IN THE SUPREME COURT OF IOWA

Supreme Court No. 22-1727

U.S. Dist. Ct. – Southern Dist County No. CV-00167-RGE-HCA

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
HONORABLE REBECCA GOODGAME-EBINGER

DEFENDANTS-APPELLEES' BRIEF AND ARGUMENT

WILFORD H. STONE, AT0007699
DANIEL M. MORGAN, AT0013452
LYNCH DALLAS, P.C.
526 Second Avenue SE
Cedar Rapids, IA 52406-2457
Telephone: 319.365.9101
Facsimile: 319.365.9512
E-Mail: wstone@lynchdallas.com
dmorgan@lynchdallas.com
ATTORNEYS FOR
DEFENDANTS/APPELLEES
GINA JOHNSON, JANE DOE, C.J. RYAN,
DEAN NAYLOR, MATT McCLEARY and
MUSCATINE COUNTY, IOWA

KIMBERLY GRAHAM
MEGHAN GAVIN
POLK COUNTY ATTORNEY
111 Court Ave., Rm., 340
Des Moines, IA 50309
Telephone: 515.286.3341
Facsimile: 515.286.3314
E-Mail:
Meghan.gavin@polkcountyiowa.gov
ATTORNEYS FOR POLK COUNTY
DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ROUTING STATEMENT

Defendants agree with Richardson that the Iowa Supreme Court should retain this case. It presents substantial issues of first impression (Iowa R. App. P. 6.1101(2)(c)) related to the expansion of direct constitutional tort claims from the State to municipalities and municipal employees, and relatedly, the expansion of direct constitutional tort claims to include alleged violations of Article I, § 17 of the Iowa Constitution.

STATEMENT OF THE CASE

Plaintiff/Appellant Silas Richardson ("Richardson") brought suit against Muscatine County and several of its employees[1] ("Muscatine County Defendants") along with Polk County and several of its employees[2] ("Polk County Defendants") (collectively referred to as "Defendants") asserting numerous claims against the Defendants for injuries he sustained when he was attacked by a fellow inmate while at the Polk County Jail ("PCJ") following a transport from the Muscatine County Jail ("MCJ"). (First Amended Complaint at Law and Jury Demand filed 8/18/21).

[1] The individually named Muscatine County Defendants include Gina Johnson, "Jane Doe," C.J. Ryan, Dean Naylor and Matt McCleary.

[2] The individually named Polk County Defendants include Jordan Rabon, Randall Rodish, and Kevin Schneider.

On September 12, 2022, Judge Rebecca Goodgame-Ebinger for the United States District Court for the Southern District of Iowa entered an order partially granting and partially denying Defendants' respective motions to dismiss. (Order RE: Pending Motions to Dismiss). However, Judge Goodgame-Ebinger reserved ruling on Defendants' request to dismiss Richardson's claims allegedly arising from a violation of Article I, § 17 of the Iowa Constitution. *Id*. Judge Goodgame-Ebginer instead directed the parties to propose several questions for certification to the Iowa Supreme Court. On October 13, 2022, the District Court entered an order approving the parties proposed certified questions as follows:

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?

(Order RE: Joint Proposal of Questions to be Certified).

The Defendants respectfully request that this Court answer the first question in the negative which would resolve the remaining three (3) certified questions. Alternatively, if this Court answers the first question in the affirmative, the Defendants request that the Court answer the second question in the negative which would resolve the third certified question. Outside the foregoing, if this Court answers the first two (2) certified questions in the affirmative, the Defendants request that the Court then answer the final two (2) certified questions in the affirmative.

STATEMENT OF THE FACTS

Plaintiff Silas Richardson ("Richardson") is a convicted felon committed to federal custody with the Federal Bureau of Prisons. (Original Notice, ¶1). However, at the time of the interaction giving rise to this action, Richardson was being held at the Muscatine County Jail ("MCJ") in Muscatine County, Iowa on a United States Marshall Service ("USMS") hold. This action arises from a transport that occurred on August 19, 2019 which moved Richardson, along with another inmate named Kelly Mitchell ("Mitchell") from the MCJ to the Polk County Jail ("PCJ") in Polk County, Iowa. (Petition at Law and Jury Demand, ¶17). Richardson alleges that there was a "keep separate" order between him and Mitchell because there was a possibility that Mitchell would be violent towards Richardson if the two were placed together. Petition, ¶¶19-21). Despite the "keep separate" directive, Richardson alleges that Deputy Gina Johnson and Deputy Jane Doe transported Richardson and Mitchell in the same vehicle to the PCJ. (Petition, ¶26). Upon arrival, Richardson and Mitchell were placed in a common holding cell and Richardson claims that once Polk County jail officials removed his and Mitchell's handcuffs to eat lunch, Mitchell proceeded to assault Richardson causing injury. (Petition, ¶¶29-32).

On March 30, 2021, Richardson filed his Petition in the Iowa District Court for Polk County, Iowa which was later removed to the U.S. District Court for the Southern District of Iowa on June 7, 2021. In his Petition, Richardson alleges that Defendants Gina Johnson ("Johnson") and Jane Doe ("Doe") violated his state and federal constitutional rights by failing to protect him from assault by Mitchell. (Petition). On August 6, 2021, Polk County filed a partial motion to dismiss Richardson's original petition. (Polk County Defendants' Pre-Answer Motion to Dismiss and Request for Judicial Notice). On August 11, 2021, the Muscatine County Defendants also filed a partial motion to dismiss and a joinder in Polk County's motion to dismiss. (Defendants Johnson, Doe, Ryan, Naylor, McCleary and Muscatine County's Partial Motion to Dismiss, Joinder to Polk County Defendants' Motion to Dismiss).

