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IN THE SUPREME COURT OF IOWA

No. 22-1194

PATTY A. THORINGTON, individually and as Administrator of the Estate of ROBERT RONALD MITCHELL
Plaintiff-Appellee,

vs.

SCOTT COUNTY, IOWA and GREG HILL,
Defendants-Appellants.

APPELLANTS' BRIEF

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ROUTING STATEMENT

The Supreme Court should retain this case. It presents at least three issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c). First, the Supreme Court has yet to apply the all due care immunity established in *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) and Iowa Code § 670.4(1)(c) to excessive force claims brought under Article I, Section 8 of the Iowa Constitution. Second, the Supreme Court has yet to apply the qualified immunity standard in the newly enacted Iowa Code sections 670.4A and 669.14A or determine the applicability of the statutes to conduct that pre-dates the effective date of the statutes. Third, the Supreme Court has not ruled on the applicability of immunities in the Iowa Municipal Torts Claim Act ("IMTCA" or chapter 670), specifically the emergency response immunity in section 670.4(1)(k), to Iowa constitutional tort claims.

These are also fundamental and urgent issues of broad public importance that should be promptly resolved by this Court. *See* Iowa R. App. P. 6.1101(2)(d) d). These immunity questions are already present in many cases in Iowa where state constitutional tort claims have been brought since *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017).

STATEMENT OF THE CASE

On October 23, 2018, Scott County Sheriff's Deputy Greg Hill attempted to place Robert Mitchell under arrest for an extraditable out-of-state warrant following a lawful traffic stop in Davenport, Iowa. (App. 158 (10:51–18:53), 159 (first video 6:30–38, 7:06–20, 15:30–16:03, second video 0:00–1:27)). Mitchell chose to physically resist arrest, jumped back into his vehicle, and dragged Deputy Hill with his vehicle back and forth—and back and forth again. (App. 158 (18:54–19:08), 159 (second video 1:27–45); 160 (1:23–41), 161 (0:21–39)). After repeated warnings to Mitchell, and after Mitchell struck Deputy Hill's Patrol SUV with his vehicle, Deputy Hill, fearing for his own life and the safety of his backup officer, Deputy Meghan Messmore, fired three shots at Mitchell in approximately one second. (App. 158 (18:54–19:11), 159 (second video 1:27–45), 160 (1:23–41), 161 (0:21–39)). Mitchell died as a result. (App. 163–64). These facts, as with many of the salient facts surrounding this encounter, are undisputed. The entire encounter was captured by Deputy Hill's and Deputy Messmore's body worn and vehicle dash cameras. (App. 158–61).

Patty A. Thorington, Mitchell's mother, brought this lawsuit individually and as Administrator of Mitchell's Estate. (App. 7). Thorington alleged, among other claims not relevant to this appeal, that Deputy Hill

engaged in excessive force in violation of Article I, Section 8 of the Iowa Constitution and that Scott County was liable for his actions under a *respondeat superior* theory. (App. 16–18). Deputy Hill and Scott County filed a Motion for Summary Judgment based on the undisputed facts. (App. 237). Deputy Hill and Scott County argued that they were entitled to three statutory immunities on all of Thorington's claims under three different legal standards: (1) all due care to conform to the requirements of the law immunity under *Baldwin v. City of Estherville* ("*Baldwin I*"), 915 N.W.2d 259 (Iowa 2018)[1] and Iowa Code § 670.4(1)(c), (2) qualified immunity under Iowa Code § 670.4A, and (3) emergency response immunity under Iowa Code § 670.4(1)(k). (App. 241–42). The district court denied Deputy Hill and Scott County summary judgment on Thorington's excessive force claim and this appeal followed. (App. 259–60).

[1] Scott County and Deputy Hill use the following labels for the *Baldwin* decisions cited in this brief: *Baldwin v. City of Estherville* ("*Baldwin I*"), 915 N.W.2d 259; *Baldwin v. Estherville, Iowa* ("*Baldwin II*"), 333 F. Supp. 3d 817 (N.D. Iowa 2018); and *Baldwin v. City of Estherville* ("*Baldwin III*"), 929 N.W.2d 691 (Iowa 2019).

STATEMENT OF THE FACTS

I. On October 23, 2018, Deputy Hill initiated a legal traffic stop, attempted to place Mitchell under arrest for an extraditable out-of-state warrant, and was met with Mitchell's physical resistance and decision to use his vehicle as a deadly weapon against Deputy Hill.

On October 23, 2018, Deputy Hill was on patrol duty in full sheriff's uniform and driving a marked sheriff's SUV equipped with a dashboard camera. (App. 158). Deputy Hill also had a body-worn camera. (App. 159). At approximately 1:08 A.M. on October 23, 2018, Deputy Hill lawfully stopped a red, four-door Ford 500 driven by Mitchell for a malfunctioning brake light. (App. 106 (126:9–12), 158 (0:00–1:12), 159 (first video 0:00–31)). Latisha Dipple was in the front passenger seat of Mitchell's vehicle. (App. 151 (68:1–3), 159 (first video 0:00–1:31)). There were no other passengers in Mitchell's vehicle. (App. 151 (68:1–3), 159 (first video 0:35–1:31)).

The stop occurred on North Brady Street near a Menards store located at 6600 North Brady St., Davenport, Iowa. (App. 111 (147:4–15), 158 (1:00–10)). Mitchell stopped his vehicle on North Brady Street and Deputy Hill parked his SUV behind Mitchell's vehicle. (App. 158 (1:00–10)). Deputy Hill then approached the driver's side of Mitchell's vehicle. (App. 158 (1:25–37), 159 (first video 0:00–05)). Deputy Hill informed Mitchell he was being pulled over for a malfunctioning brake light and asked Mitchell for his license

and registration. (App. 159 (first video 0:05–30)). Mitchell gave Deputy Hill his vehicle registration but stated he did not have his license. (App. 159 (first video 1:34–2:43)).

Deputy Hill returned to his SUV and learned that Mitchell had a suspended driver's license. (App. 111 (147:13–148:16), 158 (4:10–8:50), App. 159 (first video 2:43–7:25)). Deputy Hill then approached Mitchell's vehicle again and informed Mitchell that his license was suspended and that he was going to give Mitchell a ticket for driving while suspended. (App. 111 (147:13–148:16), 158 (8:50–10:10), 159 (first video 7:25–8:20)). Deputy Hill asked Mitchell to pull his vehicle into the nearby Menards parking lot. (App. 111 (147:13–148:23), 158 (8:50–10:10), 159 (first video 8:00–45)). Deputy Hill also told Mitchell that he needed to have someone with a valid license come pick up Mitchell's vehicle. (App. 111 (147:13–148:23), 159 (first video 8:00–45)). Dipple did not have a license so she was not able to drive. (App. 148 (57:5–13)). Mitchell pulled his vehicle into a marked parking spot in the Menards parking lot and Deputy Hill parked his SUV behind and to the left of Mitchell's vehicle. (App. 158 (10:20–53)). After parking in the Menards lot, Mitchell and Dipple began to get out of Mitchell's vehicle. (App. 158 (11:00–22), 159 (first video 9:45–55)). Deputy Hill told Mitchell and Dipple

to wait in the vehicle and they both got back in Mitchell's vehicle. (App. 158 (11:00–22), 159 (first video 9:45–55)).

While in his SUV writing the citation, Deputy Hill learned via police dispatch that Mitchell had two felony arrest warrants from Indiana for a probation violation and possession of methamphetamine and one of the warrants was extraditable. (App. 101 (106:7–25), 158 (11:25–18:10), 159 (first video 9:55–16:03, second video 0:00–34)). Deputy Hill then exited his SUV, approached Mitchell's vehicle with the citation for Mitchell to sign, and asked Mitchell to exit his vehicle. (App. 158 (18:10–25), 159 (second video 0:35–55)). Deputy Messmore arrived on the scene to back-up Deputy Hill because he was going to take Mitchell into custody for his outstanding warrants. (App. 125 (45:3–18), 160 (0:50–57), 161 (0:00–12)). Messmore's patrol vehicle was equipped with a dashboard camera and she had a body worn camera that was activated. (App. 160, 161).

Mitchell exited his vehicle, moved towards the back of the car, and Deputy Hill asked him to sign the citation. (App. 158 (18:25–43), 159 (second video 0:55–1:15), 160 (0:53–1:00), 161 (0:00–12)). Mitchell's vehicle was running when he exited and Mitchell left the driver's door open. (App. 158 (18:25), 159 (second video 0:55–1:15)). Dipple remained in the front passenger seat of Mitchell's vehicle. (App. 158 (18:25), 159 (second video

0:55–1:15)). Deputy Hill saw that Mitchell had a knife in his pocket as Mitchell exited his vehicle. (App. 92 (70:17–21), 199). After Mitchell signed the citation for driving with a suspended driver's license, Deputy Hill informed Mitchell that he had a warrant and asked Mitchell to turn around. (App. 158 (18:40–55), 159 (second video 1:17–23), 160 (1:13–26), 161 (0:12–18)). Deputy Hill had Mitchell turn around and attempted to handcuff Mitchell's hands behind his back. (App. 158 (18:40–55), 159 (second video 1:23–27), 160 (1:13–26), 161 (0:18–22)).

