IN THE SUPREME COURT OF IOWA
No. 22–1625

KRYSTAL WAGNER, Individually and as Administrator of the Estate of Shane Jensen,

Plaintiff–Appellant,

vs.

STATE OF IOWA and WILLIAM L. SPECE,

Defendants–Appellees.

Appeal from the Iowa District Court
For Humboldt County, Case No. LACV018792
Hon. Kurt J. Stoebe, District Judge

APPELLEES' SUPPLEMENTAL BRIEF

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ARGUMENT

In May, the Iowa Supreme Court overturned *Godfrey v. State*, rescinding the nonstatutory cause of action for damages under the Iowa Constitution and "restor[ing] the law as it existed in this state before 2017." *Burnett v. Smith*, 990 N.W.2d 289, 291 (Iowa 2023).

Wagner's supplemental briefing makes two arguments: (1) *Burnett* should not apply to her pending *Godfrey*-type claims, but if it does (2) *Burnett* requires that her abandoned wrongful-death claim be revived. Neither of these arguments has merit.

I. Wagner brought all claims available to her and strategically chose not to prosecute her § 1983 and wrongful-death claims.

To begin, much of Wagner's briefing turns on fairness. But her appeal to fairness materially misrepresents the record.

At first, Wagner wanted all her claims exclusively heard in federal court. She filed a federal lawsuit, bringing every claim available to her: § 1983 claims under the United States Constitution, *Godfrey*-type claims under the Iowa Constitution, and state common-law claims. *Wagner v. State*, 952 N.W.2d 843, 847 (Iowa 2020). The State moved to dismiss the state-law claims, asserting Eleventh Amendment immunity. *Id.* The federal court certified four questions to the Iowa Supreme Court, which

answered that the State retained Eleventh Amendment immunity for *Godfrey*-type and common-law claims in federal court. *Id.* at 865.

On remand in federal court, Wagner objected to the State asserting its immunity. Addendum, at 3. Not wanting to be in state court, Wagner asked the federal judge to "present the State with an opportunity to waive its 11th Amendment immunity in this case before simply dismissing Wagner's claims under the Iowa Constitution." *Id.* The State declined, so Wagner's state-law claims were dismissed and re-filed in a new state court lawsuit.

The federal suit continued and the State filed a comprehensive motion for summary judgment. Wagner then voluntarily dismissed her federal lawsuit. Publicly, Wagner's counsel described the decision as forum shopping: "We said (in the Wagner case) I think we'd rather be in state court than federal court, so we dismissed the federal court cause of action and pursued the state court cause of action." Addendum, at 10.

In filings with this Court, conversely, Wagner described her federal dismissal reasoning as avoiding a "*res judicata*" scenario—she feared a negative ruling on her § 1983 claims would doom her state lawsuit. Pl. Mtn. to Reopen Briefing, at 2. Of course, by her own *res judicata* reasoning, a favorable result in her federal case would have been a boon to her state case. So Wagner rolled the dice, strategically choosing to waive her federal forum rather than risk

the ramifications of a negative result. But that choice had consequences—Wagner was left only with her state claims and the knowledge that if those claims failed, she would be without redress.

In state court, the State again filed a comprehensive motion for summary judgment over the *Godfrey*-type and common-law claims. Dkt. 32, at 25. In response, Wagner "**concede[d] that . . . Count IV for Common Law Wrongful Death should be dismissed**" and offered nothing to the district court in support of the claim. Dkt. 47, at 2 (emphasis added). Thus, Wagner abandoned her common-law claim, prosecuting only her *Godfrey*-type claims and a derivative loss-of-consortium claim. *Id.*

"Choices have consequences." *Vasquez v. Iowa Dep't of Hum. Servs.*, 990 N.W.2d 661, 664 (Iowa 2023). Wagner conceded that her wrongful-death claim should be dismissed. The district court accepted her position.