On August 30, 2021, Richardson filed an amended complaint. (First Amended Complaint at Law and Jury Demand). The Polk County and Muscatine County defendants filed renewed motions to dismiss on September 1, and September 2, 2021 respectively. (Polk County Defendants' Pre-Answer Motion to Dismiss First Amended Complaint and Request for Judicial Notice, Defendants' Johnson, Doe, Ryan, Naylor, McCleary and Muscatine County's Partial Motion to Dismiss). Richardson filed a resistance to both motions to

dismiss on September 15, 2021. (Plaintiff's Resistance to Polk County Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(B)(6)). On September 12, 2022, the District Court for the Southern District of Iowa entered an order granting in part and denying in part the Defendants' motions to dismiss. Additionally, the District Court withheld ruling on several of Richardson's claims and directed the parties to certify several questions to the Iowa Supreme Court for resolution.

On October 13, 2022, the District Court entered an order approving the parties proposed certified questions as follows:

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?

(Order RE: Joint Proposal of Questions to be Certified to the Iowa Supreme Court).

STANDARD OF REVIEW

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

ARGUMENT

I. Article I, § 17 of the Iowa Constitution does Not Recognize a Direct Cause of Action for an Alleged Failure to Protect an Inmate from Assault by Another Inmate

A. Scope Of Review And Preservation

The Defendants agree with Richardson's statements on preservation of error. The Defendants raised the issue of whether a direct cause of action exists under Article I, § 17 of the Iowa Constitution,, otherwise known as a *Godfrey* claim, for an alleged failure to protect an inmate from assault by another inmate and the Federal District Court withheld ruling on this question pending a certified answer from the Iowa Supreme Court. (Order RE: Pending Motions to Dismiss, at 17). The issue is therefore preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine

of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Argument

Richardson argues it is clear Iowa Constitutional tort claims, known as *Godfrey* claims, apply to municipalities and municipal employees. *See Godfrey v. State*, 898 N.W.2d 844 ("*Godfrey II"*) (Iowa 2017). The Defendants disagree. The Iowa Supreme Court has never directly held *Godfrey* claims apply to municipalities or their employees, though it has decided ancillary issues in cases involving municipalities and municipal employees where the basic premise of such claims was not challenged. The District Court therefore correctly withheld ruling on Richardson's Iowa constitutional tort claim for an alleged violation of Article I, § 17 of the Iowa Constitution. Further, this Court should decline to expand *Godfrey* claims to municipalities and their employees.

1. The Iowa Supreme Court has Not Recognized a Direct Cause of Action for Violation of Article I, § 17 of the Iowa Constitution

In *Godfrey II*, the Iowa Supreme Court did not hold that every alleged constitutional deprivation created a private cause of action for money damages. *Id.* at 881. *Godfrey II* only involved alleged violations of the Iowa Constitution's due process clause and equal protection clauses, and the only direct constitutional claims that survived appeal were the plaintiff's claims

under the due process clause. Instead the Court recognized the potential for such direct constitutional claims and adopted a multi-factored test. *Id.* Sadly in the five years since *Godfrey II*, this Court has not had a single occasion to apply the plurality's multi-factor test to clauses beyond the due process and equal protection clauses.

Though the *Baldwin*, *Venckus*, and *Wagner* decisions went on to decide subsidiary issues related to the Iowa Supreme Court's new constitutional tort money damage remedy, none directly grappled with the issue of whether *Godfrey II* claims should be expanded to constitutional provisions beyond the equal protection clause or due process clause. *Baldwin v. City of Esterville*, 915 N.W.2d 259 (Iowa 2018) [hereinafter *Baldwin I*], was filed in federal district court before the *Godfrey II* case was even decided. In that case, this Court was presented only with certified questions addressing the applicability of quality immunity. The federal court did not certify a question regarding whether a direct constitutional claims existed under Iowa's search and seizure provision, Article I, § 8. One year later, this Court answered a second set of certified questions about the applicability of the IMTCA and punitive damages, but once again was not asked to opine whether a direction constitutional claim even existed. *Baldwin v. City of Esterville*, 929 N.W.2d 691 (Iowa 2019) [hereinafter *Baldwin II*]. And in reviewing the federal

district court proceedings in *Baldwin*, the defendants never raised that issue, either. *See Baldwin v. Estherville,* No. C 15-3168-MWB, 2017 WL 10290551, at *1 (N.D. Iowa Oct. 2, 2017) , certified question answered sub nom. *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018).

Just weeks later in *Venckus v. City of Iowa City*, 930 N.W.2d 792 (Iowa 2019), this Court addressed whether the statute of limitation in the IMTCA applied to constitutional claims as well as the applicability of common law prosecutorial immunity. Again, the Court was not asked to address whether direct constitutional claims existed beyond the due process and equal protection clauses, and, as will be discussed below, whether such claims exist against municipalities and their officers. In deciding *Venckus*, the Court noted there were fundamental questions about *Godfrey* claims that remained unsettled, including "whether a *Godfrey*-type claim can be asserted for alleged violations of the Iowa Constitution other than those recognized in *Godfrey* . . . ." *Id.* at 799 n. 1 (emphasis added).