As Deputy Hill was attempting to handcuff Mitchell, Deputy Hill told Mitchell "don't be diving back into the car." (App. 159 (second video 1:26–29)). At that moment, Mitchell physically resisted Hill's effort to handcuff him and jumped towards the driver's seat as Deputy Hill attempted to stop Mitchell. (App. 158 (18:55 –19:00), 159 (second video 1:29–32), 160 (1:25–30), 161 (0:24–29)). Mitchell was able to get back into the driver's seat, as Deputy Hill continued to attempt to physically stop Mitchell. (App. 158 (18:55 –19:00), 159 (second video 1:29–34), 160 (1:25–30), 161 (0:24–29)). Deputy Hill believed Mitchell might be going for a weapon inside his vehicle. (App. 79 (21:15–17)). Deputy Hill was trained that hands are what grab weapons and what kill. (App. 85 (45:7–8)). Deputy Hill was attempting to

control Mitchell's hands to prevent him from getting a weapon. (App. 85 (45:8–11)).

While attempting to restrain Mitchell, Deputy Hill's body was partially inside Mitchell's vehicle and his feet and legs were outside the vehicle. (App. 158 (18:55–19:09), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). With Deputy Hill partially inside the car trying to stop Mitchell, Mitchell was able to drive his vehicle in reverse, then stopped and went forward and stopped again. (App. 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)). Before the vehicle began to move, Deputy Hill told Mitchell "don't do it." (App. 159 (second video 1:29–45, 161 (0:27–29)). During the time the vehicle was moving backward and forward with Deputy Hill partially in Mitchell's vehicle, Deputy Hill's feet were dragging on the ground as he tried to maintain his footing. (App. 79, 81 (20:6–23, 28:17–29:4), 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)).

During the time Mitchell was driving his vehicle backward and forward, Deputy Messmore pulled out her gun, but because Deputy Hill's back was to her and potentially within her line of fire for most of the incident, she did not shoot. (App. 121 (27:10–18), 158 (18:55–19:09), 161 (0:24–40)). During the time Mitchell first drove his vehicle backward and forward, Deputy Hill managed to un-holster his gun. (App. 158 (18:55–19:09), 160

(1:25–40), 161 (0:24–40)). Also during the time Mitchell first drove his vehicle backward and forward with Deputy Hill partially in Mitchell's vehicle, Deputy Hill told Mitchell, "I'm going to kill you, I'm going to shoot you, I'm going to shoot you." (App. 159 (second video 1:29–45), 161 (0:24–40)).

Mitchell then drove his vehicle in reverse a second time and turned to the left while Deputy Hill was still partially inside the vehicle and trying to keep his footing along with the movement of the vehicle. (App. 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)). During the time Mitchell drove his vehicle in reverse a second time with Deputy Hill partially in Mitchell's vehicle, Deputy Hill again warned Mitchell, "Don't move I'm going to shoot you." (App. 159 (second video 1:29–45), 161 (0:24–40)). As Mitchell drove his vehicle in reverse a second time, the rear end of Mitchell's vehicle violently struck the front of Deputy Hill's SUV. (App. 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)). When Mitchell's vehicle collided with Deputy Hill's SUV, Deputy Hill's body was propelled rearward into the center metal section of Mitchell's vehicle (the B-pillar), the driver's door slammed onto Deputy Hill's back and Deputy Hill went down almost to his knees. (App. 81–82 (29:16–30:1, 32:24–33:12), 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)). Deputy Hill then began to rise to a standing position and fired three shots at Mitchell within approximately one second, as Mitchell's vehicle

began to move forward after colliding with Deputy Hill's SUV. (App. 84–86 (41:23–42:10, 49:1–5), 158 (18:55–19:09), 160 (1:25–40), 161 (0:24–40)).

After the three gunshots were fired, Mitchell drove out of the Menards parking lot and Deputy Hill pursued him in his SUV. (App. 158 (19:05–13), 160 (1:40–46), 161 (0:40–45)). During the pursuit, Mitchell briefly stopped the vehicle to let Dipple out on the side of the road and continued to drive off. (App. 158 (19:44–48)). After a few minutes, Mitchell turned into a gas station where he was taken into custody. (App. 158 (19:48–23:59)). The first two gun shots hit Mitchell; the third shot did not hit Mitchell. (App. 77–78, 86 (13:21–14:6, 48:4–7), 164). Dipple was not injured during the incident. (App. 121 (28:4–11)). Mitchell was taken to the hospital for medical treatment but did not survive. (App. 164–65).

While Mitchell was driving his vehicle and dragging Deputy Hill along with him, Deputy Hill believed Mitchell was trying to use his vehicle to kill him. (App. 77 (10:6–7)). Through Deputy Hill's training as a law enforcement officer, he was aware of other instances where law enforcement officers were dragged by vehicles, which has resulted in serious injury or death. (App. 80 (23:11–14)). Deputy Hill was fearful he would be killed by Mitchell's vehicle. (App. 79–80 (20:5–12, 23:5–14)). Deputy Hill did not believe he could simply remove himself from the vehicle and harm's way

because of Mitchell's driving and Deputy Hill's fear that he would be run over and seriously injured or killed. (App. 79–80 (21:9–23:20)). Thus, Deputy Hill did not fire the first shot at Mitchell until what he believed was the last possible point in time when he thought he was going to be killed by Mitchell's vehicle. (App. 89, 97 (60:8–21, 93:12–18)). Deputy Hill fired his weapon only to protect himself and Deputy Messmore. (App. 77, 80, 81 (10:5–11, 22:5–21, 28:19–29:4)). During the time Mitchell was driving his vehicle backwards, forwards, and backwards again, Deputy Hill knew Deputy Messmore was on the scene and in close proximity but did not know her exact location. (App. 87 (53:22–25)).

II. Procedural history.

On January 28, 2021, Thorington filed her Amended Petition at Law with claims of: (I) excessive force in violation of Article I, Section 8 of the Iowa Constitution against Deputy Hill and Scott County; (II) violation of Article I, Section 9 of the Iowa Constitution against Scott County, Deputy Hill and County Attorney Michael Walton; (III) violation of Article I, Section 1 of the Iowa Constitution against Scott County and Deputy Hill; (IV) unreasonable search in violation of Article I, Section 8 of the Iowa Constitution against Walton and Scott County; (V) wrongful death in violation of Iowa law against Deputy Hill and Scott County; (VI) loss of consortium

against Deputy Hill and Scott County; (VII) defamation against Scott County and Walton; and (VIII) violation of open records laws (Iowa Code chapter 22) against Scott County and Walton. (App. 16–30). Scott County, Deputy Hill, and Walton filed an Answer to Thorington's Amended Petition on June 11, 2021. (App. 33). On May 6, 2021, Thorington dismissed without prejudice Counts VII (defamation) and VIII (violation of open records law) against Scott County, Deputy Hill, and Walton. (App. 31). On September 28, 2021, Thorington dismissed without prejudice Count II against Walton (due process claim) and Count IV (unreasonable search). (App. 46). Thus, only Thorington's Counts I, II, III, V, and VI against Scott County and Deputy Hill remained.

On October 4, 2021, Thorington filed a Motion for Partial Summary Judgment on Liability. (App. 48). On February 21, 2022, the district court denied Thorington's Motion. (App. 68).

On March 16, 2022, Scott County and Deputy Hill filed their Motion for Summary Judgment. (App. 237). Scott County and Deputy Hill argued they were entitled to statutory immunities on all of Thorington's claims under Iowa Code § 670.4A(1), *Baldwin I* and Iowa Code § 670.4(1)(c), and Iowa Code § 670.4(1)(k). (App. 241–42). Scott County and Deputy Hill also argued they were entitled to summary judgment on Thorington's claims

brought under Article I, Sections 1 and 9 of the Iowa Constitution because they were duplicative of her Article I, Section 8 claim. (App. 256–59). Further, Scott County argued it was entitled to summary judgment on Thorington's claims based on direct liability against it. (App. 259).

