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

SILAS RICHARDSON, Plaintiff/Appellant,
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/Appellees.

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

Appellant's Final Reply Brief

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ISSUES

I. Art. I, §17 of the Iowa Constitution is Self-Effectuating

While Appellees make numerous arguments about why the test self-effectuation test established in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) [*Godfrey II*] should not be applied to Art. I, §17, no argument is made that Art. I, §17 fails this test, thus conceding that if the test applies, Art. I, §17 is self-effectuating.

The arguments against its application are unavailing. Much is made of this being the first case seeking to apply *Godfrey II* to other Art. I rights. (Appellee.Br. 18-20.) This is immaterial. This Court has developed a substantial structure for *Godfrey II* claims, determining procedure, immunities, and availability of punitive damages and attorney fees. *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) [*Baldwin II*] (all due care immunity); *Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019) [*Baldwin V*] (Iowa Municipal Tort Claims Act [IMTCA] immunities, punitive damages bar, and common-law attorney fees); *Venckus v. City of Iowa City*, 930 N.W.2d 792 (Iowa 2019) (judicial process immunity and IMTCA limitations period); *Wagner v. State*, 952

N.W.2d 843 (Iowa 2020) (Iowa Tort Claims Act [ITCA] sets procedure for constitutional tort claims against State or its employees). Defendants frame this as the Court "simply ignor[ing] the preliminary question" of *Godfrey II*'s application to other constitutional clauses.

Appellees ignore how between *Baldwin II* and *Baldwin V*, *Godfrey II* was affirmed as to the existence of damages actions under the Iowa Constitution, including for Art. I, §6's privileges and immunities clause not at issue in *Godfrey*. *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 221 (Iowa 2018). Even those dissenting in *Godfrey II* acknowledged the test's broad application. *Godfrey II*, 898 N.W.2d at 899 (Mansfield, J., dissenting). This breadth is seen in *Godfrey II* determining Art. I, §§6 and 9 self-effectuate based in part on the self-effectuation of Art. I, §8, as compared to the need for legislation for Art. 4, §10. *Id.* at 862-63. That the Court hasn't applied a test to an Art. I right outside the original three has no bearing on its applicability.

The U.S. Supreme Court's retreat from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.

388 (1971) doesn't restrict *Godfrey II*'s application. The retreat began decades earlier, as *Godfrey II* considered: "…continuing viability of federal *Bivens* claims would be important only if later cases cast doubt on the reasoning of the original opinion." *Godfrey II*, 898 N.W.2d at 855. They haven't; rather they "show an unwillingness to expand *Bivens* claims beyond [its] Fourth Amendment circumstances…, due process/equal protection/cruel and unusual punishment federal prison context…, and the due process/equal protection employment discrimination context[.]" *Id.* at 856. This is true of *Egbert v. Boule*, 142 S.Ct. 1793 (2022).

Appellees don't discuss the actual reasons why *Biven*'s wasn't extended in *Egbert*. First, "the Judiciary is not undoubtedly better positioned than Congress to authorize a damages action in this *national-security context*[,]" a concern not applicable here. *Egbert*, 142 S.Ct. at 1805. Second, "Congress has provided alternative remedies for aggrieved parties…that independently foreclose a *Bivens* action here." *Id.* at 1806. The same isn't true here. Neither reason detracts from the application of constitutional relief for violation of the cruel and unusual punishment clause.

Godfrey II is part of a larger trend of State constitutional torts. Three State Supreme Courts have relied on its logic in finding damages claims for self-executing constitutional provisions in their Constitutions. *See Zullo v. State*, 205 A.3d 466, 484 (Vt. 2019); *Bauserman v. Unemployment Insurance Agency*, 983 N.W.2d 855, 866-68 (Mich. 2022); *Mack v. Williams*, 522 P.3d 434, 447 (Nev. 2022). This recognition by disparate States speaks to the fundamental importance of State constitutions in protecting citizens. As federalism concerns don't arise in interpreting State constitutions, the reasoning in State decisions recognizing self-effectuating remedies is more readily applicable. *See State v. Short*, 851 N.W.2d 474, 482 (Iowa 2014) (Iowa Bill of Rights is not an "appendage controlled by federal court interpretations."); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1275 (1985) ("State judges should not suffer from the conservatizing influences…of the need to make nationally uniform rules[.]").

Restatement (Second) of Torts §874A, an authority central to *Godfrey II*, makes clear that self-effectuation isn't dependent on the

federal approach. *Godfrey II*, 898 N.W.2d at 859-60. While *Bivens* is "an illustrative analogue in the law of remedies[,]" §874A expresses "a much older body of law generated by state courts which more directly supports judicial creation of a damage remedy[.]" Friesen, 63 TEX. L. REV. at 1281.