Wagner did not—and could not—appeal the dismissal of the wrongful death claim, briefing only the district court's dismissal of her *Godfrey*-type claims. *See* Iowa R. App. P. 6.903(2)(g)(3); *Baker v. City of Iowa City*, 750 N.W.2d 93, 102–03 (Iowa 2008) (holding issue waived on appeal where appellant only offered a "conclusory statement" of error, as appellant's lack argument required court to "'assume a partisan role and undertake the appellant's research and advocacy'").

Wagner's assertion that she would be unjustly deprived of relief if *Burnett* applies to her case is simply not candid. Federal reporters are teeming with cases of plaintiffs bringing § 1983 claims alleging excessive force. If Wagner's excessive-force claim were meritorious, she would have received relief in federal court. But Wagner strategically abandoned that relief. And Wagner likewise could have prosecuted her wrongful-death claim in state court to keep her options open, but she abandoned that claim too.

Wagner's lack of relief does not result from *Burnett*, but her own choices. Wagner cannot walk back her strategic choice not to prosecute her wrongful-death claim and her concession that it should be dismissed simply because the claims she believed at the time were more meritorious ended up failing as a matter of law. And this Court should not explode its finality precedents to salvage a party who forum shopped and now has buyer's remorse.

II. *Burnett* applies retroactively to this case.

To be sure, the viability of Wagner's suit does not turn on *Burnett*. Had *Burnett* not been decided while this appeal was pending, the district court would still be affirmed. The undisputed facts—including video footage of the event—show DNR Officer Spece did not use excessive force when he fired his gun in response to an armed man who threatened suicide-by-cop, refused orders to

drop his gun, was in an open yard surrounded by homes and bystanders, fired his gun into the air, and pointed his gun toward officers. If this Court wishes, it can affirm on the merits and avoid Wagner's supplemental arguments altogether.

But *Burnett* does indeed provide a separate basis to dismiss Wagner's suit. It appears Wagner makes three arguments for why *Burnett* shouldn't apply here: (1) she has a vested right to bring her *Godfrey*-type claims, (2) the *Chevron* test does not support retroactivity, and (3) the law of the case precludes applying *Burnett* here.

Each will be addressed in turn.

A. Wagner doesn't have a constitutional right to bring an unconstitutional cause of action.

Wagner argues that she had a "vested property right in an Iowa constitutional claim at the time her son was wrongfully killed." Suppl. Brief, at 18. Wagner's appeal to statutory retroactivity precedent, like *Thorp v. Casey's General Stores Inc*, 446 N.W.2d 457, 463 (Iowa 1989), is erroneous.

In *Thorp*, the Legislature amended Iowa's Dramshop Act to narrow the statutory cause of action, depriving a plaintiff of her sole avenue of relief. *Id.* at 463. Applying cannons of statutory retroactivity, the Iowa Supreme Court held the amendments were substantive and thus could not fairly be applied retroactively. *Id.* at

462. But judicial decisions have always stood apart from statutes, and their retroactive effect does not turn on a substantive–procedural distinction.

Instead, "[a] holding relative to retroactiveness or prospectiveness of a judicial decision on a point of civil law does not implicate the United States Constitution." *Beeck v. S.R. Smith Co.*, 359 N.W.2d 482, 484 (Iowa 1984). Thus, Wagner's appeal to due process is misplaced, and her reliance on cases like *Thorp* discussing retroactive legislation is unavailing. She has no constitutional right to bring an unconstitutional cause of action.

B. *Burnett* applies retroactively.

1. *The Iowa Supreme Court's post-*Burnett *rulings show* Burnett *applies retroactively.* The Iowa Supreme Court has already announced its position on whether *Burnett* bars all pending *Godfrey* claims—it does.

