BEFORE THE IOWA SUPREME COURT

No. 24-0727

IN RE: DAVENPORT BUILDING COLLAPSE

Appeal from the Iowa District Court
for Scott County LACE137119
The Honorable Mark R. Lawson

APPELLEE BRIEF

Ronald A. May
R. Douglas Wells
GOMEZ MAY, LLP
2322 E. Kimberly Road,
Suite 120 West
Davenport, IA 52807
Phone: (563) 359-3591
Facsimile: (563) 359-4230
mayr@gomezmaylaw.com
wellsd@gomezmaylaw.com

Ryan G. Koopmans
KOOPMANS LAW GROUP, LLC
500 East Court Ave., Suite 420
Des Moines, IA 50309
Phone: (515) 978-1140
ryan@koopmansgroup.com

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ISSUE PRESENTED

In 2021, following this Court's creation of constitutional torts in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) and a form of "all-due care" immunity in *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018), the Iowa legislature codified the federal qualified-immunity standard that applies to constitutional claims brought under 42 U.S.C. § 1983. This new state qualified immunity, which is located in both the Iowa Tort Claims Act and the Municipal Tort Claims Act, provides that "an employee or officer subject to a claim brought under this chapter shall not be liable for monetary damages if" the "right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation." Iowa Code §§ 669.14A(1), 670.4A(1). The claims in this case are for common-law negligence, not a violation of the Iowa Constitution or any other right secured by law.

The issue presented on appeal is:

Does the statutory qualified-immunity defense under Iowa Code sections 669.14A and 670.4A apply to common-law negligence claims?

ROUTING STATEMENT

The Supreme Court should retain this appeal. Whether Iowa's new qualified-immunity statute applies to common-law negligence claims is a question of first impression that has significant implications. If the City Defendants in this case are correct—if qualified immunity does apply to negligence actions—then the substantive and procedural law for every negligence claim against a governmental entity and their employees will be dramatically different following this appeal. In fact, the vast majority of negligence claims against a public entity or its employees may be effectively barred, taking Iowa back to an era of pure sovereign immunity. That was not an intent the legislators expressed in the words of the statute or in their public statements supporting (or opposing) the adoption of the federal, "clearly established" qualified-immunity standard. But it is the natural consequence of the City Defendants' arguments. The issue presented is therefore a significant one that, under the Rules of Appellate Procedure, warrants the Supreme Court's retention of this case.

STATEMENT OF THE CASE

This case is about the collapse of The Davenport, a former hotel turned apartment building in downtown Davenport. In what was a preventable tragedy, three people were killed, one woman was catastrophically injured after her leg had to be amputated on site to free her from a pile of rubble she was under for nearly eight hours,[1] and many others suffered from emotional distress, were permanently displaced from their homes, and forever lost their personal belongings. D0021, Master Consolidated Petition ¶ 4 (Dec. 29, 2023). These injured residents (or their estates) filed eight separate legal actions, which the district court consolidated for purposes of pretrial motions, discovery, and settlement negotiations. D0001, Case Mgmt. Order at 1 (Dec. 19, 2023).

The consolidated petition names 19 defendants, but only three are at issue on this appeal: The City of Davenport and two of its employees, Trishna Pradhan and Richard Oswald.

[1] D0023, Short Form Petition of Quanishia White-Cotton Berry and Lexus Berry at 2 (Dec. 29, 2023).

These City Defendants filed a pre-answer motion to dismiss, claiming that the common-law claims against them are barred by qualified immunity under Iowa Code section 670.4A. D0116, MTD (2/4/24). The district court denied that motion, but the City Defendants filed this interlocutory appeal as a matter of right to address the qualified immunity issue. *See* Iowa Code § 670.4A(4) (decisions denying qualified immunity are "immediately appealable"). The City Defendants also filed an application for interlocutory appeal, asking this Court to separately consider their argument that they do not owe Plaintiffs a duty of care under the public duty doctrine; this Court denied that discretionary request.

STATEMENT OF FACTS

Because the case comes to this Court on a motion to dismiss, the facts alleged in the petition are assumed true and all inferences resolved in favor of the plaintiffs. *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127 (Iowa 2016). In their statement of facts, the City Defendants say they cede to that black-letter principle—that they do indeed "accept as true all well-pleaded facts in Plaintiffs' Master Consolidated Petition, as they must." Br. 9. But accepting

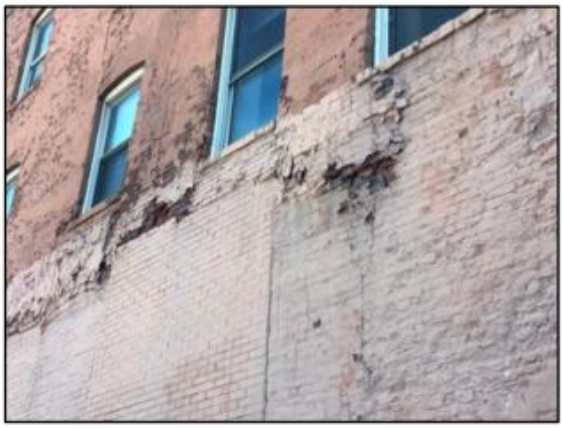
all facts as true means accepting *all* facts as true, and the City Defendants' statement of facts omits the most important ones. Indeed, the City Defendants tell a story that focuses on the fault of everyone else (though there is plenty of fault to go around), and they go so far as to paint themselves in a positive light—as actors who took only positive steps to stop this tragedy. *See* Br. 11 (citing D0021 ¶¶ 58-59) (telling the Court that the City issued an order requiring The Davenport's owner to conduct repairs to shore up the building's problems).