Among the authorities §874A relies on is a decision under the New Jersey Constitution preceding *Bivens* by a decade. Restatement (Second) of Torts §874A (1979), Reporter's Note (*citing Cooper v. Nutley Sun Printing Co.*, 175 A.2d 639 (1961)). *Cooper* relies on older authority recognizing it wasn't "beyond the capacity of the judiciary to remedy the wrongs which appellants claimed. …[U]nder the Constitution, an action for damages may well lie…." *Cooper*, 175 A.2d at 200 (*quoting Independent Dairy Workers Union of Hightstown v. Milk Drivers and Dairy Employees Local No. 680*, 152 A.2 331, 336 (1959)). While *Bivens* is *a* pillar on which *Godfrey II* stands, it is neither the only nor most important one.

Appellees conflate the legislature's imposing statutory punishments with the Court's review of them. This just shows the Court's authority to remedy a violation of Art. I, §17 however it

arises. While legislative pronouncements are used to evaluate if a punishment is cruel or unusual, this is just part of how the Court effectuates Art. I, §17's goals: "This approach is followed because the basic concept underlying the prohibition against cruel and unusual punishment 'is nothing less than the dignity' of humankind." *State v. Lyle*, 854 N.W.2d 378, 384 (Iowa 2014).

That statutory punishments are subject to Art. I, §17 review is no basis to find the Court can't remedy violations from non-statutory punishments. The proposition that the Court can grant relief from a statute threatening "prospective unconstitutional activity[,]" but not a remedy for completed unconstitutional activity "is patently absurd." Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 4 (1968). If this were true, this right would be "in such a situation reduced to vacuous liturgy." *Id*. Such a passive view of the Iowa Constitution, "in light of the admitted judicial power to 'void' unconstitutional legislation…raises significant questions about the nature of the document as law." *Id*. at 6.

II. Neither Common Law nor Administrative Remedies are Adequate to Redress Art. I, §17 Violations

Appellant previously noted no statutory relief is available for the violation claimed. (Pltf. Br. 25.) While faulting Appellant for not addressing "the multitude of statutory…remedies available[,]" Appellees don't cite a single one. (Appellee.Br.24.) This failure concedes none exist.

Appellees instead conflate the IMTCA waiving immunity with a statutory remedy, declaring there is no difference between a statutory and common law remedy for "determining whether this Court should create a direct constitutional cause of action." (Appellee.Br. 24-25.) No authority is cited for this proposition, while *Godfrey II* relies on authority contrary to this claim. *Godfrey II*, 898 N.W.2d at 860 (*citing Dorwart v. Caraway*, 58 P.3d 128, 137 (Mont. 2002)). *Dorwart* states:

> [W]e agree with the previous authorities that there is a great distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state. Common law causes of action intended to regulate relationships among and between individuals are not adequate to redress the type of damage caused by the invasion of constitutional rights.

Dorwart, 58 P.3d at 137. *Bivens* is one of those previous authorities noting the different relationship "between a citizen and a federal agent unconstitutionally exercising his authority" and that "between two private citizens[,]" including how:

> power, once granted, does not disappear like a magic gift when it is wrongfully used. …And 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'

Bivens, 403 U.S. at 391-92. "A contrary conclusion would require us to ignore the important distinction between the tortious misconduct of one private citizen toward another, on the one hand, and the violation of a citizen's constitutional rights by a [municipal] officer, on the other." *Binette v. Sabo*, 710 A.2d 688, 698 (Conn. 1998).

Common law torts, such as negligence in this case, are subject to defenses inappropriate for constitutional torts. The key example of this is comparative fault, which reduces any damage recovery "in proportion to the amount of fault attributable to the claimant." Iowa Code §668.3. This defense arises from any "acts or omissions that are in any measure negligent or reckless toward the person…of

the actor or others." Iowa Code §668.1. This would allow Appellees to not only point the figure at each other, but also at the inmate who assaulted Silas, and conceivably, at Silas himself.

Silas can't violate his constitutional rights. The other inmate can't violate Silas' constitutional rights. *Wagner*, 952 N.W.2d at 853-54 ("Usually, private persons, unless acting under color of state law, cannot commit constitutional violations."). Fault for a constitutional violation cannot be compared.

The constitutional violation was *not* the assault, but the failure to protect from the known risk of assault. While damages would include the injuries suffered from the assault, the assault is the consequence of the violation, *not* the violation to be remedied:

> [T]he common law tort model authorizes compensation for tangible injuries and such intangibles as emotional distress. The occurrence of such harms bears only a coincidental relationship to the violation of constitutional rights. Clearly, a victim of unconstitutional conduct does not always suffer "actual injury." And the amount of consequential harm incurred is only fortuitously related to the constitutional deprivation.

Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966, 977 (1980). This is seen

in the torts which Appellee claim as sufficient: "assault, battery, false imprisonment and the like." Each addresses a possible consequence, but none address *the* violation, negating their remedial value. The interests of Art. I, §17 are not reflected in these torts and require a remedy tailored to them in the manner those torts are tailored to the interests they protect. Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1260 (1979).

This is expressed in §874A, which distinguishes the legal duty described in a constitutional provision from the duty for negligence:

> The concept of negligence, as a short-hand way to invoke a duty to take 'due care'…is at best unnecessary to a theory of…constitutional tort liability, and at worst incorrect in suggesting that 'due care' on the part of the actor will substitute for the duty imposed[.]

Friesen, 63 TEX. L. REV. at 1282. Reference to negligence confuses the issue "because it implies the presence of a certain state of mind" not present in the constitutional provision which may impose a duty where noncompliance "unless excused or prevented by good cause,

results in liability whether the defendant acted carelessly, willfully, intentionally, or with some other state of mind." *Id*. at 1283.

This Court rejects strict liability for constitutional violations. *Baldwin II*, 915 N.W.2d at 276-77. Requisite intent, however, is drawn from the constitutional provision itself. *Id*. (*citing* Restatement (Second) §874A, cmt. j.) Any overlap with a common law tort is coincidental and relevant only where the tort may inform the constitutional action. *See* Friesen, 63 TEX. L. REV. at 1283 ("Defenses to the action should have the same source as the duty: the constitutional provision itself.").

As for amicus' claim as to the adequacy of administrative grievance procedures, these provide no remedy for a completed Art. I, §17 violation. The rule amicus cites provides that inmates shall be informed of a "procedure which includes at least one level of appeal" which can be limited at the jail's discretion. 201 I.A.C. 50.21(3)(c). The rule is silent as to remedies. Yet per a statute it is intended to implement, a violation of jail standards "does not permit any civil action to recover damages[.]" Iowa Code §356.36.

Iowa Code Chapter 610A provides no remedy or procedure. Its first focus is on ensuring inmates pay "fees and costs associated" with civil actions and appeals. Iowa Code §610A.1. It then provides for dismissing actions for false, frivolous, or malicious filings or evidence. Iowa Code §610A.2. Next are penalties available should an action be so dismissed. Iowa Code §610A.3. The chapter concludes with a setoff for "the cost of incarceration" from "any claim made by or monetary obligation owed to an inmate." Iowa Code §610A.4. Chapter 610A has no application here.

Reliance on common law torts to provide relief for constitutional violations is only sufficient if "the deprivation of a constitutional right is merely a technical violation." Note, HARV. L. REV. at 978. The intrinsic value of constitutional rights, distinct from consequential injury, is long recognized: "[T]he deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money." *Giles v. Harris*, 189 U.S. 475, 485 (1903). *See Wiley v. Sinkler*, 179 U.S. 58, 65 (1900) (for rights violated without actual injury the "amount of damages …is peculiarly appropriate for" a jury).

Looking at the Iowa Department of Corrections policy, it is questionable that it even applies to the circumstance at hand:

> Incarcerated individuals may grieve policies, conditions, loss or damage of personal property with value of less than $100.00…, health care treatment, employees, and other incarcerated individuals within the institution that affect them personally.

Iowa Dept. of Corrections, *Incarcerated Individual Grievance Procedure*s, IV(A)(4) at p.3[1]. It certainly provides no compensation for injury, with "[r]eferral to Tort Claim procedure for possible…damages." *Id*., IV(B)(8)(c) at p.7.

Though incarcerated, "[i]nmates have a constitutional right of access to the courts" which "extends to established prison grievance procedures." *Mark v. State*, 556 N.W.2d 152, 154 (Iowa 1996). This is essential as "a prisoner's protected rights are only as strong as his ability to seek relief from the courts or otherwise petition the government for redress of the deprivation of his rights." *Id*. (*quoting Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)). This Court

[1] available at https://doc.iowa.gov/sites/default/files/io-or-o6_incarcerated_individual_grievances_procedures.pdf (accessed 02/24/2023).

recognizes that a "paper transaction" is inadequate to remedy a completed "improper denial…of liberty interest[s][,]" with the inmate harmed able to pursue damages for a constitutional violation. *Sanford v. Manternach*, 601 N.W.2d 360, 369 (Iowa 1999).

The decision in *Corr. Servs. Corp. v. Malesko* has no relevance here, as it held only that a *Bivens* action doesn't apply against a private entity providing contracted federal services. 534 U.S. 61, 71 (2001). The case *Malesko* cites for the amicus' proposition is further distinguishable, as it addressed "an allegedly unconstitutional denial of a *statutory* right…." *Schweiker v. Chilicky*, 487 U.S. 412, 428 (1988). "In light of the comprehensive statutory schemes involved" any constitutional harm was inseparable "from the harm resulting from the denial of the statutory right." *Id*. at 428. And while the *Bivens* decision informs *Godfrey II* actions, it isn't dispositive of how violation of the Iowa Constitution is remedied.