Carter v. State is directly on point. No. 21-0909, 2023 WL 3397451, at *1 (Iowa May 12, 2023). There, the plaintiff brought a host of common-law and *Godfrey*-type claims against the State, including an unreasonable-seizure claim under article I, section 8 and a due-process claim under article I, section 9, based on officer misconduct. *Id.* The district court dismissed all claims, and on

appeal the plaintiff only briefed his *Godfrey*-type claims. *Id.* While the appeal was pending, the court decided *Burnett*.

The Iowa Supreme Court applied *Burnett* to bar the plaintiff's pending *Godfrey*-type claims: "As explained in *Burnett* . . . we overruled *Godfrey* as demonstrably erroneous and unworkable in practice. Carter's constitutional tort claims therefore cannot proceed." *Id.* Thus, it was of no matter that the plaintiff's claim accrued and was pending before *Godfrey* was overturned—the suit could not proceed.

So too here. As in *Carter*, Wagner brought common-law and constitutional torts against the State. As in *Carter*, all of Wagner's claims were dismissed. As in *Carter*, Wagner only appealed the dismissal of her *Godfrey*-type claims. And like in *Carter*, Wagner's constitutional tort claims are unauthorized and cannot proceed.

Wagner seeks to separate herself from *Carter* by arguing that her wrongful-death action "is based upon common law recognized at the time the Iowa Constitution was adopted." Supp. Br., at 12. But that was true in *Carter*, too. Carter brought an unreasonable-seizure claim against law enforcement, alleging he was arrested without probable cause. *See* Appellant's Brief, at 54–61, *Carter v. State*, No. 21-0909. False-arrest claims were firmly established in Iowa common law at the time of our constitutional ratification. *See, e.g.*, *Hutchinson v. Sangster*, 4 Greene 340 (Iowa 1854).

If the constitutional torts in *Carter* could not proceed after *Burnett*, then Wagner's constitutional torts cannot proceed either. It is of no matter whether Wagner's constitutional torts sound in entrenched common-law. The Legislature has not authorized damages for constitutional violations—the only damages Wagner seeks—which ends her suit.

2. *Applying the* Chevron *factors,* Burnett *must apply retroactively to Wagner's suit*. Even if the Iowa Supreme Court had not provided explicit guidance that pending *Godfrey*-type claims cannot proceed, the *Chevron* test confirms retroactive application is required.

"As a general rule, judicial decisions, including overruling decisions, operate both retroactively and prospectively." *Beeck*, 359 N.W.2d at 484. In exceptional circumstances, this Court may choose to deviate from the default rule and decline to apply a new case retroactively. Three factors guide the decision: (1) whether the new decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied"; (2) whether retroactive application of the new rule will "further or retard its operation"; and (3) whether retroactive application would result in "substantial inequitable results" or there is "ample basis in our cases for avoiding the 'injustice or hardship' by a holding of

nonretroactivity." *Id.* at 482 (quoting *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971)).

Applying these factors, *Burnett* explained that it was not deviating from precedent, but rather "*Godfrey* was the break with precedent." 990 N.W.2d at 298. "*Godfrey* misinterpreted the relevant constitutional text, misread Iowa precedent, and overlooked important constitutional history." *Id.* Thus, *Godfrey* was the outlier, not *Burnett*. And the *Burnett* court likewise did "not believe a meaningful reliance interest [on *Godfrey*] has accrued." *Id.* at 303.

Second, *Burnett* remedied a faulty interpretation of our Constitution, restored our common law's proper context, and reallocated power between the Judiciary and the Legislature. Allowing Wagner's claims to proceed would perpetuate, rather than rescind, *Godfrey*'s severe constitutional errors.

And third, no inequitable results will occur. As discussed above, Wagner brought every claim available to her, including § 1983 and common-law claims. She strategically abandoned them. Wagner had complete relief available to her in federal court, and she declined it. The *Chevron* factors do not require courts to save parties from the consequences of their own choices.