On June 16, 2022, the district court issued its ruling on Scott County and Deputy Hill's Motion for Summary Judgment. (App. 237). The district court found that Section 670.4A(1), enacted effective June 17, 2021, is not retroactive and therefore, Scott County and Deputy Hill could not be entitled to immunity under the statute. (App. 242–46). The district court found that genuine issues of material fact precluded summary judgment on *Baldwin I* all due care to conform to the requirements of the law immunity. (App. 246–50). The district court found that Section 670.4(1)(k), the emergency response immunity, applied to the facts of this case and required summary judgment as to Thorington's common law wrongful death claim, but declined to apply the emergency response immunity to Thorington's constitutional torts claims. (App. 250–56). Finally, the district court granted Scott County and Deputy Hill summary judgment on Thorington's claims under Article I, Sections 1 and 9 of the Iowa Constitution and on Thorington's direct liability claims against Scott County. (App. 256–59). Thus, the only claims that remain after the district court's ruling on Scott County and Deputy Hill's Motion for

Summary Judgment are Thorington's Article I, Section 8 excessive force claim under the Iowa Constitution and her loss of consortium claim, which is derivative of a tort being committed against Mitchell.[2]

On July 15, 2022, Appellants filed a timely Notice of Appeal pursuant to Section 670.4A(4), as well as an Application for Interlocutory Appeal to avoid jurisdictional issues if this Court found that Section 670.4A(4) did not allow for an immediate appeal of the district court's Order denying Scott County and Deputy Hill summary judgment on Thorington's Article I, Section 8 excessive force claim under the Iowa Constitution. (App. 262). On December 5, 2022, this Court entered an Order holding that this appeal may proceed pursuant to Section 670.4A(4) and denied the Application for Interlocutory Appeal as moot.

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[2] A loss of consortium claim "cannot lie against a defendant when, as a matter of law, the defendant is not liable to the plaintiffs." *Kelly v. Ethicon, Inc.*, 511 F. Supp. 3d 939, 955 (N.D. Iowa 2021) (quoting *Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 983 (N.D. Iowa 2002)).

ARGUMENT

I. Whether *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) and Iowa Code Section 670.4(1)(c) provide qualified immunity to Deputy Hill on Thorington's excessive force claim brought under the Iowa Constitution when Deputy Hill exercised all due care to conform to the requirements of the law existing at the time of his conduct.

A. Error preservation and standard of review.

Scott County and Deputy Hill preserved error because the issue of *Baldwin I* qualified immunity was raised in their Motion for Summary Judgment and decided by the district court. *See* App. 246–50; *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."). Scott County and Deputy Hill filed a timely Notice of Appeal of the district court's Ruling on their Motion for Summary Judgment. (App. 262).

This Court reviews a ruling on a motion for summary judgment for correction of errors at law. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005). Constitutional questions are reviewed *de novo*. *State v. Veal*, 930 N.W.2d 319, 327 (Iowa 2019); *McGill v. Fish*, 790 N.W.2d 113, 116–17 (Iowa 2010).

B. Deputy Hill is entitled to qualified immunity because he exercised all due care to conform to the requirements of the law existing at the time of his conduct.

The district court erred in finding that Deputy Hill was not entitled to the all due care to conform with the requirements of the law immunity based on the undisputed facts of the case. Section 670.4(1)(c) immunizes "[a]ny claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation . . ., or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality . . ."[3] In *Baldwin I*, this Court held that "qualified immunity should be available to those defendants who plead and prove as an affirmative defense that they exercised all due care to conform to the requirements of the law." 915 N.W.2d at 279. Based on the undisputed facts, Deputy Hill is immunized from Thorington's claims under § 670.4(1)(c) and *Baldwin I* as a matter of law.

It is critical to note that this Court expressly held in *Baldwin I* that the "all due care" defense is *not* the equivalent of the reasonableness standard in

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[3] Although the IMTCA (chapter 670) concerns claims brought against municipalities, the IMTCA provides that "[a]ll officers and employees of municipalities are not personally liable for claims which are exempted under section 670.4." Iowa Code § 670.12.

evaluating claims brought under Article I, Section 8 of the Iowa Constitution.[4]

As this Court explained:

> the right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself. Such an approach is not consistent with Iowa precedent or Restatement section 874A, and would result in too little play in the joints. Logically, the threshold of proof to *stop* an unconstitutional course of conduct ought to be less than the proof required to *recover damages* for it.

Baldwin I, 915 N.W.2d at 278–79 (emphasis in original) (footnote omitted). In reaching this conclusion, this Court examined three Iowa precedents singled out in *Godfrey*[5] for having recognized constitutional torts. *Id.* at 275. "Each involved bad faith conduct, and one of those cases made it clear that malice and lack of probable cause were elements of the claim." *Id.* (citing

[4] "[T]he Iowa Supreme Court's standard for excessive force does not materially differ from the federal standard." *Wilson v. Lamp*, 995 F.3d 628, 635 (8th Cir. 2021); *see also McElree v. City of Cedar Rapids, Iowa*, 372 F. Supp. 3d 770, 792 n.24 (N.D. Iowa 2019) ("The standard for a violation of the right to be free from excessive force under the Iowa Constitution does not appear to differ from the federal standard."). Thus, like the federal standard, Iowa's standard for evaluating excessive force claims is objective reasonableness. *Williams v. City of Burlington, Iowa*, 516 F. Supp. 3d 851, 866 n.7 (S.D. Iowa 2021) ("Iowa also appears to require objective reasonableness under its constitution as the standard for excessive force under article I, section 8."). Further, Iowa Code § 804.8 established an objective reasonableness standard for a police officer's use of force in making an arrest. *Chelf v. Civil Serv. Comm'n*, 515 N.W.2d 353, 355–56 (Iowa Ct. App. 1994) (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Thus, it mirrors the federal objective standard for police use of force, including deadly force.

[5] *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017).

McClurg v. Brenton, 98 N.W. 881, 881–82 (Iowa 1904); *Krehbiel v. Henkle*, 121 N.W. 378, 379 (Iowa 1909); *Girard v. Anderson*, 257 N.W. 400, 400–01, 403 (Iowa 1934)). This Court also recognized that at the time the Iowa Constitution was adopted, public officials "received the benefit of a form of qualified immunity." *Id.* at 276 (citing *Hetfield v. Towsley*, 3 Greene 584, 584–85 (Iowa 1852)).

Baldwin I makes it clear that the all due care qualified immunity defense is not the same as the reasonableness standard in evaluating excessive force claims brought under the Iowa Constitution. Accordingly, the all due care defense is more easily met by law enforcement officers than the objectively reasonable standard. And thus, while a law enforcement officer may have arguably used unreasonable force, he could still be entitled to qualified immunity under the all due care defense.[6]

While *Baldwin I* is explicit that objective reasonableness and all due care are not the same legal standards, what is less clear is how the all due care defense is applied. This Court has not yet had the opportunity to further develop the requirements of the all due care immunity defense. But, in

[6] It is impossible for the all due care immunity to be unavailable if only unreasonableness or negligence is shown. If that were the case, the immunity would be rendered meaningless. If a plaintiff can meet her burden of proving an officer was unreasonable or negligent to establish a constitutional violation, then there is no need for a defense that protects only reasonable conduct.

Baldwin v. Estherville, Iowa ("*Baldwin II*"), 333 F. Supp. 3d 817 (N.D. Iowa 2018), now-retired U.S. District Court Judge Mark W. Bennett provided additional guidance on the defense that has since been adopted by other Iowa federal judges.

First, Judge Bennett noted that *Baldwin I* holds that a determination that a plaintiff's rights under Article I, Section 8 of "the Iowa Constitution were violated, does not necessarily mean that he is entitled to recover damages for that violation." *Id.* at 842. Next Judge Bennett found that "[e]quating 'all due care' with a 'negligence' standard appears to be appropriate." *Id.* at 842–43. But Judge Bennett explained that the defense is not simply based on "all due care" standing alone:

> Rather, the Iowa Supreme Court stated the defense in terms of proof that the defendant "exercised all due care *to conform to [or with] the requirements of the law*." *Id.* at 260–61 (with), 279 (to), 281 (to) (emphasis added). For example, it appears that, although "objective reasonableness" of the defendant's conduct is relevant to qualified immunity for a violation of the Iowa Constitution, just as it is relevant to qualified immunity for a violation of the United States Constitution, "exercising all due care to conform with the requirements of the law" imposes a greater burden on defendants than not violating "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. 2727. . . .
>
> The distinction appears to me to be between *taking reasonable action* to "conform" to the requirements of the law, under the Iowa "all due care" qualified immunity standard, and *avoiding*

> *action* one should reasonably know would violate the law, under the *Harlow* federal qualified immunity standard.

Id. at 843 (emphasis in original). Finally, Judge Bennett found that the all due care defense encompasses "some kind of 'good faith.'" *Id.* Judge Bennett explained that "bad faith," "malice and lack of probable cause," and "lack of reasonable ground" for the conduct in question are all factors suggesting that the all due care qualified immunity defense is inapplicable. *Id.* at 845. Other Iowa federal judges have agreed with Judge Bennett's analysis of *Baldwin I. See Ohlson-Townsend v. Wolf*, No. 18-CV-4093-CJW-MAR, 2019 WL 6609695, at *8–9 (N.D. Iowa Dec. 5, 2019); *Saunders v. Thies*, No.4:19-cv-00191-JAJ-HCA, 2020 WL 10731253, at *11 (S.D. Iowa Sept. 8, 2020); *Clinton v. Garrett*, 551 F. Supp. 3d 929, 952–53 (S.D. Iowa 2021).