The federal court certified four additional questions on *Godfrey* claims to the Court in *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020) . Once again, the certified questions did not touch on the issue of whether *Godfrey* claims were viable beyond the due process clause or equal protection clause. Finally, in *Lennette v. State*, 975 N.W.2d 380 (Iowa 2022) , this Court held that no

constitutional rights were violated so it did not squarely address whether a direct cause of action existed under either the unalienable right clause or the search and seizure provision. In summary, the post-*Godfrey* jurisprudence has simply ignored the preliminary question of whether this Court need create additional direct causes of action beyond the due process and equal protection clauses.

Whether the bail and punishments clause of the Iowa Constitution is "self-executing" such that this clause can independently support a money damage claim for their alleged violation is therefore a matter of first impression. In *Godfrey II* the plurality held that "[a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected . . . and is not self-executing when it merely indicated principles. . . . In short, if [it is] complete in itself, it executes itself." *Id.* at 870 (quoting *David v. Burke*, 179 U.S. 399, 403, 21 S. 210, 212 (1900)). The *Godfrey II* plurality determined that article I, sections 6 (the equal protection clause) and 9 (the due process clause) were self-executing in the context of an employment discrimination case. *Godfrey II*, 898 N.W.2d at 870—72.

The plurality relied upon the *Bivens*[3] rationale for judicially crafting a cause of action for money damages under these constitutional provisions. *Id.* *Bivens* has been all but officially overturned by the U.S. Supreme Court. *See Egbert*, 142 S.Ct. at 1809 ("[I]f we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution."); *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) ; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017) . And although the language in *Bivens* creating a federal remedy for alleged constitutional violations was broad, *Bivens* never evolved into a federal equivalent of a Section 1983 claim. Instead, the U.S. Supreme Court steadily contracted the availability of the *Bivens* judicial remedy. *See Bush v. Lucas*, 462 U.W. 367, 368 (1983) (a comprehensive remedial scheme precludes an implied First Amendment cause of action); *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007) (rejecting expansion of *Bivens* remedy to a new Fourth Amendment context because allowing the suit could lead to a wave of litigation and because of the difficulty of proving whether federal officers were acting with a retaliatory motive).

[3] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) authorized an implied money damage claim under the Fourth Amendment against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations.

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

The bail and punishments clause is poor vehicle for *Godfrey II*'s first expansion. Defendants recognize that a few states have recognized the self-executing nature of similar provisions.[4] Such decisions, however, have failed to recognize the constant interplay between legislature and what can be deemed cruel and unusual punishment. Punishments, in the strictest terms, are creatures of statute. The legislature sets the terms and length of

[4] It is notable that the Michigan Constitution prohibits cruel or unusual punishment. Mich. Const. art. I, § 16.

incarceration for various offenses as well as monetary fines, registrations, and another forms types of sentencing. The legislature authorizes the type of punishment available. In evaluating cruel and unusual punishment claims, courts look to legislative pronouncements to determine "evolving standards of decency." *See Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005). Thus while art. I, § 17 may not explicitly require a legislative enactment, its meaning, its effect is dependent on legislative enactments.

In *Conklin v. State*, the Iowa Court of Appeals held that the Iowa Constitution does not create a private cause of action for alleged violations of Article 1, Section 17 of the Iowa Constitution. 863 N.W.2d 301, *3 (Table), 2015 WL 1332003 (Iowa Ct. App. 2015) . Although issued two (2) years prior to *Godfrey II*, the Iowa Court of Appeals holding in *Conklin*, coupled with the Iowa Legislature's recent addition of section 670.14 to the Iowa Code, is strong evidence that absent an express legislative mandate, a private cause of action for violation of Article 1, Section 17 of the Iowa Constitution should not be implied by the courts.

Even if this Court determines that Iowa's cruel and unusual provision is self-executing, it does not necessarily follow there is a direct cause of action for monetary damages. As Chief Justice Cady recognized, a judicially-created direct claim for monetary damages is only necessary "when the legislature has

not provided an adequate remedy." *Godfrey II*, 898 N.W.2d at 880 (Cady, C.J., concurring in part and dissenting in part). Richardson dismisses this question out of hand, noting that neither the Iowa Tort Claims Act nor the Municipal Tort Claims Act creates a cause of action. While undoubtedly true, such a conclusory comment hardly addressed the multitude of statutory and common law remedies available against municipalities. Unlike the ITCA where immunity is the rule and liability the exception, the converse is true under the IMTCA. The General Assembly has broadly waived sovereign immunity for municipalities and municipal officers for statutory, common law, and constitutional violations, subject only to an explicit list of exceptions.

The issue presented in *Godfrey II* was whether the Iowa Civil Rights Act was an adequate remedy for Mr. Godfrey's alleged equal protection violation. *Id.* As a result, Chief Justice Cady only addressed the availability of an adequate *statutory* remedy. Whether the "adequate remedy" is created by statute or common law is a distinction without a difference for purposes of determining whether this Court should create a direct constitutional cause of action.[5] As Richardson recognized in both briefing and in his Complaint, a

[5] While negligence is a common law cause of action, Richardson's ability to sue the municipal defendants is set forth in the General Assembly's waiver of sovereign immunity in the IMTCA. As a result, even his negligence action is an "adequate remedy" provided by the legislature.

negligence cause of action is available to redress any of the alleged harms presented here. In fact, Richardson's burden of proof for the negligence claim is less exacting than his proposed constitutional violation. Richardson has not articulated why a common law negligence claim and resulting damages is not adequate. Other common law claims are likewise available for cruel and unusual punishment claims—assault, battery, false imprisonment, and the like.

