Smith v. Miller*, 40 N.W.2d 597, 600 (Iowa 1950) (*quoting Clark v. Kelly*, 133 S.E. 365, 369 (W.Va. 1926)) (officers liable for injuries due to negligent or nonperformance of duties); *Montanick v. McMillin*, 280 N.W. 608, 617 (Iowa 1938)

(government employee "who commits a wrongful or tortious act, violates a duty which he owed to the one who is injured, and is personally liable.").

The State of Utah found the same for Art. I, §9 of Utah's Constitution. *Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996). Utah's prohibition against cruel and unusual punishment is the same as Iowa's: "Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor." *Id*. (*quoting* Utah Const. Art. I, §9). It "prohibits specific evils" capable of definition and remedy without legislation, and was intended to have immediate effect without legislative implementation. *Id*. "[I]t articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers." *Id*. (*quoting Davis v. Burke*, 179 U.S. 399, 403 (1900)).

The Michigan Constitution provides: "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Mich. Const. Art.1, §16. The "cruel and

unusual" prohibition "clearly proscribes a specific evil" and is not "a statement of abstract principle or a dormant aspiration[.]" *Rusha v. Dept. of Corrections*, 859 N.W.2d 735, 740 (Mich. 2014). It unambiguously renders "'a sufficient rule by means of which the right…may be enjoyed and protected….'" *Id.* at 741 (*quoting Detroit v. Oakland Circuit Judge*, 212 N.W. 207, 209 (Mich. 1927)).

The Ohio Constitution prohibits "cruel and unusual punishments" utilizing the same language: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Const. Art.1, §9. This provision was like the Eighth Amendment as both "guarantees against cruel and unusual punishment…*are self-executing and require no legislative or statutory authority* to support or implement them." *Ex Parte Berman*, 87 N.E.2d 716, 720 (Ohio 1949) (original emphasis).

New York's Constitution states the same prohibition in the same language: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." N.Y. Const. Art.1, §5. It is self-executing, taking "effect immediately,

without the need for enabling legislation." *Boggs v. State*, 25 N.Y.S.3d 545, 549 (N.Y. Ct. Cl. 2015).

Art. I, §17 has long been applied in a civil context, with a clear division of duties between branches of government. In the context of determining the constitutionality of punishments for contempt, deference to the legislature in *setting* punishments was proper:

> …$500 is an extraordinary fine to be imposed for a civil contempt of court; but we cannot say that the legislature was not justified in supposing that a fine of that magnitude was necessary to secure obedience to the orders of the court.

Jordan v. Circuit Court of Wapello, 28 N.W. 548, 550 (Iowa 1886). In turn, courts must act cautiously in imposing punishments within its authorities:

> The authority to punish for contempt is, of course, quite indispensable to the orderly and efficient administration of justice; but the very fact that such authority is subject to no appeal, and its application is summary to a degree bordering on the arbitrary, makes it very essential that it shall not be enhanced to a point where our guaranties are lost sight of.

Flannagan v. Jepson, 158 N.W. 641, 644 (Iowa 1916).

The Court expressed its independence regarding cruel and unusual punishment long ago. Addressing imprisonment for

inability to pay court fines and costs, it recognized, "…imprisonment becomes punishment, and possibly within the prohibition of section 17 of article 1 of the constitution[.]" *Ex Parte Tuicher*, 28 N.W. 655, 656 (Iowa 1886). While such punishment allowed for "appeal to executive clemency[,]" the Court's authority to apply Art. I, §17 could be limited by another branch of government. *Id*. While "co-ordinate branches of the government, yet they are independent, and each must within their respective spheres perform the functions of their departments…." *Id*. The Court's application of Art. I, §17 could not "be governed by what the executive may or may not in his discretion probably do." *Id*. at 657.

That Art. I, §17 self-executes accords with the separation between the legislature and the courts sought when it was drafted: "[T]he Iowa Constitution of 1857 tended to limit the power of the legislature while it protected the independence of the court. …Further, the Iowa Constitution of 1857 reflected a healthy skepticism of legislative power…." *Godfrey*, 898 N.W.2d at 865.

More directly, the Court has recognized civil claims arise from official acts of extra-judicial punishment. In *Clancy v. Kenworthy*,

35 N.W. 427 (Iowa 1887), a constable falsely arrested an individual using excessive force and failed to seek medical treatment "although the plaintiff was badly cut about and upon the head, and bleeding and suffering severely…." *Id.* at 427. A damages action was stated:

> It is thus shown that he partially, fraudulently, and oppressively discharged the duties of the office in arresting plaintiff. It thus clearly appears, from the allegation of the petition, …plaintiff is the injured party, he may maintain this action to recover on the bond the damages he has sustained….