If the City Defendants' statement of facts was the beginning and end of the allegations against them, this might be a different case—which is to say, the injuries may have been avoided and the City Defendants may not be defendants at all. But the facts are much worse, and the City Defendants' role much more involved.

The Davenport was a six-story building that was constructed as a hybrid brick and steel structure, with the outer brick façade wall being the load-bearing support for the steel frame on the western side of the building that collapsed. D0021 ¶ 32.

On August 20, 2020, The Davenport was damaged by the derecho that ripped across Iowa. *Id.* ¶ 34. A few days after the storm, on August 26, the City of Davenport inspected the building and issued an "Official Notice and Order" that documented several code violations, including missing and deteriorated brick on The Davenport's exterior façade walls. *Id.* ¶ 36. The City sent a "Final Official Notice" two months later, noting the same concerns. *Id.*

In response to the notices, then-owner Waukee Investments hired an engineering firm, Townsend Engineering, to inspect the property. In a report dated December 15, 2020, Townsend indicated that the west exterior wall (the one that ultimately failed) "had multiple areas of deteriorated mortar joints" and "some of the outer layer of brick is missing and failing." *Id.* ¶ 37. Townsend recommended that approximately 1,250 missing, cracked, or deteriorated bricks be removed and replaced. *Id.* These photographs, taken by City inspectors, show the condition of the west wall during that period. *Id.* ¶ 40.



Waukee Investments did not make the recommended repairs and instead painted over the brick (making it harder to see the wall's deteriorating condition) and sold the building to Davenport Hotel, L.L.C. *Id.* ¶ 43. The City, though, was not fooled. On July 19, 2021, within a month of the sale of The Davenport, the City sent the new owner a letter, stating that certain conditions made the building's condition "substandard" and ordering Davenport Hotel LLC to "[r]epair/replace any/all identified deteriorated [or] questionable exterior wall(s) and/or structural wall components as necessary." *Id.* ¶ 47. The City also ordered Davenport Hotel LLC to obtain a structural engineer's report, and it issued a similar final order two months later. *Id.* ¶ 48.

For a year and half, Davenport Hotel LLC took no action, and the City did not follow up. *Id.* ¶ 49. Sometime shortly before or on

February 2, 2023, however, MidAmerican Energy complained to the City about The Davenport's condition. *Id.* ¶ 54. The electric utility, which served the apartment building with power, told the City that The Davenport's west wall was deteriorating to such a degree that the company would no longer allow its employees to work in or near the building. *Id.*

At that point, Davenport Hotel LLC finally took action, hiring Select Structural Engineering LLC to perform an emergency site visit and inspection. *Id.* ¶ 55. In its report dated February 2, 2023, the engineering firm highlighted significant problems. "There is concern on the west exterior wall where a localized area of brick is cracked and crumbling," the report stated. *Id.* ¶ 56. "The main area of brick damage is roughly eight feet wide by four feet high, and occurs directly below a beam which supports the second level." *Id.* Select Structural wrote that two beams "need to be shored with heavy posts so that permanent repairs can be applied," which would "likely involve the replacement of the wall in this area." *Id.*

The same day, after reviewing Select Structural's report, the City declared The Davenport a "Public Hazard" and issued a notice

identifying conditions that required "immediate attention." *Id.* ¶¶ 58, 59. In the notice, the City's chief building official, Trishna Pradhan, stated that an inspection of The Davenport showed "visible crumbling of [the] exterior load bearing wall under the support beam." *Id.* ¶ 59. Pradhan warned The Davenport's owner that the company could no longer allow inhabitants in the building unless it "[i]immediately shore[d] up the beams for support per" Structural Engineering's report and "secure[ed] [the] exterior masonry from failure." *Id.* "[I]f the failing masonry area is not secured per this letter," Pradhan stated, then "[e]mergency vacate orders will be posted on the building," notifying tenants that the premises is unsafe and that they would have to leave their apartments. *Id.*

Eight days later, on February 10, 2023, with the problems still not resolved, the City issued an "Official Notice to Vacate" to The Davenport (*id.* ¶ 83), meaning that the City was requiring residents to leave the building because it was "in such condition as to make it immediately dangerous to the life, limb, property or safety of the public or its occupants." Davenport Municipal Code § 8.17.150(B).