Richardson paradoxically argues that constitutional claims "seek to do more than compensate an individual for harm from a violation, damages are the historic remedy for those violations." Richardson, however, has not articulated what—if any—form of damages are unavailable to him under a negligence claim but would be available to him under a constitutional claim. Richardson further ignores that nothing prohibits him from bringing a declaratory action alleging that his constitutional rights were violated. Under such an action, his larger, societal concerns could be addressed and prospective injunctive relief afforded. In summary, even if this Court determined that article I, § 17 is self-executing, there is no need to judicially create a cause of action where the legislature has provided Richardson numerous, adequate remedies.

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

As a starting point, there is no provision of the Iowa Constitution that independently authorizes an Iowa constitutional tort damage claim against municipalities or municipal employees. Further, the legislature is the creator of Iowa's political subdivisions and it has not statutorily authorized Iowa constitutional damage claims against municipalities[6]. *Bd. of Water Works*

[6] The Defendants recognize that Iowa Code § 670.1's definition of "tort" includes apparent violations of "constitutional provisions." This language does not specifically authorize direct constitutional claims for monetary damages. The bill adding "constitutional provisions" to the definition of "tort" was passed in 1974. A direct cause of action for monetary damages for an alleged violation of and Iowa Constitutional provision did not exist at the time this bill was passed.

Additionally, the inclusion of "constitutional provisions" in the definition of "tort" in § 670.1 was part of a broader amendment to the IMTCA that was intended to make it the exclusive remedy against municipalities and municipal employees, not allow new types of claims. This was needed because after the original passage of the IMTCA, you could still proceed against municipal employees individually when they did not violate municipal law. This was because the original IMTCA's language only applied when an officer or employee was enforcing a local ordinance or regulation. *See Thomas v. Gavin*, 838 N.W.2d 518, 522 (Iowa 2013). Two cases decided by the Iowa Supreme Court allowed claims against municipal employees after the original IMTCA was passed so the legislature saw a need to expand the language to make the IMTCA the exclusive remedy for all violations by municipal employees. *Id.* (citing *Vermeer v. Sneller*, 190 N.W.2d 389 (Iowa 1971); *Anderson v. Calamus Cmty. Sch. Dist.*, 147 N.W.2d 643 (Iowa 1970)).

Trustees of City of Des Moines v. SAC County Bd. of Supervisors, 890 N.W.2d 50, 60 (Iowa 2017) ("Counties and other municipal corporations are, of course, the creatures of the legislature . . . .") (quoting *Charles Hewitt & Sons Co. v. Keller*, 223 Iowa 1372, 1377, 275 N.W. 94, 97 (1937). In 2021 the Iowa legislature made explicit that it has not waived governmental immunity for municipalities for claims for money damages under the Constitution of the State of Iowa. Iowa Code § 670.14 ("This chapter shall not be construed to be a waiver of sovereign immunity for a claim for money damages under the Constitution of the State of Iowa.").

Therefore, it is no surprise that Iowa's highest court has not, on its own initiative, expanded civil damage liability to Iowa's 944 cities, 99 counties

---

At the time of the inclusion of "constitutional provisions" to the definition of tort, the only constitutional claims which did exist were claims for prospective injunctive relief only. *See Ex parte Young*, 209 U.S. 123, 155–56, 28 S. Ct. 441 (1908). There is no evidence that the General Assembly intended to authorize monetary damages for such claims in such a subtle manner. Instead the inclusion of "constitutional provisions" to the definition in § 670.1 merely funneled the existing, but narrow field of constitutional claims into the IMCTA.

In summary, the addition of "constitutional provisions" to § 670.1 of the IMTCA did not authorize a new field of direct constitutional claims for monetary damages, but was intended to make it clear that the IMTCA was the exclusive remedy for all alleged violations by municipal employees. The Iowa Legislature's recent passage of § 670.4A and § 670.14 in 2021 regarding qualified and sovereign immunity is yet another effort to clarify the bounds of municipal liability.

and thousands of municipal employees for alleged violations of the Iowa Constitution. (listing Iowa cities, site last visited June 28, 2022).[7] Doing so would invade the province of the legislature. Iowa Const. art. XII, § 1 ("The general assembly shall pass all laws necessary to carry this constitution into effect."); art. III, § 1 ("The powers of the government of Iowa shall be divided into three separate departments – the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.")); *see also Godfrey II*, 898 N.W.2d at 884 (Mansfield, J. dissenting) ("Under our form of government, . . . the function of adjusting remedies to rights is a legislative responsibility rather than a judicial task . . . .") (quoting *Bandoni v. State*, 715 A.2d 580, 595—96 (R.I. 1998)).

Nor do constitutional torts against municipalities find support in Iowa common law. *Lough v. City of Estherville*, 122 Iowa 479, 485, 98 N.W. 308, 310 (1904)) (affirming dismissal of money damage claims against mayor and

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

city council members for alleged constitutional violation related to municipal debt, and stating "While a violation of the Constitution in the respect in question is to be condemned, and the courts should interfere to prevent such violation whenever called upon so to do, yet we are not prepared to adopt the suggestion that an action for damages may be resorted to . . . ."); *cf. Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996)) (affirming dismissal of damage claim against City of Des Moines and its employees based upon Iowa's equal protection clause).