Id. at 428.

Tieman v. Haw, 49 Iowa 312 (1878) is cited as authority for an officer's liability for punitive acts in excess of duty. *Clancy,* 35 N.W. at 428. *Tieman* addressed unlawful forfeiture of property, where an acting sheriff took possession of a boat suspected of use in prostitution. *Tieman*, 49 Iowa at 312. No watch was set on the boat, which was subsequently taken and destroyed. *Id.* at 316. No authority permitted confiscation of such property. *Id.* A damages action was upheld. *Id. See also Charles v. Haskins*, 11 Iowa 329, 330 (1860) (execution of judgment against sheriff for wrongful seizure

and levy of private property); *Strunk v. Ocheltree*, 11 Iowa 158, 159 (1860) ("The defendant levied upon the property and took possession of it by virtue of his office, and sold the same when he had no right to do so. He did this as an official act.")

The Court has recognized for nearly a century that the conditions of an inmate's incarceration are subject to Art. I, §17: "It is the duty of the proper officers of the prison to provide clean and sanitary surroundings for the prisoners, and nothing less will serve the purposes or demands of society[.]" *State v. Cahill*, 194 N.W. 191, 193 (Iowa 1923). A duty to provide safe conditions is clear under Art. I, §17, to the point where an immediate threat of harm may justify temporary flight:

> The persons in charge of our prisons and jails are obligated to take reasonable precautions in order to provide a place of confinement where a prisoner is safe from…beatings by fellow inmates, safe from guard ignorance of pleas for help and safe from intentional placement into situations where an assault…is likely to result. If our prison system fails to live up to its responsibilities…we should not, indirectly, countenance such a failure….

State v. Reese, 272 N.W.2d 863, 867 (Iowa 1978). The conditions of incarceration must not pose harm to an inmate as Art. I, §17

prohibits "such punishments as amount to torture, or such as would shock the mind of every man possessed of common feelings[.]" *State v. Burris*, 190 N.W. 38, 42 (Iowa 1922) (*quoting State v. Williams*, 77 Mo. 310, 312 (1883)).

This duty to protect inmates from harm goes to the facility's top official, who may face personal liability from acts causing an inmate injury or death. *Smith*, 40 N.W.2d at 598. *Smith* concerned the death of an inmate in a jail cell fire. *Id.* The petition asserted "the sheriff failed to provide…adequate fire protection under the circumstances then existing…" and was to be submitted to the jury. *Id.* at 599-600. Considering a claim at common law, the Court had little issue imposing a duty on the sheriff. *Id.* at 598-99 (collecting authorities).

Art. I, §17, "like that of the similarly worded Eighth Amendment[,]" recognizes the cruel and unusual punishment clause "is concerned with matters such as…conditions of confinement." *State v. Richardson*, 890 N.W.2d 609, 620-21 (Iowa 2017). "[T]he protection he is afforded against other inmates" is a condition of confinement. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

The above cases show conduct which would violate Art. I, §17 gives rise to a claim for damages. This is the relief available for common law negligence claims arising from such conduct. *Barnard v. State*, 265 N.W.2d 620, 621 (Iowa 1978). At common law, the custodian of an inmate "must exercise reasonable care to protect him from harm[,]" which includes "the violent assault of another inmate." *Id*. Liability arises when an officer knows, or should have known, of a risk to the inmate, and fails to act reasonably to prevent the attack. *Id*. at 622. Such circumstances "include threats, incidents of prior violence, other reasonable cause to fear physical harm brought to the attention of the authorities, failure to provide adequate supervision, and placing known hostile persons where they have access to each other." *Id*.

This common law standard is similar to, but lesser than that utilized for constitutional claims under the Eighth Amendment. For failure to protect an inmate to violate the Eighth Amendment, deliberate indifference is required. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The test for deliberate indifference is whether the officer "knows the inmate faces a substantial risk of serious harm

and disregards that risk be failing to take reasonable measures to abate it." *Id.* at 847. This is the test applied "when actual deliberation is practical…and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

The difference between the common law and constitutional tests reflects the different interests protected at common law and by the Constitution. The constitutional focus "is not compensation as much as ensuring effective enforcement of constitutional rights." *Godfrey*, 898 N.W.2d at 877 (*citing* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 858–62 (1996)). "[A] constitutional claim is designed to 'vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of popular will.'" *Godfrey*, 898 N.W.2d at 877 (*quoting* Rosalie Berger Levinson, *Recognizing a Damage Remedy to Enforce Indiana's Bill of Rights*, 40 VAL. U. L. REV. 1, 11 (2005)).