The City's determination that the building had to be vacated was as serious as it sounds; in fact, Davenport City Code makes it a misdemeanor for anyone to occupy a building once it is subject to a notice to vacate. *Id.* § 8.17.160. City Code therefore requires that the City post a signed copy of "[e]very notice to vacate" "at or upon each exit of the building" and that the notice that state, in bold capital letters, **DO NOT ENTER UNSAFE TO OCCUPY**. *Id.*; *see also* D0021 ¶ 85. The notice must also alert residents that it is a misdemeanor to occupy the building "or to deface this notice," and the notice must specify "the conditions which cause it to be a dangerous building." *Id.*

Despite the legal requirements to alert the residents of the order to vacate—a requirement that is dictated as much by common sense and common decency as it is by the municipal code—neither Pradhan nor anyone else from the City posted the notice as required by the ordinance or otherwise alerted The Davenport residents that they needed to leave their homes. *Id.* ¶ 86. Instead, the City notified the owner of the building, and that was all. *Id.* ¶¶ 83, 86.

A few weeks later, Davenport Hotel LLC finally hired a contractor, Bi-State Masonry, to begin repairing the building. *Id.* ¶¶ 62, 63. Bi-State Masonry started its work on February 22, 2023, and the next day David Valliere of Select Structural did a follow-up inspection of the property. *Id.* He spoke with a mason from Bi-State Masonry, who showed him an area of the west wall that "has a large and potentially dangerous void beneath the façade wythe of the clay brick." *Id.* ¶ 65. In an addendum report issued a week later, on February 28, Valliere wrote that "[w]hat has recently come to the attention of the team is that this area has a large void space, roughly 12"-14" wide, between the clay brick façade [which is the load-bearing wall] and the CMU layer." *Id.*[2] "This void," Valleire explained, "appears to have been caused by the collapse of some mass of clay brick between the façade and CMU" and "is now settled and piling up against the inside face of the façade, pushing it outward." *Id.* "This will soon cause a large panel of façade to also

[2] CMU is an abbreviation for "concrete masonry unit," which is essentially a concrete block.

collapse, creating a safety problem and potentially destabilizing the upper areas of brick façade." *Id.*

Valliere explained that these problems had not been visible during his initial inspection but had come into view because of the repair work. *Id.* ¶ 65. Valliere concluded that "the most direct solution is to remove the brick façade in this area in a safe, controlled manner, and then construct a second, outer layer of CMU from the ground level up to the top of the void (roughly 15 to 18 feet)." *Id.* ¶ 222. These repairs "would allow the safe removal of unstable clay brick and add solid structure to the compromised wall." *Id.*

With those new orders, Bi-State Masonry went to work on the west well, but the job quickly came to an end. *Id.* ¶ 223. During a field inspection on March 1, 2023, Pradhan saw that Bi-State Masonry was using CMU (concrete blocks) rather than bricks to repair the outer western wall—the one that was about to fail. That was unacceptable, according to Pradhan. *Id.* Even though the City had issued a notice to vacate the property just a few weeks earlier (an order that no one at the City had made the residents aware of),

and even though the repairs were designated as an "emergency," Pradhan ordered Bi-State Masonry to stop the repair work because concrete blocks did not comply with Davenport's "Downtown Design Guidelines." *Id.* ¶ 224; *see also id at* ¶ 228. According to Pradhan, the City had only approved the "emergency repair" with the understanding "that the exterior would be finished with brick to match [the] existing" aesthetic look of The Davenport. *Id.* Pradhan ordered the repair work to stop, even though Bi-State Masonry's on-site mason told Pradhan that he "could not continue with repairing only the interior wythe of the load bearing wall given its structural composition." *Id.* "Both interior & exterior wythes ha[d] to be built concurrently," the mason told Pradhan. *Id.*

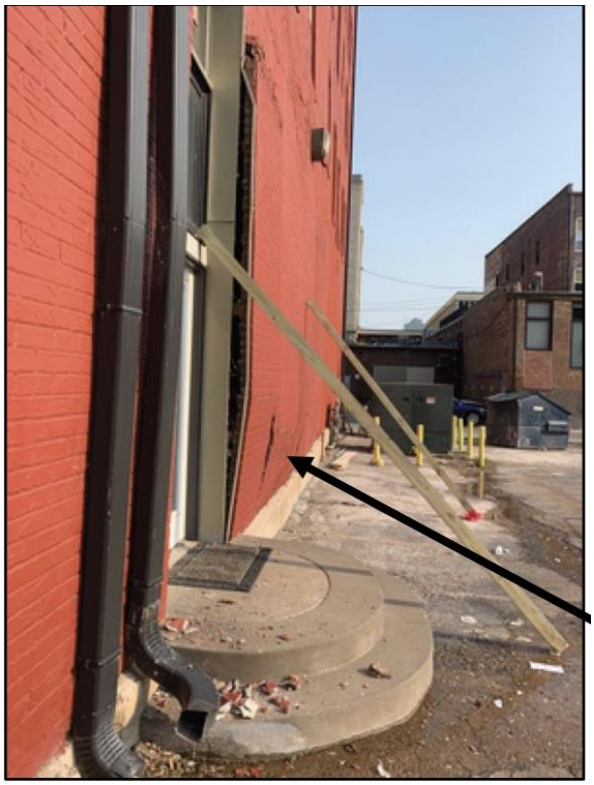
Despite the City's suggestion otherwise in its brief (Br. 43), the necessary work that Bi-State Masonry was hired to do—which is the emergency work that the City, through Pradhan, had brought to a halt because of aesthetic design guidelines—was never completed. *Id.* ¶¶ 69, 70, 225.