It is recognized back to English law that recovery can be had for the invasion of the right, not just the coinciding injury:

> In the case of Huckle v. Money, 2 Wils. 205 [1799], there was a motion for a new trial, on the ground that the jury had allowed excessive damages. …In

> disposing of the motion the Lord Chief Justice Pratt said: 'That, if the jury had been confined…to consider the mere personal injury only, perhaps twenty pounds damages would have been thought sufficient; but the small injury done…did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them[.]"

Scott v. Donald, 165 U.S. 58, 87 (1897). *See also Nixon v. Herndon*, 273 U.S. 536, 540 (1927) ("That private damage may be caused by such political action and may be recovered for in a suit at law has hardly been doubted for over two hundred years…."); *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)("It would indeed be the purest coincidence if the state remedies for violation of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.").

As for declaratory judgment, its purpose "is to determine rights in advance." *Bormann v. Board of Sup'rs In and For Kossuth County*, 584 N.W.2d 309, 312 (Iowa 1998). It provides no relief for harm done, as no wrong or loss is required. *Id*. Nor is it intended as a singular remedy: "the fact the plaintiff has another adequate remedy does not preclude declaratory judgment relief[.]" *Id*. It is

not a remedy for a completed constitutional violation. Returning to the legislature's role in statutory punishment:

> As to legislation, the ability to raise the issue of defective authority…is an adequate way of enforcing the restrictions on power. The same may not be true with regard to completed executive action. Declaring such action void is insignificant at best.

Katz, 117 U. PA. L. REV. at 39. Nor would mere recognition of constitutional injury inspire citizens harmed to engage in the necessary litigation. As only injured citizens can pursue relief, if "we expect private plaintiffs to carry a major part of the load of enforcing the public policy against [government] illegality, there must be an adequate inducement to sue." Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 515 (1955).

Municipalities can't be expected to police bad actors absent outside pressure, given how unconstitutional conduct arises during normal activity. *Id*. at 494-95. And private citizens can't be expected to do so if the only balm for their injury is court recognition paired with language condemning it to not happen again. *See* Note, *Damage Remedies Against Municipalities for Constitutional*

Violations, 89 Harv. L. Rev. 922, 927 (1976) (injunctions ineffective "in inducing them to stop violating constitutional rights.")

Injunctive relief is the same as none when harm has been done. *See* Katz, 117 U. PA. L. REV. at 50 (*citing Larson v. Domestic & Foreign Commerce Corp*, 337 U.S. 682, 691 n.11 (1949)) (test for injunction to remedy unconstitutional act "is whether relief can be had merely by ordering cessation…. If not, the injunction must be denied.") It is "a preventive remedy to maintain the status quo…and so to protect the subject of the litigation that the fruits thereof shall not be lost to the successful party." *Kent Products, Inc. v. Hoegh*, 61 N.W.2d 711, 716 (Iowa 1953). Where the right is already lost, doubling a duty already violated is no relief.

By offering "a selfish motive for prosecuting the actions, it is possible to bypass the insoluble problem of how to make a police force police itself." Foote, 29 MINN. L. REV. at 516. *See also Wilson v. Nepstad*, 282 N.W.2d 664, 673 (Iowa 1979) ("Municipalities are not going to be motivated…while insulated from their employees' negligence[.]"); Love, 67 CAL. L. REV. at 1263 (absent damages, "[i]t

is doubtful that the remedy…will motivate many aggrieved citizens to act as private prosecutors.").

Damages reflect the importance placed on constitutional guarantees. Note, 93 HARV. L. REV. at 990. The value afforded Art. I rights *and* the importance of ensuring they remain effective was clear at their drafting. *Short*, 851 N.W.2d at 482 (*quoting* 1 *The Debates of the Constitutional Convention of the State of Iowa* 103 (W. Blair Lord rep., 1857)) ("[T]he Bill of Rights is of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights.")

These rights, Art. I, §17 included, "'means something more than liberty permitted. It consists in civil and political rights which are guaranteed, assured, and guarded; …and not held at the mercy and discretion of any one man or of any popular majority.'" *State v. Sargent*, 124 N.W. 339, 346 (Iowa 1910) (*quoting People v. Hurlburt*, 24 Mich. 44, 108 (Mich. 1871)). Damages for their violation are necessary to provide an adequate remedy, one not provided by the common law or presently governed by a statute.