These distinct interests supported differentiating the Eighth Amendment's test from the common law standard:

> The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. …But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer, 511 U.S. at 838. Like its federal counterpart, Art. I, §17 use of the term "cruel and unusual punishment" references "the character of the punishment." *State v. McNeal*, 167 N.W.2d 674, 678 (Iowa 1969) (*citing* 24B C.J.S. Criminal Law s1978, pp. 551—552)).

Though constitutional claims seek to do more than compensate an individual for harm from a violation, damages are the historic remedy for those violations:

> [I]n the common law regime, remedies at law—or damages—were usually the first choice to remedy a protected right. It is equitable remedies, not damage remedies, which reflected the innovation in the common law.

> …The availability of damages at law is thus an ordinary remedy for violation of constitutional provisions, not some new-fangled innovation.

Godfrey, 898 N.W.2d at 868 (citations omitted). The territorial Supreme Court of Iowa knew the English court would award damages, compensatory and exemplary, for constitutional violations. *Id*. at 866-67. Numerous decisions by other State courts contemporaneous to the Iowa Constitutional Convention imposed damages for constitutional violations. *Id*. Having this knowledge, the framers "most likely contemplated an award of money damages for the violation of these rights." *Bott*, 922 P.2d at 739.

In finding the Eighth Amendment is self-executing for damages claim, the U.S. Supreme Court recognized damages do more compensate an individual: "It is almost axiomatic that the threat of damages has a deterrent effect, …surely particularly so when the individual official faces personal financial liability." *Carlson*, 446 U.S. at 21. Damages are the ordinary remedy for invasion of personal liberties. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). A damage remedy is also necessary given how injunctive relief is often

not an adequate, or even available, remedy for an inmate's injuries. *Bott*, 922 P.2d at 739. *See also Boggs*, 25 N.Y.S.3d at 553.

No legislative act is necessary for this Court to enforce the prohibition against cruel and unusual punishments. Damages are the remedy for such a self-executing provision. *Godfrey*, 898 N.W.2d at 868. The answer to the first certified question is yes.

II. Municipal Officers may be Sued in Their Individual Capacities for Violation of Art. I, §17 of the Iowa Constitution

A. Error Preservation

This matter is before the Court pursuant to a question of law certified to this Court by the U.S. District Court for the Southern District of Iowa pursuant to Iowa Code §§ 684A.1 and 684A.2.

B. Standard of Review

The standard set forth in Issue I(B) applies here.

C. Argument

As the dissent made clear in *Godfrey*, the decision only determined that constitutional claims can be brought against government employees in their official capacities. *Godfrey*, 898 N.W.2d at 893-94 (Mansfield, J., dissenting). As of now, this Court

has "never recognized a *Godfrey* claim against a government official in their individual capacity." *Wagner*, 952 N.W.2d at 850. The bulk of authorities, however, support that direct constitutional action may be taken against officials in their individual capacities as well.

This was the prediction in *McCabe v. Macaulay*, 551 F.Supp.2d 771 (N.D. Iowa 2007), which anticipated *Godfrey*:

> …in *Bivens* the Supreme Court recognized a direct cause of action …against federal agents in their individual capacities. *Bivens*, 403 U.S. at 397, 91 S.Ct. 1999. Similarly, the majority of state courts of last resort have recognized analogous causes of action for violations of state constitutions against state officers in their individual capacities. *Dorwart v. Caraway*, 312 Mont. 1, 58 P.3d 128, 133–34 & 133 n. 1 (2002)…; *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688, 693–96 (1998)….

McCabe, 551 F.Supp.2d at 785.

This can also be seen in the *Baldwin* decisions, in which the Iowa Supreme Court addressed immunity and procedural issues in a case involving claims against municipal officials in both capacities. *Baldwin v. City of Estherville*, 915 N.W.2d 259, 281 (Iowa 2018) [*Baldwin II*] (establishing all due care immunity); *Baldwin V,* 929 N.W.2d at 698 (municipalities immune from liability if employees exercised due care under Iowa Code

§670.4(1)(c)). While not addressing capacity directly, *Baldwin V* provides important insights.

First, it states "A *Godfrey* action is the state counterpart to a *Bivens* action." *Id.* at 696. The *Bivens* remedy is recoverable against individuals. *Carlson*, 446 U.S. at 20. Second, two of the certified questions answered necessitated consideration of individual liability of municipal employees to answer.

> The third certified question from the federal district court is
>
> > If punitive damages are an available remedy against an individual defendant…under the Iowa Constitution, can punitive damages be awarded against a municipality that employed the individual defendant and, if so, under what standard?

Baldwin V, 929 N.W.2d at 698. This question was answered under Iowa Code §670.4(1)(e), which "precludes an award of punitive damages against the municipality that employed the constitutional tortfeasor." *Id.* at 699. This is not the case for individual officers, who are personally liable for punitive damages. Iowa Code §670.12.