On May 3, 2023—two months after Pradhan stopped the repairs—the City issued another "Official Notice to Vacate" The

Davenport. *Id.* ¶ 84. Once again, the City sent the notice to the building's owner, Davenport Hotel LLC, but did not post the notice (per city code) on the building's exits (or anywhere else) and did not notify The Davenport residents that the building was so dangerous that they were legally required to vacate the premises. *Id.* at ¶ 86.

Three weeks later, on May 23, Select Structural issued another report, which was also sent to the City. D0021 ¶¶ 70, 216. The company's engineer, Valliere, observed that there were "large patches" of the west wall that "appear ready to fall imminently." *Id.* ¶ 70. "The clay brick façade on and between these openings is bulging outward by several inches and looks poised to fall," he said. *Id.*

Two days later (three days before the collapse), Pradhan returned to the site, this time with, Richard Oswald, the City's director of development and neighborhood services. D0021 ¶ 73. These are the photographs they took of the western wall that day. *Id.* ¶ 74.



The photographs show the bulging wall and the bricks that had already fallen between the load-bearing façade wall and the interior wall; they also show the "braces" that had been placed up

against the wall, which were not anchored to the ground and could not provide any structural support. *Id.*

Despite seeing the condition of the wall as shown in the photographs, despite having twice issued an order to vacate the building, and despite having stopped the emergency repairs that Pradhan knew were needed, neither Pradhan nor Oswald took action to warn the residents of The Davenport. *Id.* ¶75. Instead, they indicated that the building passed inspection. *Id.* ¶ 76, (After the building collapsed, one of them changed the inspection report to "fail" and shortly thereafter changed it to "incomplete." *Id.* ¶¶ 77-78.)

On May 27, someone working at The Downtown Davenport Partnership called 911 to report that "the wall is bulging out," and that someone working at the building told their employees "to get out of the way because it's not looking good." *Id.* ¶ 91. The fire department came, but quickly decided it was not an issue within their scope; they left within four minutes. *Id.* ¶ 92.

The next day, May 28, the western façade wall—the one that had been the focal point of the inspections and City orders—

collapsed, killing three people and injuring several others, none of whom had ever been warned to vacate. *Id.* ¶ 93, 95.

The residents of The Davenport and their families filed multiple lawsuits against The Davenport's owner, some of its contractors, and the City of Davenport and its employees, Pradhan and Oswald. As to the City Defendants that are the focus of this appeal (the City, Pradhan, and Oswald), the consolidated complaint alleges multiple theories of negligence against each of them. *See* D0021, Counts 12-22.

The City Defendants filed a motion to dismiss each of the claims, arguing that (1) they owed no legal duty to the residents of The Davenport under the public-duty doctrine and (2) they are entitled to qualified immunity under the Municipal Tort Claims Act, Iowa Code Chapter 670. Although Chapter 670 provides two express immunity provisions for claims related to inspections by municipal employees,[3] the City Defendants conceded that those

[3] Iowa Code section 670.4(1)(f) states that municipalities and their employees shall be immune from liability for any "claim for damages caused by a municipality's failure to discover a latent defect in the course of an inspection." And section 670.4(1)(j)

immunities do not apply to the facts alleged. *See* D0115, Br. in Supp. of MTD at 11, 39 (2/5/24); D0246, Reply Supp. of M. to Dismiss at 33 (2/23/24).

The City Defendants nevertheless claimed that they are immune from the negligence claims under Iowa's new qualified-immunity statute, which provides that municipalities and their employees are not liable for a claim of monetary damage for the deprivation of a "right, privilege, or immunity secured by law," where the right "was not clearly established at the time of the alleged deprivation." Iowa Code § 670.4A(1)(a).

Plaintiffs resisted. They argued that the new qualified-immunity statute, which was enacted as part of the "Back the Blue Act," applies only to alleged deprivations of constitutional or other statutory rights, not to common-law negligence actions. D0210, Res. to MTD at 22 (2/16/24). And if the qualified-immunity statute were

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provides immunity for any "claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection, investigation, or otherwise . . . if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense."

to somehow apply, Plaintiffs argued that (to the point negligence can be "clearly established" as a matter of precedent) the allegations in the petition do indeed state a claim for clearly established negligence. *Id.* at 24-30.