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

Post-*Godfrey II*, the proposition that direct constitutional tort claims are available against municipalities in the same way they are against the State has

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

Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966)) ("We are satisfied political subdivisions such as cities, school district and counties are neither agencies of the state nor corporations as those terms are employed and defined in the [Iowa Tort Claims Act] and are not included within its clear intent and purpose.")).

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

> In *Godfrey v. State*, this court held the State of Iowa and state officials acting in their official capacities could be sued directly

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

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

Neither *Baldwin* case directly decided the foundational issue of whether these types of claims apply to parties other than the State of Iowa and state officials acting in their official capacities. There was one certified question in *Baldwin I*: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, section 1 and section 8 of the Iowa Constitution?" *Baldwin v. City of Estherville ("Baldwin I")*, 915 N.W.2d at 265. The court held qualified immunity is available and formulated a test. *Id.* Likewise, in *Baldwin II*, though six certified questions were presented to the Iowa Supreme Court, the applicability of a *Godfrey* claim against a municipal defendant was neither addressed nor decided. *Baldwin v. City of Estherville ("Baldwin II")*, 929 N.W.2d 691, 701 (Iowa 2019). Once again, the procedural posture of these cases matters—as certified

question cases, the Iowa Supreme Court was obligated to restrict its answers to the facts provided by the certifying court. *Baldwin II*, 929 N.W.2d at 693.

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

Finally, *Wagner v. State*, 952 N.W.2d 843, 857 (Iowa 2020), involved claims against the State and State officials. In that case the Iowa Supreme Court reiterated its holding in *Godfrey II*, stating: "In *Godfrey II*, we held that under certain circumstances, an aggrieved party could bring a constitutional claim against the State even though the legislature had not enacted a damages remedy for violation of that constitutional provision." The *Wagner* court also construed its prior constitutional tort cases narrowly, noting that it had never held previously that an individual capacity claim could be brought under the Iowa Constitution. *Id.* at 850.

Richardson ignores the factual and procedural contexts of the Iowa Supreme Court's constitutional tort cases, preferring broad stroke liability for all government officials. He also ignores the text of the Iowa Constitution and

its command that the legislature be the branch to make our state's laws. Given the lack of either legislative authorization or common law precedent permitting Iowa constitutional tort claims against municipalities or municipal employees, the District Court correctly withheld ruling on Richardson's constitutional claim. This Court should decline to recognize a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution.

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

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

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

For over 160 years, no direct constitutional damage claim was recognized in Iowa's courts. *Godfrey II*, 898 N.W.2d at 884 (Mansfield, J. dissenting). The *Godfrey II* decision was supported by a plurality of the Iowa Supreme Court, and Justice Cady's key concurrence in part did not open the floodgates to all direct constitutional tort claims. It provided a narrow opening for certain employment discrimination claims against State of Iowa officials to proceed. *Id.* at 880. But the *Godfrey II* decision nonetheless set Iowa courts down a path to make numerous additional policy decisions. Between the

Baldwin and *Wagner* cases, there have been eleven certified questions decided by the Iowa Supreme Court to say what Iowa law is regarding implied constitutional tort claims. A sampling of those policy choices includes: Are punitive damages available against the State in *Godfrey* claims? What statute of limitations applies? Are Iowa's tort claims acts applicable to *Godfrey* claims? What parts of Iowa's tort claims acts apply—the substantive or procedural portions? What about attorney fees? Are there both individual capacity and official capacity claims? There is no end in sight to the court's policymaking obligations if it continues down this road, expanding the *Godfrey* remedy to new constitutional provisions and new classes of defendants. The Iowa Supreme Court has previously declined to create rights and remedies when doing so implicates policy considerations more appropriate for the legislature. *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678 (Iowa 2013) (declining to imply a punitive damage remedy into the Iowa Civil Rights Act and recognizing "the issue is injected with public policy considerations, making it an issue particularly appropriate for legislative consideration. . . ."); *Boyer v. Iowa High Sch. Athletic Ass'n*, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (1964) (declining plaintiffs' request to judicially abrogate the doctrine of governmental immunity, and stating that "whether or not the state or any of its political subdivisions or governmental

agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state."); *cf. Garrison v. New Fashion Pork, LLP*, 977 N.W.2d 67, 85 (Iowa 2022) ("The people, then, have vested *the* legislative authority, *inherent in them*, in the general assembly.") (quoting *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 18—19 (1870)) (emphasis in original).

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

> [W]e have come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power." At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a "range of policy considerations . . . at least as broad as the range . . . a legislature would consider." Those factors include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide." Unsurprisingly, Congress is "far more competent than the Judiciary" to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain.

Id. at 1797 (citations omitted). In *Egbert* the Supreme Court even declined to extend the *Bivens* remedy to a fact pattern that it recognized was "parallel" to the *Bivens* facts—noting that even though *Bivens* was an excessive force claim under the Fourth Amendment and the *Egbert* case also presented an excessive

force claim under the Fourth Amendment, that the judiciary remained unsuited to decide whether such a claim, in this particular context, was appropriate. *Id.* at 1799.

Richardson claims the court should ignore the policy concerns that counsel against constitutional tort claims against municipalities. But the weighing of policy concerns is the very reason we elect lawmakers and require laws to be made through the people's representatives. *Id.* at 1809—10 (Gorsuch, J. concurring) ("When might a court ever be 'better equipped' than the people's elected representatives to weigh the 'costs and benefits' of creating a cause of action? It seems to me that to ask the question is to answer it. To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation."). For the reasons set forth below, this Court should decline to extend *Godfrey II* to municipalities and their employees. The legislature is better suited to weigh the policy considerations associated with this significant expansion of constitutional tort liability to local governments.