> The fifth certified question from the federal district court is

> If an award of attorney's fees would have been available against an individual defendant…under the Iowa Constitution, would they be available against a municipality that employed the individual defendant…?

Baldwin V, 929 N.W.2d at 699. In answering this question, the Court again distinguished between the municipality and the individual employee, holding attorney fees cannot be awarded "against the municipal employer" absent statute, but that a common law award could be made against "a losing party," and "to the victorious party" if the standard is met. *Id*. at 700 (*quoting Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 603 (Iowa 1998)).

The scope of the IMTCA further supports the existence of individual capacity claims against municipal employees. "Suits against municipal employees in their individual capacities existed before the tort claims act[.]" *Lamantia v. Sojka*, 298 N.W.2d 245, 246 (Iowa 1980). Nothing in the IMTCA "indicat[es] it was the legislature's intent to abolish the right of an injured party to sue a municipal employee…." *Vermeer v. Sneller*, 190 N.W.2d 389, 391-92 (Iowa 1971). Rather, it "implies an employee can be held liable in an individual cause of action." *Id*. This includes liability for acts

performed in the course of employment. *Id*. (*citing Anderson v. Calamus Community Sch. Dist.*, 174 N.W.2d 643, 644 (Iowa 1970)).

Individual liability for a *Godfrey* claim aligns with the general rule, recognized in Iowa, imposing personal liability on "'[a] municipal employee who commits a wrongful or tortious act…even though he is then engaged in a gover[n]mental function." *Anderson*, 174 N.W.2d at 644 (*quoting* McQuillin, *Municipal Corporations, Vol. 4*, pages 151, 152). The IMTCA definition of "tort" includes "every civil wrong which results in wrongful death or injury to person…and includes…denial or impairment of any right under any constitutional provision[.]" Iowa Code §670.1(4). The inclusion of constitutional violations as IMTCA "torts" came *after* those case confirming individual liability continued after IMTCA's enactment. *Baldwin V*, 929 N.W.2d at 697. The legislature knew municipal officers could be subject to individual capacity claims for constitutional violations. *See Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971) (legislature assumed to know "existing state of law and prior judicial interpretations of similar statutory provisions.")

Liability exists whether a municipal officer's wrongful act is improper use of authority, or completely outside such authority. This is demonstrated by *Drake v. Keeling*, 299 N.W. 919 (Iowa 1941), where claims for damages against deputies, a sheriff, and their sureties were upheld. *Id*. at 924-25. Argument centered on whether the actions were under color of law, and if all parties were properly joined. *Id*. It was recognized the deputies had been acting at least under color of law: "Acts done 'virtute officii' are those within the authority of the officer, when properly performed, but which are performed improperly; acts done 'colore officii' are those which are entirely outside or beyond the authority conferred by the office." *Id*. at 924 (*quoting Hegelson v. Powell*, 34 P.2d 957, 963 (Idaho 1934)). For purposes of binding the surety, "it is immaterial whether the officer was acting by virtue of his office or under color of office, the surety is bound for his acts." *Id*. (*quoting Hegelson*, 34 P.2d at 963). At the same time, each defendant's liability could only be based on their individual actions, as "was not entitled to recover against Berg and Forbes for acts…in which they did not participate.

The only verdict that could be returned had to be based upon items of damage for which all three were liable." *Id.* at 926.

Given the importance of future deterrence to constitutional torts, it is important for the officer to be exposed to individual liability. *Carlson*, 446 U.S. at 22. The deterrent effect is lessened when the governmental body, rather than the individual official, is made liable for the damages. *Smith v. Dept. of Public Health*, 410 N.W.2d 749, 789 (Mich. 1987). There is a lessened concern of overdeterrence given the potential for indemnification which officers may be afforded under Iowa law. *See* Iowa Code §670.8(1) (duty to defend and indemnify officers for alleged acts occurring within scope of employment except for punitive damages); Iowa Code §670.8(2) (duty to defend and indemnify includes cases under 42 U.S.C. §1983). Legislative indemnification after finding individual liability was the approach when the Iowa Constitution was drafted: "The nineteenth century approach 'was to hold the officer accountable in court for violations of the victim's legal rights but then to indemnify the officer ... through the legislative process.'" *Baldwin*, 915 N.W.2d at 290 (Appel, J., dissenting) (*quoting* James

E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1925 (2010)).