The district court denied the motion to dismiss, concluding that the City Defendants were not immune based on the allegations in the petition. D0284, Ruling on MTD (4/2/24). Because the Municipal Tort Claims Act defines "tort" to include negligence actions, and because the qualified-immunity statute is part of the Municipal Tort Claims Act, the district court concluded that that the new, "clearly established" federal form of qualified immunity must apply to common-law negligence claims. *Id.* at 7-8. The district court went on, however, to rule that the petition "easily meets" the qualified-immunity pleading standard in Iowa Code section 670.4A(3) and that the City Defendants' alleged actions amounted to "clearly established" negligence. *Id.* at 10-12.[4]

[4] The district court ruled that the petition did not plausibly state a negligence claim against another City of Davenport employee, Corrin Spiegel. D0284 at 11. That ruling is not at issue in this appeal.

The City Defendants subsequently filed a notice of appeal of the qualified-immunity ruling as a matter of right, (*see* Iowa Code § 670.4A(4)) and requested that the Court accept interlocutory appeal of the non-qualified immunity issues that the district court rejected (e.g., whether the City Defendants had a duty to Plaintiffs). This Court denied the application for interlocutory appeal, so this appeal involves only the question whether section 670.4A applies to common-law negligence claims and, if so, whether the petition alleges facts that show a "clearly established" act of negligence.

STANDARD OF REVIEW AND ERROR PRESERVATION

This Court reviews a district court's ruling on a motion to dismiss based on qualified immunity for correction of errors at law. *Nahas v. Polk Cnty.*, 991 N.W.2d 770, 775 (Iowa 2023).

The City Defendants raised and thus preserved their qualified-immunity arguments through their motion to dismiss and briefing, and the Court's jurisdiction in this interlocutory appeal as a matter of right is limited to the issue of qualified immunity. This Court can affirm on any ground raised in the district court. *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 904 (Iowa 2014).

ARGUMENT

I. Iowa Code section 670.4A, which provides qualified immunity for alleged deprivations of a right, privilege or immunity, does not apply to common-law negligence claims.

Iowa Code section 670.4A(1) states that "an employee or officer subject to a claim brought under this chapter"—i.e., the Municipal Tort Claims Act—is not be liable for monetary damages if any of the following apply:

> a. The right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.
>
> b. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the law.

Iowa Code § 670.4A(1)(a).

As section 670.4A makes clear, its protections are available to all public employees who are sued under the Municipal Tort Claims Act, (i.e., to "any employee or officer subject to a claim brought under this chapter") but its terms apply only to those claims that allege a "deprivation" of a "right, privilege, or immunity secured by

law." *Id.* Common-law negligence is not one of those claims, which is to say that negligence actions are not based on a "deprivation" of a "right, privilege, or immunity secured by law," as those terms were used by the legislature.

We know that because the legislature did not pull these phrases—"deprivation" and "right, privilege, or immunity secured by law" from the air; it adopted them, wholesale, from federal law. Over 150 years ago, as part of Reconstruction, Congress enacted and President Ulysses S. Grant signed into a law a statutory cause of action (now codified at 42 U.S.C. § 1983) that provides a remedy for damages against any person, acting under color of state or federal law, who subjects the plaintiff "to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute was "passed for the express purpose of enforcing the provisions of the Fourteenth Amendment"—meaning to remedy violations of rights granted by the constitution—not to "remediate the violation of any federal statute" (*Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 225, n.12 (2023) (cleaned up)) or to sue "for violations of duties

of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979).[5]

Although section 670A.4A was enacted to give qualified immunity to state employees, not to create a cause of action against them, the Iowa legislature's adoption of section 1983's terms ("deprivation," and "right, privilege, or immunity") shows that the law was designed to provide immunity for alleged violations of the Iowa Constitution (i.e., *Godfrey* claims), not to provide some new immunity for common-law negligence actions. "It is a cardinal rule of statutory construction that when the legislature employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 682 (Iowa 2022). At no time during the 150 years of section 1983's existence has the United States Supreme Court, or any other federal court, described common-law negligence as a deprivation of

[5] *See also Freeman v. City of Modesto*, 993 F.2d 882 (9th Cir. 1993) "(The first inquiry in a § 1983 suit, *unlike a negligence suit*, is "whether the plaintiff has been deprived of a right secured by the Constitution and laws." (internal quotation omitted) (emphasis added)).

a right, privilege, or immunity, unless that negligent act constitutes a constitutional violation (e.g., excessive use of force in violation of the Fourth Amendment).

The Municipal Tort Claims Act, itself, also makes clear that a claim for negligence is different from a claim that alleges a deprivation of a right secured by law. Section 670.1 defines a "tort" as "every civil wrong," including "actions based upon negligence . . . or impairment of any right under any constitutional provision, statute or rule of law." In other words, a claim for negligence, on the one hand, and a claim for impairment of a right under the constitution, a statute, or rule of law, on the other, are different things. The qualified-immunity statute applies only to the latter.

This understanding of Iowa's qualified-immunity statute—that it adopted section 1983's terms of art, along with their legal meaning—is plain enough from the context, but the legislators who spoke for and against what is now section 670.4A made that crystal clear.