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

First, the Iowa Supreme Court itself has recognized that municipalities are different than the State. "Municipalities operate under greater fiscal

constraints than the state does and municipalities have special problems with respect to formulating and implementing budgets." *Venckus*, 930 N.W.2d at 809 (citations omitted). For example, in *Venckus* the plaintiff argued that the application of the statute of limitations in Iowa Code § 670.5 should not apply to Iowa Constitutional tort claims because the statute of limitations would then be different against the State and municipalities. *Id.* The supreme court was "nonplussed regarding the distinction," and recognized the policy reasons that undergird differences in the way the State and municipalities are treated under Iowa law. *Id.* Expanding municipal liability necessarily impacts municipal planning and budgets, making budgets less predictable and subject to depletion by money judgments resulting from this new class of claims. Municipal staffing, programming, and services depend upon municipal budgets. Municipal services span the spectrum of civic life, from parks and recreation, police, fire, public works, transportation, libraries, and housing assistance —the bread and butter of local governance.

Second, municipalities are *already* subject to liability for a broader range of common law intentional tort claims than the State. *Compare* Iowa Code § 669.14(4) (maintaining sovereign immunity for the State for claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with

contract rights) *with* Iowa Code § 670.4 (listing exceptions to the rule of liability imposed by section 670.2 for municipal actors—and not exempting any intentional torts); *see also Thomas*, 838 N.W.2d at 522 ("[T]here is no counterpart in section 670.4 to the ITCA's exception for claims based on assault, battery, false arrest, or malicious prosecution."). Therefore, municipalities are both potentially liable for torts that state actors are not liable for and deterred from committing intentional torts that may violate the Iowa Constitution to a degree that the State is not deterred. In fact, in Richardson's case, he brought the common law claims of negligence, and respondeat superior —causes of action which would cover the same ground as his Iowa constitutional claims. The nonconstitutional remedies that are available through the IMTCA are robust and do not create a need for a direct constitutional tort action against municipalities. Expanding the *Godfrey* remedy to municipalities is therefore unnecessary and creates a duplicative and confusing system of dual-track liability for municipal actors.

Third, the judicial creation of unpredictable liability could have a chilling effect on the zeal with which municipalities and their employees undertake their responsibilities. *See Egbert*, 596 U.S. at 14 ("[A]ny new *Bivens* action 'entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit

officials in the discharge of their duties.' ") (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). As the Iowa Supreme Court has recognized, "the line between good police work and overzealous police work can be razor thin. It is certainly fair to exclude the evidence from any ensuing criminal proceeding whenever the line is crossed, even slightly. But if the law enforcement officer also is subject to a damage action, this could lead him or her to be reluctant to act at all in a gray area." *Baldwin II*, 915 N.W.2d at 277. And for other types of municipal employees there is a similar cloud of liability that is created by the unpredictable possibilities related to a potential *Godfrey* claim. *Cf. Thomas*, 838 N.W.2d at 527 (recognizing practical problems of lumping municipal employees in with state employees for purposes of applying the ITCA, stating the principle would confuse the liability of not only "law enforcement officers but could affect numerous other municipal employees who in some way carry out state laws, such as animal control workers, school teachers, street maintenance workers, and parks and recreation workers."). Without a statute describing the conduct that is actionable, municipalities cannot predict the parameters of constitutional tort causes of action.

The determination of whether municipalities and municipal employees should be liable in money damages for alleged violations of the Iowa

Constitution is a policy decision that should be left to the elected branch of Iowa's government. Iowa's judiciary of course has a vital role in enforcing the Iowa Constitution as the supreme law of the land and as a negative check on unconstitutional government action. But the judiciary should not use its power to *make* law, a task that is exclusively the province of the legislative branch.

II. Iowa Law has Never Recognized a Cause of Action Against Municipal Officers in Their Individual Capacities for an Alleged Violation of Article I, § 17 of the Iowa Constitution.

A. Scope Of Review And Preservation

The Defendants agree with Richardson's statements on preservation of error. The Defendants raised the issue of whether a municipal officer can be sued in their individual capacity for a claimed violation of Article I, § 17 of the Iowa Constitution and the District Court withheld ruling on this question pending a certified answer from the Iowa Supreme Court. (Order RE: Pending Motions to Dismiss, at 16). The issue is therefore preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Argument

Although the certified question in this case asks whether municipal officers can be sued in their individual capacities for an alleged violation of Article I, § 17 of the Iowa Constitution, this question could also be posed as whether municipal officers can be sued in their individual capacities for alleged *Godfrey* claims.

In *Wagner*, the plaintiff brought suit against state natural resource officers in their official and individual capacities. 952 N.W.2d at 848. The case came before the Iowa Supreme Court on a number of certified questions from the District Court for the Northern District of Iowa. *Id*. The defendant state officer argued that the Iowa Supreme Court should not address the certified questions on the basis that the only remaining claims against him were in his individual capacity which were not viable for Iowa Constitutional claims. *Id*. at 849. After a brief review of *Godfrey* and its progeny, the Iowa Supreme Court agreed without holding that it has "…never recognized a *Godfrey* claim against a government official in their individual capacity." *Id*.