III. Municipal Officers are Individually Liable for Violating Art. I, §17

Appellees' starting point, Appellee.Br. 26, ignores Art. V, §1 of the Iowa Constitution: "The judicial power shall be vested in a supreme court, district courts, and such other courts…as the general assembly may…establish." Iowa Const. Art. V, §1. Such power includes that "'to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, *to ascertain, and by its officers to apply, the remedy*.'" *Cedar Rapids Hum. Rts. Comm'n v. Cedar Rapids Cmty. Sch. Dist., in Linn Cnty.*, 222 N.W.2d 391, 395 (Iowa 1974) (*quoting* 10 Words & Phrases, Court, p. 351) (emphasis added). A right is:

> "founded in the law, and therefore to be ascertained and maintained by the law; whence it follows that there must be some legal remedy…. The remedy is, in our system, to be found in the resort…to the judicial power as administered in courts of justice…and not the less so because in any case the…wrong alleged may…bring in question the efficacy of official acts done by the jurisdiction of other departments of the government. …The power, obviously judicial, of ascertaining and expressing the legal rights of individuals, is in effect the power of protecting those rights from violation by the act or authority, either of individuals or of the legislative departments[.]"

Bryan v. Cattell, 15 Iowa 538, 544–45 (1864) (*quoting Page v. Hardin*, 8 B. Monr. (Ky.) 648 (Ky. Ct. App. 1848)).

Much of Appellees' subsequent arguments assert that at no point before *Godfrey II* was a constitutional damages remedy recognized against municipal officers. This overlooks the authorities relied on in *Godfrey II*. *See McClurg v. Brenton*, 98 N.W. 881, 882 (Iowa 1904) (Des Moines mayor, police chief, and night force captain); *State v. Tonn*, 191 N.W. 530, 535 (Iowa 1923) (damages action available for constitutional violation from search by county attorney and deputies). That those cases discussed violations in terms of trespass doesn't diminish their constitutional nature: "If, in the case of an officer charged with an unconstitutional encroachment, the remedy of trespass…was deemed to be 'given' by the common law, it was nevertheless the Constitution that determined the outcome." Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1134 (1969).

Appellees speculate on the legislature's purpose in including "constitutional provisions" as torts covered by the IMTCA. (Appellee.Br. 26-27 n.6.) Unnoted is the recognition in *Wagner* that

this language contemplates constitutional tort claims: "The IMTCA…applies to 'actions based upon...denial or impairment of any right under any constitutional provision.' …The ITCA, by contrast, does not expressly cover 'constitutional' tort claims." *Wagner*, 952 N.W.2d at 852 (Iowa 2020).

Rather, Appellees look to two cases as inspiring the 1974 amendment of the IMTCA. (Appellee.Br. 27 n.6.) This overlooks how "legislative reaction to our indemnification cases[,]" including Appellees cited cases, "did not require a change in…the definition of tort." *Wilson*, 282 N.W.2d at 670. That change responsed to a case involving a "tort based on a breach of statutory duty." *Id.* (*citing Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (1971)).

Jahnke held there was no liability arising from a breach of statutory duty under the IMTCA as this wasn't encompassed in the tort definition. *Jahnke*, 191 N.W.2d at 783. By amending the definition, the legislature expressly declared such a breach constituted a tort for IMTCA purposes. The legislature simply made "more specific its original intention when…it expended the definition" of tort. *Symmonds v. Chicago, N. St. P. & P.R. Co*, 242

N.W.2d 262, 264 (Iowa 1976). *Wagner*, 952 N.W.2d at 852, n.3 ("Thus, in the 1974 amendment…the legislature has given a wider berth for claims against municipalities[.]")

The idea that including "constitutional provision" in the definition didn't contemplate "authoriz[ing] monetary damages for such claims" ignores how the duty to defend and indemnify was simultaneously amended to include "cases arising under 42 U.S.C §1983" which provide damages for constitutional violations. *See* H.F. 462, GA 65 §7 (1974).

A substantial portion of Appellees' argument is focused on liability to the *municipality*, not its officers, rendering much of it a red herring. This is exemplified by citation to Iowa Code §670.14, which concerns sovereign immunity for the municipality. (Appellee.Br. 28.) This has no bearing on the certified question: "Can municipal officers be sued in their individual capacities for a claimed violation of Article I, § 17 of the Iowa Constitution?" Whether municipalities are directly liable is not before the Court, only the liability of its officers, who have always faced liability for their wrongful acts. *See Montanick v. McMillin*, 280 N.W. 608, 615

(Iowa 1938) ("Public service should not be a shield to protect a public servant from the consequences of his personal misconduct.").

How Art. XII, §1 applies is the same as it applied in *Godfrey II*: "In context, we think the clear meaning of article XII, section 1 is to require the general assembly to put 'this' new constitution into operation and to provide for the transition from government under the prior constitution to the new regime." *Godfrey II*, 898 N.W.2d at 869. *See The Milwaukee*, 14 Iowa 214, 218 (1862) ("Nor was it necessary for the legislature to pass any act in relation thereto to carry any of the provisions of the new Constitution into effect.")