In all events, *Burnett* applies retroactively. The Iowa Supreme Court has already extinguished pending *Godfrey* claims

in *Carter*, 2023 WL 3397451, at *1; *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023); *Venckus v. City of Iowa City*, 990 N.W.2d 800, 812 (Iowa 2023); and *Richardson v. Johnson*, No. 22-1727, 2023 WL 4036138, at *1 (Iowa June 16, 2023). And the *Chevron* factors instruct that this Court should not perpetuate an unconstitutional exercise. Thus, *Burnett* applies to pending *Godfrey* claims, which in turn provides a separate basis to affirm the district court's dismissal.

C. The law-of-the-case doctrine doesn't apply.

Finally, Wagner makes a half-hearted reference to the law-of-the-case doctrine. But Wagner cannot show it applies here.

The "law of the case doctrine prevents" courts "from reexamining decisions . . . made in a prior appeal of the *same case*." *Freer v. DAC, Inc.*, 951 N.W.2d 6, 8 (Iowa 2020) (emphasis added). The doctrine is grounded in error preservation—requiring parties to timely "object to an incorrect statement of the law," lest they be stuck with the consequences. *State v. Crawford*, 974 N.W.2d 510, 521 (Iowa 2022). It doesn't apply when an issue could not have been decided in the earlier appeal. *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 246 (Iowa 2018).

First, there is no prior appellate decision in *this case*. In Wagner's federal case, Judge Williams certified questions to the

Iowa Supreme Court. *See Wagner*, 952 N.W.2d at 847 (answering questions about how *Godfrey* claims operate). But Wagner later filed a new state lawsuit, which she lost and appeals from. This is a separate case, with a separate case number, in a separate jurisdiction. The law-of-the-case doctrine facially does not apply.

Second, the certified-question action did not allow the State to litigate the viability of *Godfrey*. "The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else." *Foley v. Argosy Gaming Co.*, 688 N.W.2d 244, 248 (Iowa 2004) (quoting *Tarr v. Manchester Ins.,* 544 F.2d 14, 15 (1st Cir. 1976)). In the certified-question action, the State's brief explicitly noted that it was foreclosed from challenging *Godfrey*. *See* Appellee's Final Brief, at 26 n.3, No. 19-1278 (Nov. 15, 2019) ("[C]ertified questions are typically not appropriate vehicles to challenge precedent. . . . Thus, we assume for the purpose of this certified-question action the viability of the *Godfrey II* decision."). The State thus did not fail to timely object to an incorrect statement of the law.

Because this appeal is not the "same case" as the certified-question action, nor could the prior certified-question action have adjudicated whether *Godfrey* was good law, the law-of-the-case

doctrine is inapplicable and does not require that Wagner's unauthorized *Godfrey* claims proceed.

III. *Burnett* does not require that Wagner's dismissed common-law claim be revived, and Wagner is estopped from challenging the wrongful-death claim's dismissal.

Again, if this Court wishes it can simply affirm the district court on the merits and avoid Wagner's Hail Mary argument to revive her dismissed and unappealed wrongful-death claim. Still, Wagner's common-law argument is so rife with error that it must be briefly addressed.

Wagner asserts that, in extinguishing direct claims for damages under the Iowa Constitution, *Burnett* required that plaintiffs be allowed to bring common-law claims against the State notwithstanding sovereign immunity. But Wagner *already* brought a common-law claim against the State. She lost it at summary judgment.

Wagner points to the notice-pleading standards to justify reinstating her claim. But those standards don't apply here. This case is well past the pleading stage. The State moved for judgment on the wrongful-death claim, Wagner conceded judgment in the State's favor was appropriate, and the district court dismissed the claim. The issue is not whether the State was deprived of "fair

notice" of Wagner's wrongful-death claim. Rather, the State litigated the claim and *won*.

So it doesn't matter whether *Burnett* left open the possibility that plaintiffs could bring common-law claims against the State without worrying about sovereign immunity. Wagner did bring a common-law claim against the State, it was litigated, and she conceded the loss.