As constitutional provisions "are specifically designed to protect citizens against certain types of unlawful acts by government officials" this purpose would be stifled should the responsible official avoid liability. *Ritchie v. Donnelly*, 597 A.2d 432, 446 (Md. 1991). "Damages are a necessary deterrent for such misconduct" when no injunction, exclusion, or other non-monetary relief can redress the wrong. *Brown*, 674 N.E.2d at 1141. Such a "narrow remedy" is needed to protect against official misconduct. *Id*. *See also Bott*, 922 P.2d at 739 (damages necessary from inflicting cruel and unusual punishment as injunctive relief may not be adequate remedy).

The answer to the second certified question is yes. Municipal employees have historically faced claims for tortious acts in their individual capacities. The IMTCA does not change this. This is recognized by the legislature, which has not acted to change it. Personal liability is of central importance to deterring

constitutional violations. An individual capacity claim is necessary for a violation of Art. I, §17 and must be recognized.

III. Neither Statutory Qualified Immunity nor All Due Care Immunity are Available for Individual Officers

A. Error Preservation

This matter is before the Court pursuant to a question of law certified to this Court by the U.S. District Court for the Southern District of Iowa pursuant to Iowa Code §§ 684A.1 and 684A.2.

B. Standard of Review

The standard set forth in Issue I(B) applies here.

C. Argument

1. Qualified Immunity under Iowa Code §670.4A is not available as it Violates the Iowa Constitution

Statutes are cloaked with a presumption of constitutionality, imposing on the challenger a heavy burden to prove unconstitutionality beyond a reasonable doubt. *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002). "If fairly possible, a statute will be construed to avoid doubt as to constitutionality." *Simmons v. State Public Defender*, 791 N.W.2d 69, 73-74 (Iowa 2010).

a. Iowa Code §670.4A(1) violates Separation of Powers Under the Iowa Constitution

As noted above, constitutional claims may be subject to the IMTCA. *Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019). The IMTCA provides individual officers subject to a IMTCA claim with immunity from liability for money damages if:

> a. The right…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.
>
> b. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the law.

Iowa Code §670.4A(1). This immunity only applies when the claim is governed by the IMTCA. *Vermeer*, 190 N.W.2d at 391-92. Where the claim against a municipal officer is outside "the scope of their employment or duties," it does not apply. Iowa Code §670.2(1).

A problem with the IMTCA is its immunities "reflecting certain *legislative* priorities. Some of those are unsuitable for *constitutional* torts." *Baldwin II*, 915 N.W.2d at 280. The overriding

consideration of clearly established law above all else is one of those legislative priorities. In rejecting the federal standard for qualified immunity, *Baldwin II* recognized it:

> …is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally we think of due care or objective good faith as more nuanced and reflecting several considerations. [Citation omitted.] Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law.

Id. at 279.

The Iowa Constitution separates the powers of Iowa's branches of government and declares: "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." Iowa Const. Art. III, §1. This separation is foundational to Iowa's constitutional system and was done to avoid the tyranny and arbitrary control to which life and liberty would be exposed if the "'the power of judging be not separated for the legislative and executive powers[.]'" *State v. Barker*, 89 N.W. 204, 208 (Iowa 1902) (citation omitted). *See also Webster County Bd. of Sup'rs v. Flattery*,

268 N.W.2d 869, 873 (Iowa 1978) ("Art. III, s1…incorporates the historic concept of separation of powers to safeguard against tyranny, developed in early philosophical and political writings.").

Art. III, §1 is violated if one branch of government]t seeks to "impair another in the performance of its *constitutional* duties" or "'purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" *Klouda*, 624 N.W.2d at 260 (*quoting State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000)) (original emphasis).

"The judicial power is ordinarily defined to be the power to construe and interpret the Constitution and laws, and to apply them and decide controversies, and is vested in courts." *Hutchins v. City of Des Moines*, 157 N.W. 881, 887 (Iowa 1916). This is distinct from the legislative power "to make, alter, and repeal laws." *Id.* Legislative power cannot bar constitutional claims and "must give way to the paramount role of the Iowa Constitution in our system of government." *Wagner*, 952 N.W.2d at 861.

It is the role of the Court to define what a party must prove to establish a constitutional violation. "It is the state judiciary that

has the responsibility to protect the state constitutional rights of the citizens." *Godfrey*, 898 N.W.2d at 865. The Court is the ultimate arbiter of the remedy, though the legislature "may provide and limit a statutory remedy for constitutionally based tort violations, as long as the remedy provides meaningful redress for significant violations." *Zullo v. State*, 205 A.3d 466, 482 (Vt. 2019). *See also Godfrey*, 898 N.W.2d at 865 ("If these individual rights in the very first article of the Iowa Constitution are to be meaningful, they must be effectively enforced.") By imposing a duty on the one injured by a constitutional violation to establish this injury is already in law, the legislature usurps the authority of the Court to establish the elements for recovery for a constitutional violation.