Section 670.4A was added to the Municipal Tort Claims Act (and its word-for-word counterpart, section 699.14A, was added to

the Iowa Tort Claims Act) in 2021 following this Court's creation of constitutional torts in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) and the establishment of "all-due care" immunity in *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018). The qualified-immunity provisions were included in what some legislators and the Governor called the "Back the Blue Act,"[6] but they originated (in their current form), as an amendment to Senate File 476.[7]

The amendment's author and sponsor, Senator Dan Dawson, is a special agent with the Iowa Division of Criminal Investigation.[8] In urging the passage of the amendment (and in opposing an amendment to his amendment), Senator Dawson spoke about the

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[6] *See* Stephen Gruber-Miller and Ian Richardson, *Saying she's 'grateful to the heroes,' Gov. Kim Reynolds raises penalties for protest-related crimes, boosts police protections*, DES MOINES REGISTER, Jun. 17, 2021, https://www.desmoinesregister.com/story/news/politics/2021/06/17/iowa-gov-kim-reynolds-signs-back-the-blue-law-higher-protest-penalties-protecting-police/7414047002/.

[7] *See* SF 376: S-3049, adopted 3/8/32, https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=S-3049

[8] Biography, Senator Dan Dawson, https://iowasenaterepublicans.com/senators/dan-dawson/.

Godfrey decision (which had not yet been overruled), about the apprehension police officers felt afterwards, and about the perceived inadequacy of the all-due-care immunity that the Court created in *Baldwin*.[9] A law enforcement officer cannot "take about two hours to figure out what the constitutional boundaries are," Senator Dawson said, so he urged his colleagues to pass the more stringent, federal qualified-immunity standard into law. *SF 476 Debate* 06:36:54–:58. "We're not here trying to create something new," he said. *Id.* at 06:38:03–:11. "We're trying to preserve the current law of the land right now"—referring to the federal qualified-immunity standard—"because there is a slew of political actors out there that have decided to make kicking law enforcement in their teeth a hobby every day." *Id.* at 06:38:11–:22.

The entirety of Senator Dawson's comments, and the comments of those who spoke before and after him, focused solely

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[9] *Senate Video SF 376: by Dawson from Pottawatomie*, Iowa Legislature, at 03:53:06–03:53:39, 05:46:32–05:48:32, 6:31:06–06:38:36, ("*SF 476 Debate*"), https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20210308010408854&dt=2021-03-08&offset=10080&bill=SF%20476&status=i&ga=89.

on constitutional claims and this Court's decisions in *Godfrey* and *Baldwin*. *Id.* 05:39:20–06:38:36. Not a word was said about a need or desire to apply the terms of section 670A.4A to common-law negligence actions—not during the debate of the amendment or in the subsequent debates in the Senate or House about the Back the Blue Act, Senate File 342, which the qualified-immunity language was later added to.[10]

It would be shocking if there would have been, because the qualified-immunity standard that the legislature adopted simply does not work for negligence claims.

Under section 670.4A, a municipal employee is immune from suit for an alleged deprivation of a right, privilege, or immunity secured by law if that right "was not clearly established at the time

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[10] *Senate Video SF 342, Debate*, Iowa Legislature, at 1:18:02–3:02:13 (5/17/21), https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20210517100213441&dt=2021-05-17&offset=11746&bill=SF%20342&status=i&ga=89; *House Video SF 342, Debate*, Iowa Legislature, at 4:59:49–6:49:39 (4/14/21), https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20210414042300075&dt=2021-04-14&offset=2205&bill=SF%20342&status=i&ga=89; *House Video SF 342, Debate*, Iowa Legislature, at 8:42:11–9:37:38 (5/18/21).

of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law." Iowa Code § 670.4A(1)(a). As Senator Dawson made clear in his comments, when he said that "[w]e're not here trying to create something new,"[11] this language is also borrowed—this time from the United States Supreme Court.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court held that government officials are immune from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." This immunity, which applies to section 1983 claims and *Bivens* actions, is what most people (including the Iowa legislature) mean when they refer to "qualified immunity." In *Baldwin*, the city and the State of Iowa, as amicus curiae, asked this Court to adopt *Harlow* immunity for *Godfrey* claims, but the request was denied. *Baldwin*, 915 N.W.2d at 279. "*Harlow* examines objective reasonableness," the Court

[11] *SF 476 Debate* at 06:38:03–:11.

explained, so "in some ways it resembles an immunity for officials who act with due care." *Id.* But the U.S. Supreme Court's qualified-immunity standard "is centered on, and in [this Court's] view gives undue weight to, one factor: how clear the underlying constitutional law was." *Id.*

The legislature ultimately disagreed with that conclusion, deciding to codify *Harlow* into Iowa Code so that it could (in Senator Dawson's words) "put qualified immunity back to where it was initially intended to begin with." *SF 476 Debate* at 05:48:21-:32. But despite the disagreement between the two branches on whether *Harlow* immunity properly weighs the competing considerations, there is full agreement on what the standard means and how demanding it is.