What's more, judicial estoppel precludes Wagner from asserting her wrongful-death claim should not be dismissed. When a party asserts a position, and the position is judicially accepted, the party is estopped from taking a contrary position later in the case. *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 195–99 (Iowa 2007). Here, Wagner took an unequivocal position: she conceded her claim should be dismissed. And the position was judicially accepted: her claim was dismissed. Thus Wagner is estopped from asserting a contrary position later in this case, and this Court and summarily reject her effort to revive the wrongful-death claim.

Substantively, Wagner's lurching analysis of *Burnett* is also incorrect. *Burnett* did not "implicitly" adopt Justice McDonalds lone concurrence in *Lennette v. State*, 975 N.W.2d 380 (Iowa 2022), which argued sovereign immunity should not apply to common-law torts brought under article I, section 8 of the Iowa Constitution. Where Justice McDonald advocated for a stark deviation from

Iowa's common-law and criminal-procedure precedents, *Burnett* instructed that it was "restor[ing] the law as it existed in this state before 2017." 990 N.W.2d at 291.

And *Burnett* expressly affirmed state sovereign immunity. *Id.* at 300–01. "The 1857 debates show that the delegates recognized this sovereign immunity as a background principle." *Id.* at 300. It collected cases recognizing sovereign immunity for the State, and its actors, going back to the 1800s. *Id.* Thus, *Burnett* says nothing about a future plaintiff's common-law options and their interplay with sovereign immunity—it simply overturned *Godfrey*, extinguishing the lone authority permitting Wagner's suit.

CONCLUSION

Applying the law as it existed in this State before 2017, there is no direct claims for damages under article I, sections 8 and 9 of the Iowa Constitution. In addition to the reasons stated in the State's principal brief, *Burnett* separately requires that Wagner's suit be dismissed. And the district court's dismissal of her wrongful-death claim is final. So the district court's judgment should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and this Court's July 6, 2023 Order because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 2,881 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Tessa M. Register
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CERTIFICATE OF FILING AND SERVICE

I, Tessa M. Register, hereby certify on the 15th day of August, 2023, I, or a person acting on my behalf filed this brief and served it on counsel of record to this appeal via electronic filing.

/s/ Tessa M. Register
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IN THE SUPREME COURT OF IOWA
No. 22–1625

KRYSTAL WAGNER, Individually and as Administrator of the Estate of Shane Jensen,

Plaintiff–Appellant,

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APPELLEES' ADDENDUM TO SUPPLEMENTAL BRIEF

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Addendum Table of Contents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

KRYSTAL WAGNER, individually and as Administrator of the Estate of Shane Jensen, Plaintiffs, v. STATE OF IOWA and WILLIAM (BILL) L. SPECE, Defendants.	Case No. 3:19-cv-03007-CJW-KEM **PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING IMPACT OF THE IOWA SUPREME COURT'S ANSWERS TO CERTIFIED QUESTIONS**

COMES NOW the Plaintiff, Krystal Wagner, individually and as Administrator of the Estate of Shane Jensen, to submit this Supplemental Brief Regarding the Impact of the Iowa Supreme Court's Answers to Certified Questions, as follows:

WAGNER'S POSITION

A. The applicability of the ITCA

The Iowa Supreme Court held that the ITCA's **procedural** provisions apply to her *Godfrey* claims under the Iowa Constitution. *Wagner v. State*, No. 19-1278, 2020 WL 7775949 at *9-10 (Iowa Dec. 31, 2020). The Iowa Supreme Court also held that the substantive provisions of the ITCA, in this case the failure to waive immunity for assault and battery by state officials, *i.e.*, excessive force claims, are unconstitutional to the extent they purport to prevent Iowans from suing the State and State employees for constitutional violations. *Id.* The *Wagner* court noted that in *Godfrey II* it "concluded, at least implicitly, that the ITCA did not foreclose a direct constitutional damage claim against the State and state employees acting in their official capacity." *Id.* at *10. The *Wagner* court continued, the "issue before us now is whether the procedural limits of the ITCA

should nonetheless apply to such a claim. It is logical to hold that constitutional torts, like other torts, are subject to the **procedures** set forth in the ITCA. **Just because the substantive barriers to liability in the ITCA do not apply, that does not mean we should dispense with the entire ITCA.**" *Id*. (emphasis added).