In the proceedings below, Thorington and the district court erred in equating the all due care standard with reasonableness or negligence. This ignores the entirety of the immunity. As Judge Bennett identified, the immunity does not simply require that an officer acts with all due care. It requires an officer to exercise "all due care *to conform to the requirements of the law*." *Baldwin I*, 915 N.W.2d at 279 (emphasis added). Thus, a defendant officer is entitled to qualified immunity under *Baldwin I* if he acted with all due care to conform to applicable law addressing the situation confronting

him existing at the time the officer acts. This requires an examination of statutory and case law existing at the time Deputy Hill encountered Mitchell.

Under Iowa Code section 804.8, use of deadly force by a law enforcement officer

> is only justified when a person cannot be captured any other way and either of the following apply:
> a. The person has used or threatened to use deadly force in committing a felony.
> b. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

Deputy Hill acted with all due care to conform to the requirements of section 804.8. The severity of the crime quickly escalated when Deputy Hill attempted to place Mitchell under arrest and handcuff him for the outstanding Indiana warrants. Mitchell physically resisted arrest and assaulted Deputy Hill, who he indisputably knew was a law enforcement officer, in violation of Iowa law. *See* Iowa Code § 708.3A (assault); § 719.1 (interference or resistance to peace officer); § 804.12 (prohibiting force to resist arrest). Deputy Hill did not immediately resort to deadly force when Mitchell resisted arrest and continued to actively resist. Rather, Deputy Hill attempted to physically restrain Mitchell as Mitchell re-entered his car and began driving it backwards and forward dragging Deputy Hill along with him in an attempt to evade arrest. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160

(1:25–40), 161 (0:24–40)). Mitchell's actions posed an immediate threat to the safety of Deputy Hill and the nearby Officer Messmore, and Deputy Hill's use of physical force was justified under Iowa law. *See State v. DeWitt*, 811 N.W.2d 460, 470 (Iowa 2012) (uncooperative suspect attempting to flee justifies imposition of more force). During the encounter, Deputy Hill also gave multiple warnings to Mitchell to stop. *See Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (deadly force permissible if, where feasible, some warning given). Only after exhausting other means to arrest and capture Mitchell, under rapidly evolving circumstances threatening Deputy Hill's safety, did Deputy Hill use deadly force.

Here, the conclusion that Deputy Hill's is entitled to all due care qualified immunity is also solidified by the Eighth Circuit's key decision in *Molina-Gomes v. Welinski*, 676 F.3d 1149 (8th Cir. 2012) granting officers qualified immunity under facts remarkably similar to the instant case. In *Molina-Gomes*, law enforcement members set up a meeting with Molina Campos at a gas station, at which an undercover officer was to give Molina Campos money owed from a drug deal and then other officers present would arrest him. *Id.* at 1151. After Molina Campos arrived, the undercover officer approached his car, placed the drug money in the backseat, and spoke to Molina Campos through the rear window. *Id.* As they were talking, Molina

Campos began to drive forward. *Id.* Fearing he would escape, another officer drove his unmarked car to block Molina Campos from behind while the defendant officer, Welinski, moved his car in front of Molina Campos. *Id.* At the same time, the undercover officer opened the driver door and ordered Molina Campos to get out of his car. *Id.* Boxed in, Molina Campos first reversed, dragging along the undercover officer before he fell to the ground, and then attempted to drive around Welinski's vehicle. *Id.* As Molina Campos tried to escape, Welinski got out of his vehicle and fired at Molina Campos, who later died. *Id.*

Molina Campos' family filed a lawsuit alleging Welinski violated the Fourth Amendment by using excessive force in trying to arrest him. *Id.* at 1152. The Eighth Circuit found Welinski's use of deadly force was reasonable and afforded him qualified immunity:

> The reckless driving by Molina Campos in his attempt to escape was a danger to the arresting police officers and to any drivers on the roadway. When Molina Campos sped backwards, he dragged the undercover officer along, knocking him to the ground. He then crashed into a police vehicle before driving around Welinski's vehicle towards county road 34. At the time Welinski fired his weapon he had probable cause to believe that Molina Campos posed a threat of serious danger to the officers as well as to other motorists. *See Scott v. Harris*, 550 U.S. 372, 383–86, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *see also Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267, 2274, 180 L.Ed.2d 60 (2011) ("It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others."). Welinski made a

> split second decision to try to prevent Molina Campos from harming the officers or others in the area. He fired for just 3 seconds and stopped shooting before using all his bullets. *See Sanders v. City of Minneapolis*, 474 F.3d 523, 526–27 (8th Cir. 2007). Welinski's use of force under these quickly evolving dangerous actions by Molina Campos was "objectively reasonable under the circumstances as [Welinski] perceived them." *See Hernandez v. Jarman*, 340 F.3d 617, 623–24 (8th Cir. 2003).

Id. at 1152–53.

Molina-Gomes requires the same result here in light of critical facts that cannot be disputed and were accepted by the district court. Both the dash and body worn camera video of the encounter indisputably show Mitchell physically resisting Deputy Hill's attempt to handcuff him outside Mitchell's vehicle while placing him under arrest for two Indiana felony warrants, one of which was extraditable. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). Despite Hill's efforts to restrain him, Mitchell entered his car and aggressively drove it first in reverse, then forward, and then again in reverse before violently (and loudly) striking Deputy Hill's patrol vehicle, all while Deputy Hill was partially in Mitchell's vehicle being dragged alongside. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). Deputy Messmore was also in close proximity to Mitchell's vehicle as he aggressively drove back and forth in an attempt to evict Deputy Hill from the vehicle and evade arrest,

which placed her in danger. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). Mitchell's actions violated Iowa Code § 804.12, which prohibits the use of force to resist arrest. Moreover, while Officer Welinski was credited in *Molina-Gomes* for his restraint in firing just eight bullets in three seconds, Deputy Hill fired only three bullets in a single second, and only after multiple unheeded warnings, before holstering his weapon. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)).

Against this backdrop, Deputy Hill acted with all due care to conform to the requirements of the law, i.e., *Molina-Gomes*. Mitchell resisted and attempted to evade arrest both physically and by recklessly maneuvering his car, and his actions posed an immediate threat to both Deputy Hill and Messmore's safety. Deputy Hill fired immediately after Mitchell crashed into his police SUV and threw Deputy Hill into the B-Pillar of Mitchell's vehicle nearly taking him to the ground. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). When Deputy Hill fired his gun he was still within the door swing area of Mitchell's open driver's door after previously being dragged by Mitchell's vehicle driving back and forth. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)). Deputy Hill did not know what Mitchell's next decision would be after

slamming into Deputy Hill's SUV, and his repeated warnings to Mitchell were ignored. What Deputy Hill was confronted with thus far placed him in reasonable fear of serious injury or death, and Hill had no indication to believe Mitchell would change course despite his warnings. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."); *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996) (Courts are "careful not to indulge in armchair quarterbacking or exploit the benefits of hindsight when evaluating police officers' use of deadly force. It may appear, in the calm aftermath, that an officer could have taken a different course, but we do not hold the police to such a demanding standard.").

Deputy Hill's actions demonstrate that he was "taking reasonable action to 'conform' to the requirements of the law." *Baldwin II*, 333 F. Supp. 3d at 843 (emphasis omitted). Under *Molina-Gomes*, the controlling Eighth Circuit precedent at the time of the incident, a reasonable officer in Deputy Hill's position would know that deadly force could be used against a suspect who posed an imminent danger of serious injury or death to a law enforcement officer by being dragged underneath the suspect's vehicle. Here, Deputy

Hill's actions were consistent with both *Molina-Gomes* and Iowa Code § 804.8. Deputy Hill, after giving repeated warnings, used deadly force only when faced with Mitchell's continued use of his vehicle to recklessly drag Deputy Hill in the Menards parking lot.

Baldwin I and *Baldwin II* both suggest that a law enforcement's good faith ought to be considered in determining whether the all due care immunity defense is allowed. *Baldwin I*, 915 N.W.2d at 275; *Baldwin II*, 333 F. Supp. 3d at 843. Here, Deputy Hill acted in good faith under the undisputed facts. Throughout Mitchell's dangerous maneuvers, Deputy Hill believed Mitchell was trying to use his vehicle to kill him and believed his life and Deputy Messmore's life were in danger. (App. 77, 80–81 (10:5–11, 22:5–21, 28:19–29:4)). Deputy Hill was aware of similar instances in which officers were dragged by vehicles driven by evading suspects, which resulted in serious injury or death. (App. 80 (23:11–14)). He did not believe he could simply remove himself from the vehicle because of Mitchell's reckless driving and his fear that he would be run over or dragged underneath the car and seriously injured or killed. (App. 79–80 (21:9–23:20)). And as explained above, Deputy Hill did not fire the first shot until numerous warnings were ignored and when he feared he was going to be killed or seriously injured by Mitchell's vehicle. (App. 79–80 (21:9–23:20), 158 (18:55–19:11), 159 (second video

1:29–45), 160 (1:25–40), 161 (0:24–40)). These facts demonstrate Deputy Hill did not act in bad faith, but rather believed Mitchell's actions placed his life in danger and used deadly force only when he perceived no other option.