Instead, the Iowa Supreme Court declined to expressly rule on the individual capacity issue and instead focused on the certified question of whether or not the Iowa Tort Claims Act applied to *Godfrey* claims against the State. *Id*. "For if we did not answer these questions, we would have to

answer a different question- namely, whether individual capacity *Godfrey* claims are available." *Id*. However, the Court opined that answering the ITCA certified question could dictate the answer to the individual capacity question because "[u]nder the ITCA, the state official who were acting within the scope of their office or employment may only be sued in the name of the State, i.e., in their official capacity. *Id*. at 851.

After a lengthy analysis of the ITCA, the Iowa Supreme Court held that "an injured party bringing a constitutional tort claim for damages under the Iowa Constitution against the State or a state employee must proceed within the procedural framework of the ITCA." *Id*. at 865. Furthermore, because the ITCA governs such claims, "the constitutional tort claim will normally go forward only against the State unless the state employee was no acting within the scope of their office or employment." *Id*. Although the Court did not expressly answer the individual capacity question in *Wagner*, its holding strongly suggests that Iowa Constitutional claims against state officials are not available against said officials in their individual capacities unless the official was acting outside the scope of their office or employment. (emphasis added).

As argued above, the Defendants expressly dispute that a direct cause of action exists under Article I, § 17 of the Iowa Constitution. However, in the event this Court determines that such a cause of action should be permitted to

go forward, this Court's analysis in *Wagner* and *Baldwin II* should guide the Court to the conclusion that municipal officers may not be sued in their individual capacities for claimed violations of Article I, § 17 of the Iowa Constitution.

In *Baldwin II*, the Iowa Supreme Court, assuming without deciding that Iowa Constitutional claims are valid against municipalities and their employees, answered that the Iowa Municipal Tort Claims Act ("IMTCA") generally governs constitutional tort claims against municipalities and their employees. 929 N.W.2d at 701-02; *see also Venckus*, 930 N.W.2d at 808. Iowa Code § 670.2(1) (2022) expressly provides that "every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." While this language is not identical to the ITCA, when read in conjunction with the Court's handling of the questions in *Wagner*, the only consistent conclusion is that like *Wagner*, Iowa Constitutional claims are not permitted against municipal officers in their individual capacities unless there is some showing that they were acting outside of the scope of their employment or duties.

If the Iowa Supreme Court answers the first certified question in the affirmative, then based on *Godfrey II*, *Wagner*, and the language of the

IMTCA, the Court should answer the second certified question in the negative.

III. Statutory Qualified Immunity and "All Due Care" Immunity is Available to Individual Municipal Officers for Alleged Violations for Article I, § 17 of the Iowa Constitution.

A. Scope Of Review And Preservation

The Defendants agree with Richardson's statements on preservation of error. The District Court expressly addressed the issue of what immunities would apply if the Iowa Supreme Court recognizes a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution. (Order RE: Pending Motions to Dismiss, at 16). The issue is therefore preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Argument

If this Court determines that a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution exists, then this Court should further affirm that qualified immunity and "all due care" immunity are available to municipalities and municipal employees as a defense to such claims. In *Baldwin I* the Iowa Supreme Court held that "a government official

whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law." *Id.* at 281.

Richardson now argues that the "all due care" immunity standard established in *Baldwin I* should not apply to his desired Article I, § 17 claim because the evidentiary standard for his hypothetical claim would be "deliberate indifference" which he claims is a higher standard than the standard for "all due care" immunity. There are several problems with Richardson's argument. First, while it's true that the "deliberate indifference" standard for an alleged violation of the 8th Amendment[8] of the U.S. Constitution is rather high, as argued above, the Iowa Supreme Court has not recognized a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution and therefore has not established the evidentiary standard by which such a claim would be measured.

The second and perhaps more problematic issue with Richardson's argument against "all due care" immunity is that he attempts to put the cart before the horse by asserting the high evidentiary standard of "deliberate

[8] The United States has never recognized a direct cause of action for an alleged violation of the 8th Amendment to the U.S. Constitution. The vast majority of claims for an alleged violation of the 8th Amendment are brought via 42 U.S.C. § 1983 of the United States Code.

indifference" subsumes the immunity standard of "all due care." Qualified immunity is an *immunity* from suit rather than a mere defense to liability and is effectively lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). For the "all due care" immunity established in *Baldwin I* to have meaning, it must necessarily be considered *before* reaching the merits of an alleged violation of Article I, § 17 of the Iowa Constitution. (emphasis added).

If a municipal official can prove that they acted with all due care to comply with the law, then the case must not be permitted to reach the jury. If the municipal officer fails to carry that burden, then the jury will decide if the officer acted with deliberate indifference (assuming arguendo that this Court were to recognize a direct cause of action for an alleged Article I, § 17 violation and establish "deliberate indifference" as the evidentiary standard for such). Deliberate indifference may be a high evidentiary standard, but it does not subsume the "all due care" immunity established in *Baldwin I* which Defendants would be entitled to assert as an affirmative defense if this Court elects to recognize a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution.

The statutory version of qualified immunity is found at Iowa Code § 670.4A (2022). It provides that a municipal employee is immune to claims brought under Chapter 670 when:

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

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

Richardson's allegation that the statutory qualified immunity standard violates separation of powers principles is ironic, given that in *Godfrey II* several members of the Iowa Supreme Court criticized the judicial creation of a constitutional tort claim as assuming the role of the *legislature*. *Godfrey II*, 898 N.W.2d at 883-884 (Mansfield, J., dissenting, joined by Waterman, J. and Zager, J.) ("What we have not done in the past 160 years is to go beyond declaring unconstitutional actions "void," which we are authorized to do . . . and assume the *legislature's* role . . . .") (emphasis in original). There is no separation of powers violation created by Section 670.4A.