Qualified immunity in Iowa Code §670.4A is different from the immunities set out Iowa Code §670.4. The immunities in Iowa Code §670.4 are affirmative defenses for which the defendant has the burden of proof. *See Cubit v. Mahaska County*, 677 N.W.2d 777, 780 (Iowa 2004) (emergency response immunity raised "as an affirmative defense"); *Breese v. City of Burlington*, 945 N.W.2d 12, 23 (Iowa 2020) (Iowa Code §670.4(1)(h) state of the art defense is

an affirmative defense); *Anderson v. State*, 692 N.W.2d 360, 364 (Iowa 2005) ("The discretionary function immunity is an affirmative defense[.]").

These defenses recognize "[i]mmunity is the exception, and liability is the rule under the tort claims acts." *Anderson*, 692 N.W.2d at 364. This is how immunity must be for constitutional torts: "Because the question is one of immunity, the burden of proof should be on the defendant." *Baldwin II*, 915 N.W.2d at 280. Instead, Iowa Code §670.4(1) makes immunity the rule, burdening the plaintiff to prove an exception for liability. This is beyond the legislature's power to provide and limit meaningful remedies, and intrudes on the power of the Court to define the elements of constitutional torts. This violation of separation of powers is unconstitutional, void, and of no effect. *Carr v. District Court of Van Buren County*, 126 N.W. 791, 795 (Iowa 1910).

b. Iowa Code §670.4A(3) Violates Separation of Powers and Right to Petition for Redress of Grievance Under the Iowa Constitution

Iowa Code §670.4A requires assessment of clearly established law at the time of pleading, with plaintiffs required to "state…that

the law was clearly established at the time of the alleged violation." Iowa Code §670.4A(3). "Failure to plead…the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice." *Id*.

The effect of Iowa Code §670.4A(3) is to prevent the courts from developing any new law as to violations of the Iowa Constitution by municipal actors. A statutory prohibition against the Iowa courts performing their central, essential function violates the separation of powers created by the Iowa Constitution. Iowa Const. Art. III, §1. It also violates the right to petition the court for redress of injury caused by municipal officers. Iowa Const. Art. I, §20. This dual violation is caused by the statute prohibiting individuals from bringing, and Iowa courts resolving, claims alleging violations of the law absent a prior determination of a claim for the violation. Because Iowa Code §670.4A(3) violates the separation of powers and right to petition for redress of grievance under the Iowa Constitution, it is unconstitutional, void, and of no effect. *Carr*, 126 N.W. at 795.

By requiring plaintiffs to allege their rights were violated in a manner either previously adjudicated or statutorily declared a violation, while mandating dismissal with prejudice for failing to do, Iowa Code §670.4A(3) legislatively bars Iowa courts from determining any new violations of Iowa law as it relates to acts of municipal employees and officers. This is well beyond the legislature's "authority to regulate the practice and procedure in all Iowa courts." *State v. Thompson*, 954 N.W.2d 402, 411 (Iowa 2021). It is "the duty of the general assembly…to provide for a general system of practice in all courts of this state." Iowa Const. Art. V, §14. The constitutional practice of "legislation regulating practice and procedure" is historically recognized. *Thompson*, 954 N.W.2d at 414 (collecting cases).

Such proper regulation involves the setting of appellate deadlines, limiting appeals in chancery cases, and prohibiting requiring a manner of appellate pleading. *Id*. These regulations are of a different kind, addressing the "'purely statutory'" right of appeal and its procedure *Id*. (*quoting State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917).

Even then, the legislature's power has limits. While the legislature may issue a statute, "dispens[ing] with [a] formal pleading, but [cannot] undertake to prescribe the manner of arguing errors complained of in presenting a cause to this court." *Wine v. Jones*, 168 N.W. 318, 321 (Iowa 1918). It may not, under the guise of regulation, "so change the character of the court as that it shall be other in reviewing a law action than "a court for the correction of errors at law." *Id.* While a statute may address the procedure for presenting the claims of error raised in matter for review, it cannot prohibit the presentation of the claimed errors, something "inherently essential to any review of a ruling the correctness of which is challenged." *Id.*

Looking to the district court, it "shall be a court of law and equity…and have jurisdiction in civil and criminal matters…in such a manner as shall be prescribed by law." Iowa Const. Art. V, §6. District courts "have general jurisdiction of all matters brought before them." *Laird Bros. v. Dickerson*, 40 Iowa 665, 670 (1875). "The legislature may not deprive the District Court of its

jurisdiction, nor, in the least limit it; all that it is authorized to do is prescribe the manner of its exercise." *Id*.