Any requirement for action "by the general assembly are notably absent from the Bill of Rights of article I of the Iowa Constitution with two exceptions" not at issue here. *Godfrey II*, 898 N.W.2d at 869. "We think it clear that section 1 of the schedule article cannot swallow up the power of the judicial branch to craft remedies for constitutional violations of article I." *Id*.

That imposing liability on officers could financially burden a municipality is something this Court historically gives little weight, due to this being the legislature's choice:

> [T]hat financial consequences of legislation must be the primary responsibility of the legislature and cannot weigh heavily in the court's function of interpreting statutory language. We have no reason to believe our legislature did not weigh those factors when enacting and amending chapter 613A.

Wilson, 282 N.W.2d at 674. Mandating defense and indemnification of municipal officers is a policy decision by a legislature that fully understands municipal "fiscal constraints[.]" *Farnum v. G.D. Searle & Co., Inc.*, 339 N.W.2d 392, 397 (Iowa 1983).

While policy decisions are the general province of the legislature, this doesn't deprive the Court of the power to establish a damages remedy: "[N]either the source of the right (the Constitution) nor the nature of the (rather customary) remedy (money damages) would seem to require that the judiciary await explicit legislative authorization before employing the remedy to vindicate the right." Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1543 (1972). While the considerations for a damages remedy may differ from those for injunctive relief "this goes to the appropriateness of the remedy created, however, and not to the Court's remedial power." *Id.*

The questions presented are of remedial power, not policy: "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation…is entitled to redress his injury through a particular remedial mechanism normally available in." *Bivens*, 403 U.S. at 397. The Court has long found a damages remedy where none is statutorily afforded: "[I]n the absence of a special remedy or a special liability created by statute, the law gives to the injured party compensation[.]" *Graessle v. Carpenter*, 30 N.W. 392, 392 (Iowa 1886). This applies for constitutional remedies:

> If it is the absence of contrary legislative expression which frees the courts to engage in remedial creativity in the case of ordinary statutes, why is it not also true that the absence of such expression either in the Constitution or by the Congress enables the courts to fashion remedies protective of constitutional interests in liberty?

Katz, 117 U. PA. L. REV. at 33. *See also* Dellinger, 85 HARV. L. REV. at 1550 (proper for court to recognize constitutional remedy using "the same general standard…used in creating private rights of action from statutory rules.")

Art. I, §17 simply gives "legal recognition to the interests in liberty contained therein." Katz, 117 U. PA. L. REV. at 35. The Court's task is to exercise its judicial power "to make the remedial decisions." *Id*. To the extent this involves policy considerations, the Court is fully capable. *See Howsare v. Iowa District Court for Polk County*, No. 21-1946, 2023 WL 2051345, *4 (Iowa Feb. 17, 2023) ("[W]ith respect to allegedly unlawful pretrial detention, "[i]n the absence of any other sanction in statute or rule, the remedy for a violation ... is release from detention rather than dismissal of the charge."); *Venckus*, 930 N.W.2d at 802 (reflecting on history of policy consideration in judicial development of judicial function immunity); *Liggett v. Shriver*, 164 N.W. 611, 612-13 (Iowa 1917) (Court looks "to Constitution, statutes, and judicial decisions of the state, to determine its public policy…."); Katz, 117 U. PA. L. REV. at 39 (*quoting* B. Cardozo, *The Nature of the Judicial Process* 113 (1921)) ("'If you ask how [the judge] is to know when one interest outweighs another,…he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."); Hill, 69 COLUM. L. REV. at 1151 ("Undoubtedly

there is congressional competence to deal with such matters, but the course of Supreme Court decision hardly suggests it to be a primary competence.")

It is the Court's power and duty to determine whether a constitutional violation occurred and to provide a remedy where one is not preexisting. Hill, 69 COLUM L. REV. at 1154. Certainly, once it has done so, the legislature may rebalance policy concerns so long as the remedy remains adequate. *Godfrey II*, 898 N.W.2d at 880 (Cady, J., concurring) ("I concur in the opinion of the court to the extent it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy."). The legislature is "free to revise with an adequate alternative any remedy which is not determined by the Court to be indispensable…." Dellinger, 85 HARV. L. REV. at 1549. Yet "[o]n the issue of adequacy, the decision-maker is the court." *Godfrey II*, 898 N.W.2d at 875.

Looking again at the IMTCA, Defendants contend because the ITCA requires constitutional torts to "go forward only against the State unless" an act was outside the scope of employment, that the

same should be true for municipal employees. (Appellee.Br.44.) This ignores the differences between the code chapters. Per the ITCA, where the attorney general certifies or the court finds in-scope actions, "the suit…shall be deemed" as against the State. Iowa Code §669.5(2). Nothing in Chapter 670 provides the same.