B. Punitive Damages

Wagner concedes that the Iowa Supreme Court held punitive damages are not available on her claims under the Iowa Constitution. However, punitive damages are generally available in civil cases in Iowa, see I.C.A. 668A, and the Iowa Supreme Court specifically noted that punitive damages continue to be available pursuant to Wagner's §1983 claims. *Wagner*, 2020 WL 7775949 at *12 n.7.

C. Administrative Exhaustion Requirements

Wagner concedes the Iowa Supreme Court held that she must comply with the administrative exhaustion requirements of the ITCA. Wagner notes that she has already complied with those procedures and, in fact, already has a case pending in Iowa District Court for Humboldt County, Case No. 02461 LACV018792, against the same defendants, regarding the same set of facts and alleging wrongdoing under the Iowa Constitution and Iowa common law. That case has been under a stay order, issued October 29, 2019, pending the outcome of the certified questions in this case.

D. Must Wagner Bring Her Iowa Constitutional Claims in State Court

Wagner concedes that the Iowa Supreme answered the question, "[a]re plaintiffs required to bring their Iowa constitutional claims in the appropriate Iowa District Court," with a "yes," but note that answer does not accurately describe the holding of the court. In actuality, the holding of the Iowa Supreme Court in *Wagner* is that the Iowa Attorney General gets to decide, apparently

on a case-by-case basis,[1] the application of the Eleventh Amendment to *Godfrey* claims. In this case, so far, the Defendants have refused to waive 11th Amendment immunity, but could choose to do so at any time.

The Iowa Supreme Court noted that Wagner could choose to pursue her federal claims in state court and that is undoubtedly true. The *Wagner* Court explained:

> In this case, the federal claims under the United States Constitution and 42 U.S.C. § 1983 will continue to go forward in federal court, but her state claims can only be pursued in state court. However, that result was by no means inevitable; in fact, it can be easily avoided. All the plaintiff has to do is to bring her federal claims and her Godfrey claims (after exhausting the administrative process) in state court. If the defendants do not remove, the entire case remains in state court. If the defendants remove the litigation to federal court, they will be deemed to have waived their right to defend the Godfrey claims in a state forum and all the claims will go forward in federal court.

Wagner, 2020 WL 7775949 at *15. While this case was pending, another plaintiff filed a case alleging excessive force in state court, including both state and federal claims, and the state removed the case to federal court, waiving its 11th Amendment immunity. See *Yakish v. Smith and State of Iowa*, U.S. Dist. Ct., Northern Dist. Iowa, Cedar Rapids Div., Case No. 19-cv-120-CJW-KEM. Wagner chooses not to pursue her federal constitutional claims in state court because she wants her federal constitutional rights heard and decided in federal court. Pursuant to the Iowa Supreme Court's holding in *Wagner*, it will be up to the State to decide if it wants to waive its 11th Amendment immunity in this case. The State could allow the federal and state claims to be pursued in one federal court action, or it could refuse to waive that immunity and instead face two separate actions, one in federal court deciding federal issues and damages and a separate one in state court deciding state issues and damages. Wagner asks the Court to present the State with an opportunity

[1] The Iowa Supreme Court did not address the equal protection and procedural due process implications of allowing the state to decide what rules are going to apply to Godfrey claim on a case-by-case basis after a lawsuit has been filed.

to waive its 11th Amendment immunity in this case before simply dismissing Wagner's claims under the Iowa Constitution.