Given all the facts confronting Deputy Hill at the moment he fired his weapon, Deputy Hill exercised all due care to conform to the requirements of the law under terrifyingly fast and chaotic circumstances. Therefore, as a matter of law, Deputy Hill is entitled to the all due care to conform to the requirements of the law qualified immunity under Iowa Code § 670.4(1)(c) and *Baldwin I*.

II. Whether Iowa Code Section 670.4A provides qualified immunity to Deputy Hill on Thorington's excessive force claim brought under the Iowa Constitution when there was no clearly established law precluding Deputy Hill's conduct.

A. Error preservation and standard of review.

Scott County and Deputy Hill preserved error because the issue of Section 670.4A qualified immunity was raised in their Motion for Summary Judgment and decided by the district court. *See* App. 242–46; *Meier*, 641 N.W.2d at 537. Scott County and Deputy Hill filed a timely Notice of Appeal of the district court's ruling on their Motion for Summary Judgment. (App. 262).

This Court reviews a ruling on a motion for summary judgment for correction of errors at law. *Otterberg*, 696 N.W.2d at 27. Constitutional questions are reviewed *de novo*. *Veal*, 930 N.W.2d at 327; *McGill*, 790

N.W.2d at 116–17. "When the district court ruling on a motion for summary judgment presents a legal question involving statutory interpretation, [this Court's] standard of review on the statutory interpretation issue is for correction of errors at law." *Jahnke v. Deere & Company*, 912 N.W.2d 136, 141 (Iowa 2018) (citation omitted).

B. Deputy Hill is entitled to qualified immunity under Iowa Code § 670.4A because there was no clearly established law precluding his conduct at the time of his encounter with Mitchell.

Deputy Hill is entitled to qualified immunity under § 670.4A on Thorington's excessive force claim (Count I) because, under the undisputed facts, there is no clearly established law that would have put an objectively reasonable officer on notice that his actions were illegal. Iowa Code § 670.4A provides that Deputy Hill is immune from suit if (1) "the right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation" or (2) "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." Scott County and Deputy Hill have not uncovered any Iowa court decision analyzing the requirements of qualified immunity under this provision of the Iowa Code since its effective date of June 17, 2021. But the language of Iowa Code § 670.4A generally follows the clearly established law standard for

federal qualified immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Following this legal standard, Deputy Hill is plainly entitled to qualified immunity under Iowa Code § 670.4A because there was no clearly established law that precluded him from using deadly force under the circumstances confronting him (as revealed in the videotape of the incident) in October 2018.

Qualified immunity shields a government official from individual liability against claims of excessive force when his conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; *accord Davis v. Hall*, 375 F.3d 703, 711–12 (8th Cir. 2004). "The Supreme Court has generously construed qualified immunity protection to shield 'all but the plainly incompetent or those who knowingly violate the law.'" *Davis*, 375 F.3d at 711–12 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id.* at 712 (citations omitted). In the federal context, qualified immunity is a two-part test: the court asks whether the officer violated a statutory or constitutional right, and whether that right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Iowa Code § 670.4A employs the second part of the federal test—whether the right

was clearly established at the time of the alleged deprivation. Accordingly, on appeal of the denial of Deputy Hill's claim to qualified immunity under § 670.4A, Thorington must identify governing case law that would have put Deputy Hill on notice, in October 2018, that he violated a clearly established law that precluded his use of deadly force in analogous circumstances.

A clearly established law is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (citation omitted). Whether the officer had fair notice that his conduct was unlawful is based on the law at the time of the conduct. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). "While [the Supreme] Court's case law do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (cleaned up). In that light, the Supreme Court has repeatedly cautioned courts not to define clearly established law at too high a level of generality. *Id.* The law must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018) (citation omitted). Otherwise, qualified immunity would be converted into a rule of unqualified liability by alleging abstract

rights. *White*, 580 U.S. at 79. Notably, "[s]uch specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix*, 577 U.S. at 12 (citation omitted).

In accord with the U.S. Supreme Court's specificity requirement, Iowa Code § 670.4A asks whether "the law was . . . sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law." The lower court determined that the video evidence (in the light most favorable to Plaintiff) illustrates that (1) Mitchell attempted to evade arrest and entered his Ford 500; (2) Deputy Hill tried to stop him and ended up partially inside Mitchell's vehicle; (3) Mitchell dangerously maneuvered his car in reverse, forward, and in reverse again, while Deputy Hill's "lower body" was being dragged on the ground; (4) Mitchell then "slammed [the Ford 500] into the front of Hill's SUV" forcing Deputy Hill's body to be thrown into the B- Pillar; (5) after Deputy Hill "disentangled himself from the vehicle," he got up to his feet and fired at Mitchell while standing in the "door swing" of the car. (App. 240, 253). The lower court also found that the life of Deputy Messmore, who had arrived on scene just before Mitchell attempted to evade arrest, was "at risk" due to

Mitchell's "dangerous driving." (App. 253). Under these undisputed facts, there was no governing precedent that would have alerted every reasonable police officer that the use of deadly force was constitutionally prohibited. Indeed, at the time of the events at issue, or any other time for that matter, it was not clearly established that a law enforcement officer who was being dragged by a vehicle was prohibited from using deadly force to protect himself (and his fellow officer) from serious injury or death at the hands of a driver, who ignored clear warnings to stop, and instead persisted in dangerously and recklessly maneuvering a car with the officer partially inside. Because Plaintiff cannot show any case law that would have demonstrated that every reasonable police officer would have understood that the split-second decision to fire three shots under these circumstances violated clearly established law, Deputy Hill is entitled to qualified immunity under Iowa Code § 670.4A.

As discussed in Section (I.B) above, controlling law in effect at the time —*Molina-Gomes*—plainly signaled that it was appropriate for Deputy Hill to use deadly force in this situation. 676 F.3d at 1151–53. In *Molina-Gomes*, the Eighth Circuit found that an officer's split-second decision to shoot an escaping motorist who briefly dragged another officer before shedding him, crashed into a squad car and was heading for open road, did not violate the Fourth Amendment, without even reaching the question of whether the law

was clearly established. *Id.* at 1153. In the summary judgment briefing, Thorington attempted to distinguish *Molina-Gomes* by contending that no one, including Deputy Hill, was in the path of Mitchell's vehicle, as was the officer who shot Molina Campos. But to the contrary, the Eighth Circuit said nothing about anyone being in the path of Campos's vehicle when Officer Welinski fired, and the district court decision specifically noted that "Welinski opened fire as Campos drove towards him, *and continued as Campos passed him.*" *Molina-Gomes v. Welinski*, No. 09-3707 (JRT/JJK), 2011 WL 13187418, at *2 (D. Minn. May 25, 2011) (emphasis added). Indeed, the district court readily acknowledged that no constitutional violation occurred even though several shots were fired as the car headed towards open road where other motorists faced potential danger. *Id.* at *3–4.

Thorington inaccurately contended below that, unlike Molina Campos, Mitchell posed no danger to other officers and motorists after fleeing the scene. But that argument ignored the fact that in both *Molina-Gomes* and this case, deadly force was warranted because of the danger created by the motorist's dragging of police officers, immediately followed by dangerously crashing into police cars before trying to escape to open road. 676 F.3d at 1151. Not to mention the lower court's specific finding in this case that Deputy Messmore's life was in danger due to Mitchell's dangerous driving. (App.

253). And as mentioned above, while the *Molina-Gomes* court was impressed by Officer Welinski's restraint in not emptying his weapon—he fired eight shots in 3 seconds—Deputy Hill fired just *3 shots in approximately 1 second* before holstering his weapon—plainly highlighting the restraint and reasonableness of his actions under the law in 2018. (App. 158 (18:55–19:11), 159 (second video 1:29–45), 160 (1:25–40), 161 (0:24–40)).

Based on *Molina-Gomes*, a reasonable officer in Deputy Hill's position could have believed that Mitchell's actions posed an imminent threat to Deputy Hill being seriously injured or killed by being dragged underneath or struck by Mitchell's vehicle, as well as to Deputy Messmore. Thus, Deputy Hill is entitled to qualified immunity under § 670.4A because it was not clearly established that he could not use deadly force under these circumstances, and in light of *Molina-Gomes* it would not be sufficiently clear to any reasonable officer that deadly force was prohibited under these circumstances. *See Kisela*, 138 S. Ct. at 1153 (2018) (excessive force cases are "an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.") (internal quotation marks omitted).

C. Section 670.4A(1) should be applied retroactively to Deputy Hill's encounter with Mitchell on October 23, 2018.

Section 670.4A was effective June 17, 2021 and the incident that is the subject of this lawsuit took place on October 23, 2018. Qualified immunity should apply retroactively here because § 670.4A(1) is a remedial statute.