"For a right to be 'clearly established,' the law must have been sufficiently clear that every reasonable official would have understood that his actions violated that right." *Swearingen v. Judd,* 930 F.3d 983, 987 (8th Cir. 2019). The question cannot "be examined at a high level of generality." *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (en banc). It's not enough, for instance, for

a plaintiff to cite dozens of cases for the proposition that excessive force is a violation of the Fourth Amendment. Instead, "[t]he dispositive question is whether the violative nature of *particular conduct* is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal quotation omitted; emphasis in original). While a plaintiff does not need to cite a case directly on point, there must be "controlling authority" or "a robust consensus of cases of persuasive authority" that puts "the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation omitted).

For constitutional claims, that is a "demanding standard," but not an impossible one. In *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012), the Eighth Circuit held that a police officer violated the Fourth Amendment by tasing the plaintiff who "was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him." *Id.* at 366. The court ruled that the officer was not entitled to qualified immunity because, three years earlier in *Brown v. City of Golden Valley*, 574 F.3d 491

(8th Cir. 2009), the court determined that the law "was sufficient to inform an officer that use of his taser on a nonfleeing, nonviolent suspected misdemeanant was unreasonable." *Shekleton*, 677 F.3d at 367.

In contrast, in *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), the Eighth Circuit concluded that an officer who used excessive force to take a woman to the ground with a bearhug, even though she was not acting threatening, was entitled to qualified immunity. *Id.* at 980. The court explained that *Shekleton* and cases like it that concern "the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force against a suspect who ignores a command and walks away." *Id.*

The juxtaposition of these two cases—*Shekleton* and *Kelsay*—shows how precise a court precedent must be before the law is deemed clearly established. But those differing decisions also show why the legislature could not have intended this standard to apply to common-law negligence claims.

The reason that the plaintiff in *Shekleton* succeeded, and the plaintiff in *Kelsay* did not, is because he could point to precedent—to the Eighth Circuit's previous holding, as a matter of law, that a similar fact pattern violated the Fourth Amendment. That was possible because the determination of whether a government official's conduct violates a constitutional right is a legal one; even when a jury is the factfinder, and thus the reviewing court must view the facts in the light most favorable to the winning plaintiff, "the substance of a constitutional right is a question of law and therefore not within the authority of the jury." *Alexander v. City of Milwaukee*, 474 F.3d 437, 444 (7th Cir. 2007). So "whether the acts done by the [government official] violate the Constitution and whether the law was clearly established at the time of any violation are, as questions of law, subject to [the appellate court's] de novo review." *Id.*[12]

[12] *See also Reynolds v. City of Chicago*, 296 F.3d 524, 527 (7th Cir. 2002) (Posner, J.) ("As with many other such questions in constitutional cases, it is to be decided as if it were a pure question of law, that is, with no deference given to the finder of fact, whether judge or jury."); *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002) (Easterbrook, J.) ("We assume that the jury resolved all factual

That is why *Harlow's* "clearly established" qualified-immunity standard (which the legislature adopted in section 670.4A) works for constitutional claims: because courts issue published decisions, which establish the law, that can be read by or taught to police officers and government officials.

Negligence cases are not like that. Even where the underlying facts are agreed to (the who, what, when, where), "seldom does a party who has the burden of proof [in a negligence action] sustain that burden as a matter of law." *Hepp v. Zinnel*, 199 N.W.2d 68, 69 (Iowa 1972). It's almost unheard of, and it goes both ways: As this Court has held, even when the plaintiff gets beat up in a bar fight that he indisputably started, and sues the bar for not calling the police *on him*, the jury (not the court) still decides whether the bar was negligent. *See Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829

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disputes in the McNairs' favor. Juries are not authorized, however, to determine the substance of the Constitution. Taken in the light most favorable to the verdict, the record shows an over-the-top response by the police department as an entity: too many cars, too many gun muzzles on display."); *Johnsen v. Indep. Sch. Dist. No. 3 of Tulsa Cnty., Okl.*, 891 F.2d 1485, 1489 n.3 (10th Cir. 1989) ("Whether the speech is constitutionally protected is a question of law and should not be submitted to the jury.").

N.W.2d 772 (Iowa 2013). And that jury finding comes in the form of a simple verdict form, not a written decision that anyone can read and learn from. There is no recitation of the facts, or even a firm determination of which specification of negligence the jury found the defendant liable for (there are often many). A jury verdict in a common-law negligence case produces a transcript (if someone pays for it) and a one- or two-page piece of paper that says "yes" the defendant was at fault, or "no" he was not. That is it, and it is never enough to "clearly establish" the law of negligence.

For negligence claims, there will almost never be a published, "controlling authority" about particular conduct, or "a robust 'consensus of cases of persuasive authority" that puts negligence "question beyond debate." *Ashcroft*, 563 U.S. at 741. So if qualified immunity applies to negligence actions, it will be impossible for nearly every plaintiff to show that the "violative nature of *particular conduct* is clearly established" (*Mullenix*, 577 U.S. at 12), meaning almost every negligence claim against the state or local

governments will be barred, taking Iowa back to an era of nearly pure sovereign immunity.[13]

That is a dramatic change in the law—one that should be expressed clearly, if the legislature really intended to make it. *See Victoriano v. City of Waterloo*, 984 N.W.2d 178, 182 (Iowa 2023) ("A statute will not be presumed to overturn long-established legal principles, unless that intention is clearly expressed or the implication to that effect is inescapable." (quotation omitted)).