By example, the courts cannot be deprived of their power to punish contempt, but statute may limit the punishment. *Eicher v. Tinley*, 264 N.W. 591, 594-95 (Iowa 1936). It is the legislature which prescribes crimes and their punishments which the courts adjudicate and impose. *Klouda*, 642 N.W.2d at 261. The legislature may also establish causes of action which supersede those established by courts at common law. *Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429, 434-435 (Iowa 2019).

But the legislature cannot prohibit the court from *deciding* a claim. "The people have the right freely…to petition for a redress of grievances." Iowa Const. Art. I, §20. *See also Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) (right of access to courts is an aspect of right to petition). "The primary, essential right of an injured person is to secure redress from the person causing the injuries." *Wells v. Wildin*, 277 N.W. 308, 311 (Iowa 1938). The right to seek redress for injury is "[t]he very essence of civil liberty." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). It is indisputable "that

where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.*

Iowa Code §670.4A(3) prevents the Iowa courts from interpreting the Constitution and laws of Iowa to originally determine whether an act of a municipal officer violates a petitioner's rights. It does so by requiring dismissal of any claim filed where the petitioner is unable to allege a claimed violation is clearly established. This violates the right to petition for redress of grievance.

A claim can only be alleged where "to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]" Iowa R. Civ. P. 1.413(1). Attorneys are ethically forbidden from bringing a proceeding unless there is a basis in law and fact for doing so that is not frivolous. Iowa R. Prof. Cond. 32:3.1. Nor may an attorney knowingly make a false statement of fact or law to a tribunal. Iowa R. Prof. Cond. 32:3.3(a). If the law has not already been clearly established, no Iowa court can ever find the

law has been clearly established, because no party can ever bring the claim. This leaves individuals who have been injured by a municipal officer in a manner not previously adjudicated without the possibility for redress by the courts.

This all amounts to a two-fold violation of the Iowa Constitution. One branch of government cannot "through the exercise of its acknowledged powers…prevent another [branch] from fulfilling its responsibilities to the people under the Constitution." *Webster County Bd. of Sup'rs*, 268 N.W.2d at 874 (quoting *O'Coin's, Inc. v. Treasurer of County of Worcester*, 287 N.E.2d 608, 612 (Mass. 1972)). Iowa Code §670.4A(3) must be struck down as "nothing must impede the immediate, necessary, efficient and basic functioning of the courts." *Webster County Bd. of Sup'rs*, 268 N.W.2d at 873.

2. All Due Care Immunity Does Not Apply to a Claim Under Art. I, §17 for Cruel and Unusual Punishment

Violation of Art. I, §17 from infliction of cruel and unusual punishment due to condition of incarceration arises where the officer has acted with deliberate indifference to a known risk of

harm to an inmate. Deliberate indifference "entails something more than mere negligence, [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. The violation is in the knowing disregard "of an excessive risk to inmate health or safety[.]" *Id*. at 837. "[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id*. As an official who acts reasonably in response to a known risk is not deliberately indifferent, this is a finding to be made while determining the violation.

Because of this, the "all due care" standard established in *Baldwin* is not applicable to a violation under Art. I, §17. "All due care" immunity arose in the context of unreasonable search and seizure under Art. I, §8 of the Iowa Constitution. *Baldwin II*, 915 N.W.2d at 281. Due care is the benchmark for a violation of Art. I, §8 as "[p]roof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution." *Id*. at 280. In adopting this immunity standard for Art. I, §8, the Court acknowledged "constitutional claims other than

unlawful search and seizure may have a higher mens rea requirement…embedded within the constitutional provision itself." *Id*. at 281.

Critically, "all due care" was adopted to avoid inflicting a damages judgment on government officials based on strict liability based for mistaken judgment calls. *Id*. at 277. This is not a concern under the higher mens rea of deliberate indifference. There is no need to separately assess reasonableness outside of determining the necessary mental state for a violation.

The heightened intent which must be proved to establish a violation means additional immunity is not necessary to protect against overdeterrence. As the Utah Supreme Court recognized: "A prison employee's 'lot is not so unhappy' that he cannot possess any human frailties of forgetfulness, distractibility, or misjudgment without rendering himself liable for a constitutional violation." *Bott*, 922 P.2d at 739-40 (*quoting Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Rather "[t]o engender liability, an employee's must be voluntary and sufficiently culpable to contravene a prisoner's right

to be free from cruel and unusual punishment" under a deliberate indifference standard alone. *Bott*, 922 P.2d at 740.

By requiring proof of conduct well above negligence, there is no basis for application of "all due care" immunity to violations of Art. I, §17. As this immunity is directed toward conduct subject to a lower mens rea than that necessary to violate the cruel and unusual punishment clause, "all due care" immunity is not available for such a violation.