CONCLUSION

Wagner asks that the Court grant the Defendants ten days to choose whether to waive 11th Amendment immunity; order that a Scheduling Order and Discovery Plan be submitted for the trial of any issues to be decided by this court after the Defendants make their 11th Amendment decision; and set the matter for trial as expeditiously as allowed under the rules.

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CRIME & COURTS

Cases dismissed, in limbo after Iowa Supreme Court ends constitutional damage claims

William Morris
Des Moines Register

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First, the Iowa Supreme Court said plaintiffs could sue for money damages against government officials who allegedly violated their Iowa constitutional rights.

Then, six years later, the court told plaintiffs they could not.

Last month's decision in Burnett v. Smith overturned the court's 2017 decision, known as Godfrey II, which had allowed direct claims under the Iowa Constitution. The court's ruling reinstated the previous policy that if a government worker or agency violates someone's rights, plaintiffs can file only those suits permitted within the narrow constraints of the Iowa Tort Claims Act and similar laws.

Those generally are limited to common-law causes of action such as wrongful death or trespass. Police, for instance, have immunity against many kinds of challenges to their actions while on the job.

The ruling is a seismic shift for Iowa attorneys, many of whom had embraced Godfrey claims as a tool to pursue constitutional claims in state court, their preferred venue, rather than federal court. Since the Burnett decision was announced May 5, numerous cases have had to be overhauled or in some cases simply dismissed.

Here are some of the ramifications playing out across the state.

Multiple cases against law enforcement dismissed

For a number of lawsuits, the Burnett decision represents the end of the road.

The Supreme Court has cited the Burnett decision to affirm the dismissal of constitutional claims of a Johnson County woman who claimed police used excessive force pursuing an OWI suspect into her home and an Iowa City man who claimed police wrongly charged him with rape while ignoring evidence of his innocence.

In one high-profile lawsuit, the court ruled against Jason Carter, who was found civilly liable for the killing of his mother in Marion County and ordered to pay $10 million, then acquitted of her murder in a criminal trial. Carter is pursuing state and federal suits against investigators he claims framed him for the murder, but the Iowa Supreme Court on May 12 upheld a lower-court ruling dismissing his Godfrey claims, citing the Burnett ruling.

Some plaintiffs are voluntarily dismissing cases that no longer have any legal backing. Courtney Saunders, who accused Des Moines police of racially profiling him in a 2018 traffic stop, had previously seen his federal claims dismissed, but his state constitutional claims had continued. On May 9, his attorney, Gina Messamer, filed to dismiss them, as well, citing Burnett.

"Policy-wise, it is frustrating (after Burnett) that if a police officer negligently hits you with a car, you can get compensation," Messamer said in an email. "But if a police officer violates your constitutional rights, there is no recourse under Iowa law."

In Des Moines, impact on Blazing Saddle arrest cases

Messamer also is representing two men suing Des Moines police for arresting them at gunpoint outside the Blazing Saddle bar in the East Village during the George Floyd protests in May 2020. Those cases too involve Godfrey claims.

The suit by Matthew Raper and Thuan Luong has already gone before a federal judge. As in Saunders' case, the court dismissed their federal claims but remanded the case to state court for further proceedings on their state claims. The lawsuit returned to state court about a month ago, but one of the remaining claims alleged illegal seizure in violation of the Iowa Constitution — the kind of claim no longer viable in the wake of Burnett.

Messamer said the two men will keep pursuing their state court claim for false arrest.

Analysis: Iowa Supreme Court shows new conservative approach by reversing recent civil rights precedent

Another lawsuit by Logan Villhauer, who also was arrested outside Blazing Saddle, was still awaiting a decision in federal court on both federal and state claims when Burnett was

decided, and the parties filed notice earlier this month to settle the case.