Appellees try to bend the language of Iowa Code §670.2(1) to mean the same as Iowa Code §669.5. (Def.Br.45.) But as the Court has recognized, Iowa Code §670.2 doesn't prohibit actions against municipal officers individually:

> [W]e did hold…an injured party could sue both the municipality and the municipal employee for a particular tort committed by the employee. …[S]ince the Act expressly requires local governments to defend and indemnify these employees…it would be illogical to conclude that another provision of the Act forbid them from being sued.

Thomas v. Gavin, 838 N.W.2d 518, 524 (Iowa 2013) (*citing Nelson v. Steiner*, 262 N.W.2d 579, 581-82 (Iowa 1978)). As Appellees argue elsewhere, this Court is "nonplussed" by the distinctions between the IMTCA and ITCA, given how any "purported inconsistency is actually a legislative policy decision of long standing." *Venckus*, 930 N.W.2d at 809. (*See* Appellee.Br.38.)

IV. Neither *Baldwin* Immunity nor Statutory *Harlow* Immunity is Available

The Court has stated *Baldwin* immunity is not applicable "in *every* constitutional tort." *Lennette v. State*, 975 N.W.2d 380, 394 n.4 (Iowa 2022). Appellees don't argue how "all due care" immunity informs or is informed by Art. I, §17's cruel and unusual punishment clause. *See Baldwin*, 915 N.W.2d at 281 ("constitutional claims other than unlawful search and seizure may have a higher mens rea requirement" and "may take more than negligence just to violate the Iowa Constitution."); Friesen, 63 TEX. L. REV. at 1283 ("Defenses to the action should have the same source as the duty: the constitutional provision itself.")

Appellees conflate "all due care" immunity with federal qualified immunity to support its application to Art. I, §17 torts. (Appellee.Br.47-48.) Nothing in *Baldwin II* indicates this defense is an immunity from suit; to the contrary: "a defendant must *plead and prove* as an affirmative defense that she or he exercised all due care to comply with the law." *Baldwin II*, 915 N.W.2d at 281. Given the rejection of *Harlow* immunity in *Baldwin II* as "an overly

legalistic and therefore overly protective shield," there is no reason to believe "all due care" immunity is an immunity from suit. *Id.* (*quoting* John C. Jeffries Jr.*, The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 281 (2013). Rather, it is subject to the defendant presenting proof to establish it.

There is no irony in Appellant's arguments on Iowa Code §670.4A, which Appellees leave to the amicus to directly address. (Appellee.Br.48-50.) Appellant conceded in initial briefing the legislature can regulate claims, but it can't invade the *judicial power* to adjudicate constitutional issues or define a constitutional violation. (Appellant.Br.46-57.)

Contrary to the amicus' assertions, Appellant's arguments are directly within the "eschewed" analytical framework as they address impairment of constitutional duties. Iowa Code §670.4A places additional substantive burdens on plaintiffs seeking relief from constitutional violations. Immunity is "of substantive law[,]" distinguished from procedural components. *Wagner*, 952 N.W.2d at 858-59. *See also Schmitt v. Jenkins Truck Lines, Inc,* 149 N.W.2d 789, 791 (Iowa 1967) (*quoting State v. Birmingham*, 392 P.2d 775,

776 (Ariz. 1964) ("'[S]ubstantive law is that…which *creates, defines and regulates rights*; …procedural law is that which prescribes the *method* of enforcing the right Or obtaining redress[.]'")

Iowa Code §670.4A(1) requires clearly established law governing a constitutional violation to exist at the time a violation occurs to impose liability. The plaintiff is burdened to prove it existed. The statute, read as a whole, makes this clear. *See Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole rather than looking at words and phrases in isolation.")

Plaintiff must assert clearly established law existed at the time of the violation. Iowa Code §670.4A(3). *See Victoriano v. City of Waterloo*, 984 N.W.2d 178, 181 (Iowa 2023) ("three components" of §670.4A(3) all imposing obligations on plaintiff). Defendants need to do nothing. Immunities that impose no burden on defendants, but protect them from liability aren't defenses, but elements:

> We do not believe the immunity from suit or limitation of liability provided by section 613.18 is an affirmative defense that must be raised in the pleadings and proven by the defendant. …[P]laintiff must establish the seller is not in the newly defined

> class of sellers immune from suit or whose liability is precluded by the statute. The plaintiff must prove the elements of its case, including proof that the seller is not immune….

Erickson v. Wright Welding Supply, Inc, 485 N.W.2d 82, 86 (Iowa 1992). *See also Meade v. Christie,* 974 N.W.2d 770, 779 (Iowa 2022) (immunity statute "requires a plaintiff to show a director's specific intent" before liability imposed); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 355 (Iowa 1994) ("The burden is clearly on the plaintiffs to raise and negate *Noerr* immunity."); *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (plaintiff must establish three elements to negate immunity under Iowa Code §85.20).