In sum, the answer to the third certified question is that neither Iowa Code §670.4A immunity nor "all due care" immunity is available to individual officers for alleged violations of Article I, §17 of the Iowa Constitution.

IV. Statutory Qualified Immunity, but not All Due Care Immunity, may be Available for Municipalities

A. Error Preservation

This matter is before the Court pursuant to a question of law certified to this Court by the U.S. District Court for the Southern District of Iowa pursuant to Iowa Code §§ 684A.1 and 684A.2.

B. Standard of Review

The standard set forth in Issue I(B) applies here.

C. Argument

1. Immunities may be Available Under Iowa Code §670.4, but not Iowa Code §670.4A

"The IMTCA expressly dictates immunities for defendant municipalities." *Baldwin V*, 929 N.W.2d at 697 (*citing* Iowa Code §670.4(1)). It found the "due care" immunity for municipalities set out in Iowa Code §670.4(1)(c), would protect the municipality from liability if it were proven "the officers exercised due care in executing an ordinance." *Id*. at 698. Based on *Baldwin V*'s analysis, the immunities set out in Iowa Code §670.4 could provide qualified immunity to the municipality to the extent any are factually applicable. However, the statutory immunity would need to be of a kind with an immunity available to the municipal employee. *Baldwin V*, 929 N.W.2d at 696 (municipality "vicariously immune" under Iowa Code §670.4(1)(c) when "employees would be immune from personal liability" under "all due care" immunity).

Under the facts presented in these proceedings, none of these statutory immunities appear to be applicable on their face. Should Appellees assert a specific immunity under Iowa Code §670.4 as

being available to an Art. I, §17 claim for cruel and unusual punishment, Appellants will address it in Reply.

It is also provided, "[a] municipality shall not be liable for any claim brought under this chapter where the employee or officer was determined to be protected by qualified immunity under [Iowa Code §670.4A(1)]." Iowa Code §670.4A(2). As Iowa Code §670.4A(1) is unconstitutional for the reasons set out above, there is no immunity available to the municipality under Iowa Code §670.4A(2).

2. All Due Care Immunity Does Not Apply to a Claim Under Art. I, §17 for Cruel and Unusual Punishment

As liability for a violation of Art. I, §17 is deliberate indifference, a requirement for conduct well beyond what "all due care" immunity protects against, this immunity is not available for either the individual or the municipality.

Historically, municipalities had few immunities available to them at common law from the wrongful acts of their employees:

> To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions…. The second doctrine immunized a municipality for its

> "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature.

Owen v. City of Indep., Mo., 445 U.S. 622, 644 (1980). This is how it was in Iowa. *Harris v. City of Des Moines*, 209 N.W. 454, 456 (Iowa 1926) (*quoting Pettengill v. City of Yonkers*, 22 N.E. 1095, 1096-97 (N.Y. Ct. App. 1889)) (no municipal respondeat superior liability for governmental functions); *Mardis v. City of Des Moines*, 24 N.W.2d 620, 625 (Iowa 1948) (no municipal respondeat superior liability for discretionary functions). Where the conduct involved is ministerial or proprietary, respondeat liability applied. *Rowley v. City of Cedar Rapids*, 212 N.W. 158, 160 (Iowa 1927). "The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves." *Owen*, 445 U.S. at 647.

"Today, governmental liability is the rule and immunity the exception" and available "only to the extent permitted by statute." *A. Doe v. Cedar Rapids Community School Dist.*, 652 N.W.2d 439, 443 (Iowa 2002). There is no common law immunity available to a

municipality for a violation of the cruel and unusual punishment clause of Art. I, §17.

For these reasons, the answer to the fourth certified question is that immunity under Iowa Code §670.4 may be available to municipalities, if any are factually applicable and of a kind with immunity available to the employee, but no "all due care" immunity is available for violations of Article I, §17 of the Iowa Constitution.

CONCLUSION

For the reasons sets forth above, the four certified questions above should be answered as follows:

1. A direct cause of action exists under Article I, §17 of the Iowa Constitution for an alleged failure to protect an inmate from assault by another inmate.

2. Municipal officers can be sued in their individual capacities for a claimed violation of Article I, §17 of the Iowa Constitution.

3. Neither Iowa Code §670.4A immunity nor "all due care" immunity is available to individual officers for alleged violations of Article I, §17 of the Iowa Constitution.

4. Iowa Code §670.4 immunities may be available to municipalities, but no "all due care" immunity is available for violations of Article I, §17 of the Iowa Constitution.

ORAL ARGUMENT REQUEST

Counsel requests to be heard in oral argument.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ *Adam Witosky* Date: May 4, 2023
Adam Witosky