In *State v. Thompson*, 954 N.W.2d 402 (Iowa 2021) the Iowa Supreme Court noted that although the judicial department can make rules of practice and procedure, "the legislative department continues to legislate on the topics of who can participate in judicial proceedings, what information or evidence

can be present in judicial proceedings, and what information or evidence can be considered in judicial proceedings." *Id.* at 413. In *Wagner* the Iowa Supreme Court likewise specifically acknowledged the legislature's right to regulate constitutional tort claims, stating: "we are guided by the principle that the legislature has the right to regulate claims against the State and state officials, including damage claims under the Iowa Constitution, so long as it does not deny an adequate remedy to the plaintiff for constitutional violations." *Wagner*, 952 N.W.2d at 847. Iowa Code Section 670.4A regulates damage claims against municipalities and municipal officials in several ways, qualified immunity of which is one. It is the province of the legislature, not the courts, to determine whether and under what circumstances municipalities are subject to tort liability. *Boyer v. Iowa High School Athletic Ass'n*, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (Iowa 1964) ("[W]hether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state."). The argument that the legislature cannot even regulate constitutional tort claims through a statutory version of qualified immunity lacks merit.

As outlined above, qualified immunity is a complete immunity from suit, rather than a mere defense to liability. Accordingly, federal courts "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* Under either the *Baldwin* test or

the statutory qualified immunity test, the Defendants should be entitled to assert the affirmative defense if this Court determines there is a valid direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution.

IV. Statutory Qualified Immunity and "All Due Care" Immunity is Available to Municipalities for Alleged Violations of Article I, § 17 of the Iowa Constitution.

A. Scope of Review and Preservation

The Defendants agree with Richardson's statements on preservation of error. The District Court expressly addressed the issue of what immunities would apply if the Iowa Supreme Court recognizes a direct cause of action for an alleged violation of Article I, § 17 of the Iowa Constitution. (Order RE: Pending Motions to Dismiss, at 16). The issue is therefore preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Argument

The Defendants generally agree that historically the federal qualified immunity standard has not been applied to shield the *actual* municipality from suit. (emphasis added). Rather, federal courts have repeatedly found that if the municipal officer is insulated by qualified immunity, the employing municipality may not be subject to liability. *See Sinclair v. City of Des Moines*,

Iowa, 268 F.3d 594, 597 (8th Cir. 2001) ("Because the police officers are absolved of liability, the City cannot be held liable for their actions."). *See also Veneklase v. City of Fargo*, 248 F.3d 738, 748 (8th Cir. 2001) (en banc); *Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998) ("The City cannot be liable…whether on a failure to train theory or a municipal custom or policy theory, unless [an officer] is found liable on the underlying substantive claim.") (quoting *Abbott v. City of Crocker*, 30 F.3rd 994, 998 (8th Cir. 1994)).

The federal courts' approach to municipal liability when the municipal officer is shielded by qualified immunity is clearly what the Iowa Legislature was attempting to encapsulate with the passage of Iowa Code § 670.4A(2). "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)]." Given the express language of Iowa Code § 670.4A(2), an Iowa municipality cannot be held liable for the actions of one of its employees when the employee themselves is shielded by qualified immunity.

As outlined above, Richardson's argument that Iowa Code section 670.4A is unconstitutional is without merit. It is certainly the province of the Iowa Legislature to waive sovereign immunity as it sees fit and therefore it is also their province to limit liability where appropriate. *See Wagner*, 952

N.W.2d at 847. Therefore, under Iowa Law, a municipality cannot be held liable for the conduct of one of its employees when the employees themselves is not liable on the basis of qualified immunity.

CONCLUSION

The Defendants respectfully request that this Court answer the first question in the negative which would resolve the remaining three (3) certified questions. Alternatively, if this Court answers the first question in the affirmative, the Defendants request that the Court answer the second question in the negative which would resolve the third certified question. Outside the foregoing, if this Court answers the first two (2) certified questions in the affirmative, the Defendants request that the Court then answer the final two (2) certified questions in the affirmative.

/s/ Wilford H. Stone
WILFORD H. STONE, AT0007699
DANIEL M. MORGAN, AT0013452
LYNCH DALLAS, P.C.
526 Second Avenue SE
Cedar Rapids, IA 52406-2457
Telephone: 319.365.9101
Facsimile: 319.365.9512
E-Mail: wstone@lynchdallas.com
dmorgan@lynchdallas.com

ATTORNEYS FOR
DEFENDANTS/APPELLEES
GINA JOHNSON, JANE DOE, C.J. RYAN,
DEAN NAYLOR, MATT McCLEARY and
MUSCATINE COUNTY, IOWA

/s/ Kimberly Graham
KIMBERLY GRAHAM
MEGHAN GAVIN
POLK COUNTY ATTORNEY
111 Court Ave., Rm., 340
Des Moines, IA 50309
Telephone: 515.286.3341
Facsimile: 515.286.3314
E-Mail:
Meghan.gavin@polkcountyiowa.gov
ATTORNEYS FOR POLK COUNTY DEFENDANTS

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

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains **9,543 words**, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1.)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated this 8th day of March, 2023.

/s/ Wilford H. Stone