City Manager Scott Sanders confirmed in a statement that the case was settled for $3,000, a relatively minimal sum. Villhauer's attorney could not immediately be reached for comment, and it's not clear whether the end of Godfrey claims, of which Villhauer was pursuing several, had an impact on the timing or amount of the settlement.

Other cases amended to remove Godfrey claims

Court filings show a number of plaintiffs in pending lawsuits have sought to replace no-longer-viable constitutional claims with other causes of action.

Gary DeMercurio and Justin Wynn, two security testers who were arrested after entering the Dallas County courthouse after hours, are suing the county and sheriff for false arrest and other claims. Their original complaint alleged Iowa constitutional violations of due process, protection against search and seizures, and guarantees of free movement and association.

On June 2, the men filed an amended petition replacing those claims with allegations of federal constitutional violations.

In Black Hawk County, Lisa Boggess sued Waterloo police last year over the shooting death of her husband, Brent Boggess. On June 12, she too filed a new complaint, replacing what were state constitutional claims with corresponding causes of action under the U.S. constitution.

Why not just file federal claims?

While many of the rights guaranteed by the Iowa Constitution have nearly identical provisions in the U.S. Constitution, there were several legal and tactical advantages for plaintiffs to sue under the state, rather than federal, constitution.

A lawsuit bringing only state-law claims must be heard in state court. Once a plaintiff brings claims for violations of federal law, the defendant has the right to move the case to federal court, where many plaintiffs' attorneys believe the procedures are more cumbersome and more favorable to the defense.

State-law claims can be more flexible in other ways too. Messamer is representing 14 plaintiffs in the largest pending case over alleged police misconduct during the post-George Floyd protests in Des Moines. Despite extensive depositions, many of the officers involved in

the disputed arrests have not been identified, meaning they were sued as John Does. Those claims cannot simply be refiled under the federal constitution, Messamer said.

"For a federal civil rights claim, you have to sue the arresting officer personally, which I can't do when I don't know the officer's name," she said. "So the only way for those plaintiffs to have any recourse was through their Iowa Constitution claims, because Iowa law allows for (employer) liability. Burnett killed a lot of claims for those plaintiffs who were arrested by John Doe officers."

Will plaintiffs who relied on Godfrey be able to refile?

Left unclear is what will happen with other cases that were brought with Godfrey claims, many of which are past the statute of limitations to file new petitions or already are on appeal.

Dave O'Brien, one of Boggess' attorneys, has several other lawsuits in that limbo. A lawsuit by Krystal Wagner, alleging excessive force by the DNR officer who shot and killed her son, is awaiting a ruling before the Iowa Court of Appeals on whether it can continue. In another case, filed by the mother of a man shot and killed while driving away from a Scott County sheriff's deputy, the Iowa Supreme Court on Thursday rejected a motion to summarily dispose of the county's appeal, instead ordering additional briefing from the parties on how Burnett should be applied.

"We said (in the Wagner case) I think we'd rather be in state court than federal court, so we dismissed the federal court cause of action and pursued the state court cause of action," O'Brien said. "If we can't get the Iowa courts to take a second look at any of these issues in light of Burnett, we'll have to go back to federal court and say, 'Look, we want to reopen this case.'"

For O'Brien, fairness would require giving plaintiffs like his a chance to pursue other causes of action they abandoned in favor of their Godfrey claims.

"We relied on you (the Iowa Supreme Court). You told us we could do this. Now you changed your mind and you're telling us we can't. That can't be justice, can it?" said O'Brien, adding that the fact the court asked for more briefings in his Scott County lawsuit gives him cause for hope. "You have to give us an avenue, and I think they will."

Meanwhile, he said, he expects he and other plaintiff-side attorneys will take their chances with moving their cases to federal court in order to pursue claims for constitutional

violations.

"Lesson learned now. We're just going to have to file these federal claims in every case," he said. "... We chose not to file federal claims because we didn't want to get removed to federal court. Now in retrospect, federal court is looking a lot better!"

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