In *Hrbek v. State*, this Court explained, "Whether a statute applies retrospectively, prospectively, or both is simply a question regarding the correct temporal application of a statute." 958 N.W.2d 779, 782 (Iowa 2021). To determine the correct temporal application of a statute, courts must use a three-part inquiry:

> First, the court must determine whether application of a statute is in fact retrospective. Second, if the court determines application of a statute is in fact retrospective, then the court must determine whether the statute should be applied retrospectively. Third, if the court determines a statute should be applied retrospectively, then the court must determine whether a constitutional rule prohibits retrospective application of the statute.

Id. Initially, Scott County and Deputy Hill do not dispute that the application of Iowa Code § 670.4A is retrospective here. As for the second element, the statute should be applied retroactively because § 670.4A is a remedial, not a substantive statute. Third, the Iowa Constitution does not prohibit the retroactive application of § 670.4A.

i. Iowa Code § 670.4A should be applied retroactively because it is remedial.

A statute may be applied retroactively if it is remedial or procedural, but not substantive. *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985). A substantive statute is one that "creates, defines and regulates rights." *Id.* A procedural statute relates to "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Id.* (quoting *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976)). A remedial statute "affords a private remedy to a person injured by a wrongful act, corrects an existing law or redresses an existing grievance, gives a party a mode of remedy for a wrong where none or a different remedy existed, or remedies defects in the common law and in civil jurisprudence generally." *Board of Trustees of Mun. Fire & Police Ret. Sys v. City of West Des Moines*, 587 N.W.2d 227, 231 (Iowa 1998).

Section 670.4A is a remedial statute because it "regulates conduct for the public good." *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000). The purpose of Iowa Code § 670.4A—like other statutes that codify the defense of qualified immunity—"is to serve the public good by shielding public officials from potentially disabling threats of liability." *Spavone v. New York State Dept. of Correctional Services*, 719 F.3d 127, 134 (2d Cir. 2013). The

defense is grounded in compelling policy justifications that go beyond merely regulating the use of taxpayer funds to satisfy claims, including "the general costs of subjecting officials to the risks of trial—distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Harlow*, 457 U.S. at 816). To be sure, there was a problem to be solved by this legislation before and after its enactment: to reduce the "fear of a frivolous lawsuit" for "[a] responding officer in a high-pressure situation."[7] Thus, § 670.4A is a remedial law.

In considering whether a procedural or remedial statute is applied retroactively, Iowa courts have applied a three-part test:

> First, we look to the language of the new legislation; second, we consider the evil to be remedied; and third, we consider whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy.

City of Waterloo v. Bainbridge, 749 N.W.2d 245, 251 (Iowa 2008). In *Bainbridge*, this Court held that there was legislative intent for the retroactive

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[7] Ian Richardson, *Iowa Senate votes to give police 'qualified immunity' to lawsuits and more details about complaints against them*, Des Moines Register (Mar. 8, 2021), https://www.desmoinesregister.com/story/news/politics/2021/03/08/qualified-immunity-iowa-senate-votes-codify-lawsuit-protections-police/4629475001/.

application of a statute, even where an express statement of retroactivity did not exist in it.[8] *Id.* at 247–49. There, this Court addressed Iowa Code § 657A.10A(5), which gave municipal governments an alternative means of abating the public nuisance caused by abandoned buildings. *Id.* at 248–49. After determining that the statute involved was "not a substantive statute," this Court considered whether it applied retroactively by invoking the three-part test. *Id.* at 250–51. As to the first part of the test, this Court held the statute's language allowed the city to obtain title to property that had been abandoned at any time. *Id.* at 251. As to the second part of the test, this Court held that the "the evil to be remedied is the existence of unsafe abandoned buildings," and "[a] building abandoned before the effective date of the statute creates the same unsafe condition as a building abandoned after the effective date of the statute." *Id.* As to the third part of the test, this Court held that "there are no other statutes that allow the city to obtain title to abandoned property in this manner." *Id.* Thus, this Court held that § 657A.10A applied retroactively.

As to the first part of *Bainbridge*'s three-part test, the language and

[8] *See also Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 606 N.W.2d at 375–76 (holding statute had retroactive application); *Bd. of Trs. of Mun. Fire & Police Ret. Syst.*, 587 N.W.2d at 232 (same); *Emmet County State Bank v. Reutter*, 439 N.W.2d 651, 653 – 54 (Iowa 1989) (same).

temporal application of § 670.4A is not restricted—it applies to all employees, officers, municipalities, and counties at "the time of the alleged deprivation," regardless of when it occurred. § 670.4A(1)(a), (3). The statute further notes that "[a]ny decision by the district court denying qualified immunity shall be immediately appealable," and that "[t]his section shall apply in addition to any other statutory or common law immunity." § 670.4A(4), (5). As to the second part of the test, the "evil" to be remedied is to limit what the United States Supreme Court has described as "social costs" to "society as a whole," including (1) "the expenses of litigation," (2) "the diversion of official energy from pressing public issues," (3) "the deterrence of able citizens from acceptance of public office," and (4) "the danger that fear of being sued will" chill law enforcement conduct. *Harlow*, 457 U.S. at 814. Thus, the "evil to be remedied" is the filing of frivolous civil tort actions against law enforcement officers, which exacerbates these "social costs." As to the third part of the test, § 670.4A consists of different language than other pre-existing qualified immunity statutes in Iowa, such as Iowa Code § 670.4(1)(c). *See Stark v. Hamelton*, No. 3:18-cv-00069-RGE-SHL, 2021 WL 4056716, at *4 (S.D. Iowa Sept. 2, 2021) ("This language [of § 670.4A], on its face, is noticeably different than the language of § 670.4(1)(c) construed by the Iowa Supreme Court in *Baldwin*."). Because there were no pre-existing statutes

that allowed qualified immunity in this manner, a retrospective application will not be repugnant to any existing statute. Accordingly, § 670.4A fits squarely within the three-part test for retroactivity.

Moreover, federal case law finding that *Harlow* qualified immunity is applied retroactively supports the conclusion that § 670.4A is retroactive. "In enacting § 670.4A, it appears the Iowa legislature was adopting a state law version of qualified immunity that tracks the qualified immunity doctrine as it exists under federal law [*Harlow* qualified immunity]." *Stark*, 2021 WL 4056716, at *4 (holding defendants had established good cause to add an affirmative defense of qualified immunity pursuant to Iowa Code § 670.4A even though the conduct at issue predated its enactment). Just as federal courts have consistently found that *Harlow* qualified immunity is applied retroactively, this Court should likewise find § 670.4A retroactive, as it codifies *Harlow*-style qualified immunity. *See Rodriguez v. City of Passaic*, 730 F. Supp. 1314, 1326 n.18 (D.N.J. 1990) ("Virtually every reported federal decision considering the retroactivity of *Harlow* of which this court is aware found in favor of retroactivity."); *Finch v. Wemlinger*, 361 N.W.2d 865, 869 n.6 (Minn. 1985) (noting "*Harlow* is to be applied retroactively, and therefore applies to this case even though the trial occurred before" *Harlow* was decided); *Alexander v. Alexander*, 706 F.2d 751, 754 (6th Cir. 1983)

(reviewing grant of summary judgment and noting "the Supreme Court's recent instruction to this circuit to apply *Harlow* retroactively"); *Druckenmiller v. United States*, 553 F. Supp. 917, 918 (E.D. Penn. 1982) (finding "[f]ailure to retrospectively apply *Harlow* would result in a continuance and augmentation" of the "special costs" that *Harlow* was designed to prevent).

ii. The Iowa Constitution does not prohibit the retroactive application of Iowa Code § 670.4A.

As an initial matter, there is a strong presumption that § 670.4A is constitutional:

> we must remember that statutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

State v. Kilby, 961 N.W.2d 374, 377 (Iowa 2021) (quoting *State v. Senn*, 882 N.W.2d 1, 6 (Iowa 2016)). Section 670.4A is not unconstitutional merely because it establishes a qualified immunity standard differing from *Baldwin I*'s holding. *Baldwin I*'s holding is still good law. Section 670.4A(5) provides that , "[t]his section shall apply *in addition to* any other statutory or common

law immunity." (emphasis added). Thus, *Baldwin I* and § 670.4A are two separate immunities, and Deputy Hill is entitled to immunity under either.

Nothing in *Baldwin I* expressly limits qualified immunity under the Iowa Constitution to the all due care standard, nor does *Baldwin I* state that *Harlow* qualified immunity is unconstitutional in Iowa. Instead, this Court actually found that *Harlow* qualified immunity "in some ways . . . resembles an immunity for officials who act with due care." *Baldwin I*, 915 N.W.2d at 279. This Court also noted a number of other states allowing *Harlow* qualified immunity for direct state constitutional claims. *Id.* In fact, the language of the *Harlow*-style immunity that was incorporated into § 670.4A has consistently been upheld as constitutional by both this Court and the Eighth Circuit, and applied in other contexts. *See, e.g.*, *Moore v. Webster*, 932 F.2d 1229, 1233 (8th Cir. 1991); *Leydens v. City of Des Moines*, 484 N.W.2d 594, 597 (Iowa 1992).