In context, Iowa Code §670.4A(1) requires plaintiffs to prove the conduct violating their rights had already been found to violate those rights before they obtain relief. While a statute "may furnish a remedy less convenient than the old," if the remedy is "destroyed, or so burdened with new conditions and restrictions as to make it hardly worth pursuing" it is unconstitutional. *McCormick v. Rusch*, 15 Iowa 127, 135 (1863). By making the remedy contingent on the

plaintiff proving clearly established law, Iowa Code §670.4A unconstitutionally restricts the remedy.

Comparison of substantive immunity to procedural limitations is unavailing. A statute of limitations isn't an element of a claim as, "A party seeking to establish a statute of limitations bar has the burden of proving the bar." *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 157 (Iowa 1984). Procedural requirements "such as the…statute of limitations" which "don't go to the ultimate questions of liability and damages" aren't deprivations "of an adequate remedy." *Wagner*, 952 N.W.2d at 858 (Iowa 2020).

It is long recognized:

> The distinction between general statutes of limitation and the…restrictions embraced in statutes creating rights…is that the general statute of limitation is procedural only, and affects the remedy only, while the so-called condition precedent to suit statutes prescribe the right itself and if not complied with…affects both the right and the remedy.

Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970). "[T]he initial rights are different" with limitations on tort actions arising from "a policy that such…should be brought within the time limit to prevent stale claims, frauds, unreasonable results, et cetera." *Id.*

Limitations for statutory rights reflect "a legislative judgment that the cause should be brought within a specified time." *Id*. This is true of Iowa Code §670.5, which makes the time limitation "an inherent element of the right so created and the limitation of the remedy is likewise a limitation of the right." *Id*.

This is also what distinguishes the Iowa Code §670.4 exceptions from Iowa Code §670.4A. Each appears to be an affirmative defense which defendants must plead and prove. This is certainly true of §670.4(1)(b), cited by amicus. (Amicus.Br.13-14, n.4.) *See D&W Development, Inc. v. City of Milford*, No. 12-0579, 2013 WL 2145735, *2 (Iowa Ct. App. 2013) ("affirmative defense" of "statutory immunity…from claims in connection with the assessment or collection of taxes.").

The State's position appears to be that applying Iowa Code §670.4 immunities would affect a "wholesale barring [of] categories of constitutional tort claims." (Appellee.Br.13.) Appellant accepts the State's concession that the "substantive barriers to liability in [Iowa Code §670.4] do not apply." *Wagner*, 952 N.W.2d at 858.

Iowa Code §670.4A is a substantive limitation of a constitutional, not statutory, right. The legislature is "clearly forbidden" from using a substantive statute to deny an adequate remedy for constitutional violations. *See Godfrey II*, 898 N.W.2d at 880 (recognizing "a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy.") It can provide an alternate remedy where that remedy is adequate. *Id*. By imposing statutory *Harlow* immunity as an element of constitutional torts, Iowa Code §670.4A deprives plaintiffs of the damages remedy available for Art. I, §17.

Iowa Code §670.4A(3) deprives the Court of its power to adjudicate new constitutional violations. Amicus notes §670.4A(3) doesn't mandate an order of consideration between whether a plausible violation is pled or the law clearly established. (Amicus.Br.16.) This is true. This doesn't mean the Court's power is not impeded by §670.4A(3).

"The only issue when considering a motion to dismiss is the 'petitioner's right of access to the district court, not the merits of his allegations.'" *Hawkeye Foodservice Distribution, Inc. v. Iowa*

Educators Corp., 812 N.W.2d 600, 609 (Iowa 2012) (*quoting Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001)). Assuming a cause of action for the violation alleged can be found at the pleadings stage, what Appellees and the amicus fail to address is the bar created by the requirement to plead clearly established law itself. This doesn't originate in the federal approach, as this pleading requirement doesn't exist federally. The defendant must raise it as part of qualified immunity in a federal matter. The effect of requiring clearly established law to be pled is that unless it can be reasonably argued to exist, it can't be pled, requiring dismissal with prejudice. The legislature has effectively barred claims for violations of constitutional rights that have not previously been established.

"Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). It can't be legitimately contended the right to petition under Art. I, §20 doesn't afford the right to access the courts. Nor can it be denied this right

is meaningless absent the Court's exercising its judicial power to adjudicate a colorable claim.

CONCLUSION

Art. I, §17 meets the test for self-effectuation and the test is to be applied. Damages are necessary to remedy violations of the cruel and unusual punishment clause, which no common law tort nor administrative regulations can provide. Individual claims against municipal officers are available. *Baldwin* immunity is inapplicable to Art. I, §17 claims, and the statutory *Harlow* immunity is unconstitutional. Each certified question should be answered in Appellant's favor.

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