This Court's holding in *Baldwin I* addressed certified questions from an Iowa federal court, including whether a qualified immunity defense was available only in the context of a constitutional tort claim alleging damages arising under Article I, Sections 1 and 8 of the Iowa Constitution. *Baldwin I*, 915 N.W.2d at 280. Importantly, *Baldwin I* left open the issue of whether other provisions of the Iowa Tort Claims Act (ITCA) and Iowa Municipal Tort

Claims Act (IMTCA)—aside from § 669.14(1) and § 670.4(1)I (the provisions the Court analyzed)—would apply to constitutional tort claims against public officials and public agencies. *Id.* at 281. The Court also stated that other constitutional provisions may garner different standards for the application of qualified immunity. *Id.*; *see also Wagner v. State*, 952 N.W.2d 843, 858–59 (Iowa 2020) (holding claims under the Iowa Constitution are governed by the ITCA and IMTCA and their procedural requirements).

Further, the retroactive application of § 670.4A is constitutional as it is remedial and does not deprive Thorington of a vested right. Section 670.4A in no way deprives Thorington's ability to bring constitutional claims, nor does it change the elements she must prove to meet her burden. Thus, it in no way deprives Thorington of a vested right. *See Baldwin*, 372 N.W.2d at 492 ("[A] right is not 'vested' unless it is something more than a mere expectation, based on an anticipated continuance of the present laws.").

However, a change in a statute that is remedial can constitutionally apply retroactively even to causes of action vested before the statute's enactment. *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 461 (Iowa 1989). Even "curative acts" that deprive a plaintiff of a vested cause of action survive constitutional scrutiny. *Id.* at 462. Similar to a remedial statute, a curative statute is "a statute passed to cure defects in prior law, or to validate

legal proceedings, instruments, or acts of public and private administrative authorities which in the absence of such an act would be void for want of conformity with existing legal requirements." *Id.* As discussed above, § 670.4A was designed to correct and expand existing lawsuit immunity for officers and, therefore, its retroactive application survives constitutional scrutiny. Thorington's due process rights are not violated by the application of § 670.4A, even if it allegedly deprives her of a vested cause of action.

III. Whether Iowa Code Section 670.4(1)(k), the "emergency response immunity," applies to Thorington's excessive force claim brought under the Iowa Constitution.

A. Error preservation and standard of review.

Scott County and Deputy Hill preserved error because the issue of Section 670.4(1)(k) emergency response immunity was raised in their Motion for Summary Judgment and decided by the district court. *See* App. 250–56; *Meier*, 641 N.W.2d at 537. Scott County and Deputy Hill filed a timely Notice of Appeal of the district court's ruling on their Motion for Summary Judgment. (App. 262).

This Court reviews a ruling on a motion for summary judgment for correction of errors at law. *Otterberg*, 696 N.W.2d at 27. Constitutional questions are reviewed *de novo*. *Veal*, 930 N.W.2d at 327; *McGill*, 790 N.W.2d at 116–17. "When the district court ruling on a motion for summary

judgment presents a legal question involving statutory interpretation, [this Court's] standard of review on the statutory interpretation issue is for correction of errors at law." *Jahnke*, 912 N.W.2d at 141 (citation omitted).

B. Iowa Code § 670.4(1)(k) provides Deputy Hill with emergency response immunity against excessive force claims brought under the Iowa Constitution.

i. The lower court expressly found that Deputy Hill was acting in response to an emergency.

At summary judgment, Deputy Hill maintained he was entitled to emergency response protection under Iowa Code § 670.4(1)(k) on Thorington's wrongful death (Count VI) and Iowa constitutional claims (Counts I, II, and III)[9] because the IMTCA provides immunity against any "claim based upon or arising out of an act or omission of a municipality in connection with an emergency[.]" The emergency response doctrine "gives a municipality immunity for claims concerning the action and reaction of its officers or employees in response to an emergency situation." *Keystone Elec. Mfg., Co. v. City of Des Moines*, 586 N.W.2d 340, 350 (Iowa 1998).

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[9] Thorington's claims under Article I, Section 9 (Count II) and Article I, Section 1 (Count III) of the Iowa Constitution based on allegations of excessive force were dismissed by the lower court because Thorington's Article I, Section 8 claim (Count I) was the more "appropriate vehicle for alleged constitutional violations arising from excessive force" and "[a]ny damages awarded would be duplicative." (App. 258).

This Court has determined that the legislative intent of the emergency response immunity "sweeps broadly" and affords the greatest protections encompassed by the legislature's use of the specific language: "in connection with" and "emergency response." *Cubit v. Mahaska Cty.*, 677 N.W.2d 777, 782 (Iowa 2004) (finding the "statute sweeps broadly"); *Kulish v. Ellsworth*, 566 N.W.2d 885, 890–91 (Iowa 1997) (noting "in connection with" is a broad term conveying a legislative intent to encompass a wide range of situations). This Court has further held that it "has no power to read a limitation into the statute that is not supported by the words chosen by the general assembly." *Cubit*, 677 N.W.2d at 782. In that light, the lower court determined that Deputy Hill's actions squarely fit within the parameters of the emergency response immunity under the IMTCA. Judge Lawson held that "the situation became an emergency when Mitchell dove into his vehicle and began moving back and forth with Hill hanging out the open door. This was an unexpected, unforeseen set of circumstances . . . [t]he actions Deputy Hill took in response – namely, his decision to fire shots at Mitchell, were a part of that response to the emergency." (App. 252–53).

The lower court found strong support in multiple state and federal cases that granted emergency response immunity for police officers against claims of excessive force in similar situations. *See, e.g.*, *Williams v. City of*

Burlington, Iowa, 516 F. Supp. 3d 851, 866 n.7 (S.D. Iowa 2021) (holding emergency response immunity applied to a claim brought by the estate of an armed suspect who was shot by police as he fled from them on foot after a routine traffic stop); *Sero v. City of Waterloo*, No. C08-2028, 2009 WL 2475066, at *17 (N.D. Iowa Aug. 11, 2009) (finding emergency response immunity applied to officers alleged to have committed excessive force after they chased and arrested a suspect who merely stared at them upon leaving a liquor store); *Harrod v. City of Council Bluffs*, 753 N.W.2d 18 (Table), 2008 WL 2200083, at *4–5 (Iowa Ct. App. May 29, 2008) (unpublished) (emergency response immunity applied to municipality where innocent victim was accidently shot by officers responding to a carjacking). In determining Deputy Hill was acting in response to an emergency situation, the district court opined "the immunity provided by the emergency response doctrine does not permit a finding that the emergency created by Mitchell's actions dissipated completely in the span of a few seconds." (App. 254); *see Adams v. City of Des Moines*, 629 N.W.2d 367, 370 (Iowa 2001) ("A close reading of section 670.4(11), however, reveals that its focus is not limited to the emergency giving rise to the response, but to the response itself. In other words, it is the occurrence and continuation of an emergency response, rather than just an emergency, that extends the city's immunity from liability.").

Accordingly, based on the video evidence, the lower court reasonably and appropriately determined that Deputy Hill fit within the parameters of the emergency response immunity afforded to him under § 670.4 (1)(k).

ii. The application of the IMTCA's emergency response immunity against Iowa constitutional claims for excessive force is constitutional.

While the lower court determined that Deputy Hill acted in response to an emergency created by Mitchell, it only afforded Deputy Hill immunity under § 670.4(1)(k) on Thorington's wrongful death claim (Count IV). (App. 254). Based in part on this Court's analysis in *Baldwin I* and *Baldwin III*, the lower court held that "the Iowa Supreme Court has not extended all of the immunities contained in the IMTCA to constitutional torts" and it would not "step where the Iowa Supreme Court has not tread" by granting Deputy Hill emergency response immunity under § 670.4(1)(k) against Thorington's Iowa constitutional claims. (App. 254, 256). But in reaching this conclusion, the lower court did not take into account the plain statutory language of the IMTCA unequivocally applying its immunities, including the emergency response immunity under § 670.4(1)(k), directly to Iowa constitutional claims. *See* § 670.1(4) ("'Tort means every civil wrong . . . and includes . . . [the]

denial or impairment of any right under any constitutional provision[.]”).[10] Additionally, firmly established precedent from this Court has concluded that emergency response immunity is valid law and does not violate the Iowa Constitution.

The IMTCA’s direct application to Iowa constitutional claims is “cloaked with a strong presumption of constitutionality” and “a party challenging a statute carries a heavy burden of rebutting this presumption.” *State v. Thompson*, 954 N.W.2d 402, 409 (Iowa 2021) (quoting *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002)). In order to overcome this presumption, Thorington is required to “show beyond a reasonable doubt that a statute violates the constitution.” *Id.* at 410. But Thorington cannot meet this high bar and accordingly, the IMTCA’s emergency response protections entitle Deputy Hill to immunity against Thorington’s remaining constitutional claim under Article I, Section 8 (Count I).

The lower court’s refusal to apply emergency response immunity to the constitutional claim was based primarily on this Court’s statement in *Baldwin*

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[10] Additionally, § 670.4(2) of the IMTCA provides that the statutory remedies shall be exclusive, a position this Court has previously recognized. *See, e.g.*, *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007) (“Iowa Code chapter 670 is the exclusive remedy for torts against municipalities and their employees.”).

I that "Iowa's tort claims acts already protect government officials in some instances when they exercise due care. . . The problem with these acts, though is that they contain a grab bag of immunities reflecting certain *legislative* priorities. Some of those are unsuitable for *constitutional* torts." *Baldwin I*, 915 N.W.2d at 280 (emphasis in original); (App. 254). But *Baldwin I's* recognition in dicta that "some" of the IMTCA's immunities are unsuitable for constitutional claims is a far cry from a finding that § 670.4(1)(k) should not be applied in this case or would be unconstitutional if so applied.

Almost 25 years ago, this Court specifically reflected on the constitutionality of the emergency response immunity under the IMTCA in *Kulish,* 566 N.W.2d at 890, in the face of a contention that § 670.4(1)(k)[11] "violates the equal protection clauses of our federal and state constitutions." The *Kulish* Court squarely rejected plaintiff's argument and held "[w]hile the district court offered no explanation for its summary rejection of plaintiffs' constitutional claim, reasons justifying its ruling are evident…[T]he [emergency] immunity provision in section 670.4(11) reasonably relates to a legitimate government interest. Plaintiffs' claim to the contrary is not persuasive." *Id.*

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[11] In 1997, emergency response immunity was contained in Iowa Code § 670.4(11) and has since been codified in § 670.4(1)(k) of the IMTCA.

Just three years later, this Court again confirmed the constitutionality of emergency response immunity in *Kershner v. City of Burlington*, 618 N.W.2d 340, 346 (Iowa 2000), and held "the only relevant inquiry in determining whether the city has immunity under the emergency response provision is whether plaintiff's claim is 'based upon or arising out of an act or omission in connection with an emergency response' by officers or employees carrying out their official duties." The *Kershner* Court further stated that "[o]ur only task, therefore, is to apply the language of section 670.4(11) as written." *Id.* The *Kershner* Court cites to *Drahaus v. State,* 584 N.W.2d 270, 274 (Iowa 1998) for the proposition that when the text of a statute is plain and its meaning clear, the "court will apply the language of the statute as written and will not search for meaning beyond express terms of statute or resort to rules of statutory construction." *See also Cubit*, 677 N.W.2d at 781 (explaining the Court refused to limit emergency response immunities because "[w]hen we interpret a statute, we attempt to give effect to the general assembly's intent in enacting the law. Generally, this intent is gleaned from the language of the statute") (citation omitted). Given that the undisputed facts in *Kushner* showed the defendant's conduct was in connection with an emergency response, as was similarly determined by Judge Lawson at summary judgment here, this Court held "the [emergency] immunity provision of section

670.4(11) applies and plaintiff's claim cannot go forward." *Kershner*, 618 N.W.2d at 346.

Additionally, in a 2008 unpublished opinion, the Iowa Court of Appeals in *Harrod* affirmed the district court's decision to grant a municipality emergency response immunity for the actions of its police officers in mistakenly shooting at an innocent victim, nearly 20 times, in response to a carjacking. 753 N.W.2d 18 (Table), 2008 WL 2200083, *4. The Court of Appeals maintained "the Iowa Supreme Court has held emergency response immunity constitutional under both the equal protection clauses of the United States and Iowa Constitutions as reasonably related to a legitimate government interest." *Id.* The *Harrod* Court, in further analyzing plaintiff's contention that the emergency response immunity was unconstitutional, upheld the district court's conclusion that plaintiff could not "overcome the presumption of constitutionality" of the emergency response statute. *Id*.

More recently, in *Baldwin III*, this Court specifically found that the immunities in the IMTCA apply to *Godfrey* actions. *Baldwin v. City of Estherville* ("*Baldwin III*"), 929 N.W.2d 691, 696–98 (Iowa 2019). Following *Baldwin III*, in *Venckus v. City of Iowa City*, this Court also explained that "[c]laims arising under the state constitution are subject to the IMTCA." 930 N.W.2d 792, 808 (Iowa 2019). And in *Wagner*, this Court held that the

ITCA's procedures applied to constitutional claims, without defining what is and what is not in ITCA's procedures and without addressing the IMTCA statutory immunities at issue here. *Wagner*, 952 N.W.2d at 858–59.

Finally, the lower court was reluctant to apply § 670.4(1)(k) to Iowa constitutional claims because it determined this Court "has thus far only extended statutory immunity to constitutional torts where it is not inconsistent with the *Baldwin* standard of due care. A statutory immunity that provides immunity in the face of lack of due care is inconsistent with the purpose of the constitutional tort and with supreme court precedent to this point." (App. 255). But this reasoning ignores the fundamental purpose of the Iowa legislature's decision to provide emergency response immunity to municipal employees under the IMTCA. In *Doe v. New London Cmty. Sch. Dist.,* 848 N.W.2d 347, 357 (Iowa 2014), this Court stated a "rational basis exists for the legislature to place, within reason, greater limits on legal claims against municipalities than on legal claims against private entities. Municipalities have finite resources and a limited ability to raise more resources." *See Messerschmidt v. City of Sioux City,* 654 N.W.2d 879, 882 (Iowa 2002) (discussing the discretionary function immunity for municipalities and noting that it applies where the city may weigh various competing needs including "limited financial resources"). The *Doe* court further elaborated as

to why municipal employees, like Deputy Hill, are entitled to immunity protections:

> Claims against municipalities, unlike claims against private entities, are ultimately paid for by residents of those municipalities. For example, in this case, any award against the District would be paid by local taxpayers or by an insurer under a policy purchased by local taxpayers. Insurance rates, in turn, are often affected by claims experience and the risks being covered. Thus, our legislature could reasonably determine that municipalities should bear some responsibility for misconduct committed by their employees and not benefit from absolute sovereign immunity, but the legal responsibility should not extend as far as that of a private entity.

Doe, 848 N.W.2d at 357. Citing the emergency response immunity in *Kulish* as an example, the *Doe* Court found "this philosophy pervades the IMTCA, which contains numerous exemptions for municipalities that are not available to private tortfeasors" and determined that plaintiff's attempt to undercut the IMTCA "would endanger every one of these exemptions." *Id*.

While *Baldwin I* has mentioned that some IMTCA immunities might not apply to constitutional claims, arguably because the immunity has to take into account an all due care standard, that interpretation is undermined by this Court's concrete precedent previously establishing that (a) emergency response immunity is constitutional and (b) there is a valid, legitimate, and rational basis for the IMTCA to provide emergency response immunity to municipal employees. Indeed, the IMTCA does not preclude valid claims of constitutional misconduct to proceed against police officers. The Iowa

legislature merely affords police officers with more protection than a private citizen given the limited resources of Iowa municipalities. Accordingly, there is unwavering support for the IMTCA's emergency response immunity to be applied against Thorington's constitutional claims.

Just this month, in *Victoriano v. City of Waterloo*, No. 22-0293, 2023 WL 115162, at *2 (Iowa Jan. 6, 2023), in determining a separate question of statutory interpretation and construction within the IMTCA, this Court reminded litigants that "we focus on the language of the statute at issue." Following this guidance, the plain language of the IMTCA directly states the emergency response immunity applies to all constitutional claims. In order to overcome the presumptive constitutionality of the IMTCA, Thorington must provide caselaw that shows beyond a reasonable doubt that the emergency response immunity cannot be applied against Iowa constitutional claims, or that § 670.4(1)(k) is unconstitutional. But Thorington cannot do so. As she is unable to offer any convincing authority to meet this high burden, the IMTCA emergency response immunity is cloaked with the presumption of constitutionality. And given the lower court has firmly found that Deputy Hill was acting in response to an emergency created by Mitchell, he is entitled to emergency response immunity under § 670.4(1)(k) from Thorington's Article I, Section 8 constitutional claim for excessive force (Count I).

CONCLUSION

For these reasons, the district court's decision denying Scott County and Deputy Hill's Motion for Summary Judgment on Thorington's Article I, Section 8 excessive force claim under the Iowa Constitution should be reversed. Because Thorington's only remaining claims are her Article I, Section 8 excessive force claim and a derivative loss of consortium claim, this case should be dismissed in its entirety.

REQUEST FOR ORAL SUBMISSION

Scott County and Deputy Hill respectfully request oral arguments in this matter.

Dated: March 30, 2023

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ATTORNEY'S CERTIFICATE OF COST

I, the undersigned, hereby certify the cost of printing Appellants' Brief was $0.00.

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/s/ Ian J. Russell March 30, 2023
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, the foregoing **Appellants' Brief** was filed electronically with the Supreme Court of Iowa. Notice of this filing will be sent through the electronic document management system to all parties who are registered filers.

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