Consider medical-malpractice actions against physicians who practice at county- or state-owned hospitals; those are "claims" brought under Chapter 670 and 699, so under the City Defendants' reading of sections 670.4A and 699.14A, qualified immunity applies. That would surely be surprising but welcome news to those physicians, because it would likely immunize them from nearly every medical-malpractice claim. There is no controlling case law

[13] *See Mendez v. Cnty. of Los Angeles*, 897 F.3d 1067, 1083 (9th Cir. 2018) ("Applying the 'clearly established' requirement of the qualified immunity analysis to all state common-law negligence claims would effectively eviscerate state common law.").

that addresses the numerous (and yet unimagined) ways that a physician's actions might fall below the standard of care. And because juries, not judges, decide what conduct constitutes negligence, there will likely never be controlling authority in this area that would meet the "clearly established" test.

Harlow's "clearly established" standard simply does not work in a negligence action, so section 670.4A cannot apply to negligence claims *unless* this Court is willing to substantially depart from federal precedent on what it means for law to be "clearly established"—that is, if the Court is willing to make up the law anew. But that is not what the legislature intended, and it would not be faithful to the legal terms of art it used.

"The law uses familiar legal expressions in their familiar legal sense, (*Henry v. United States*, 251 U.S. 393, 395, (1920) (Holmes, J.)), and the legislature clearly intended to adopt the strict, federal standard when it comes to determining whether a violation of the law is "clearly established." Indeed, the City Defendants embrace

that very idea (Br. at 16–20)[14] and this Court has already held that when the legislature inserted federal heightened pleading standards into section 670.4A(3), which "have established meaning in federal law," the lawmaking body demonstrated its intent "to incorporate that meaning" into the statute. *Nahas*, 991 N.W.2d at 78. The same principle applies to the meaning of "clearly established," which shows, definitively, that section 670.4A does not apply to negligence claims.

* * *

A "right, privilege, or immunity secured by law" is just what it sounds like: a *right* secured by law. The right to free speech; the right to be free from unreasonable searches and seizures; the right to be free from cruel and unusual punishment; the right to equal protection of the law. A claim for common-law negligence is something different—something to which qualified immunity does not apply.

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[14] *See also* City Defendants' Br. at 14 ("By enacting Iowa Code enacting Iowa Code § 670.4A, Iowa's legislature "adopt[ed] a state law version of qualified immunity that tracks the qualified immunity doctrine as it exists under federal law." (internal quotation omitted)).

Plaintiffs' claims in this case are based on common-law negligence, not a right that was secured to them by law. To be sure, the duty of care that the City Defendants owed to plaintiffs may have been established by city code—like the duty to use due care in driving down the street is established, in part, by the speed limit—but those municipal ordinances do not create "rights, privileges, or immunities," in the sense that section 1983 and federal courts uses those terms. They are simply standards that may be used to establish a duty of care. *See Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 37 (Iowa 1982) ("A statutory duty or standard may thus establish an essential element for a negligence action. However, it does not provide the cause of action. The cause of action itself is a creation of the common law that is inherent in the tort of negligence.").

Because the legislature "obviously transplanted" section 640.4A's terms from section 1983 and the federal caselaw applying qualified immunity, it "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Nahas*, 991 N.W.2d at 781 (cleaned up). Under those

standards—under that body of learning—qualified immunity does not apply to the claims in this case.[15]

This Court denied the City Defendants' application for interlocutory appeal, so the only issue properly before this Court, at this point, is whether qualified immunity applies. *See* Iowa Code § 670.4A(4). Because it does not, the appeal should be dismissed and the case remanded to the district court, where the City Defendants can raise any defense they may have to the merits of Plaintiffs' negligence claims.

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[15] As support for their argument, the City Defendants cite to a recent federal district court decision that seemed to apply section 470.4A to a negligence claim against a Davenport police officer. But the court in that case had already ruled, as a matter of law, that the plaintiff's negligence claim failed because Iowa law expressly "authorizes officers to use reasonable force 'necessary to effect the arrest or defend any person from bodily harm while making the arrest.'" *Klum Est. of Klum v. City of Davenport*, No. 3:23-CV-00043-RGE-WPK, 2024 WL 2880640, at *14 (S.D. Iowa May 30, 2024) (quoting Iowa Code § 804.8.). The court's application of section 670.4A was more of an afterthought that, according to the court, only "bolstered" its ruling that the claim failed as a matter of law. *Id.* In any event, the plaintiff in *Klum* did *not* contest the City of Davenport's assertion that section 670.4A applies to negligence claims, so the court was not presented with the argument that Plaintiffs are making here.

II. If qualified immunity applies to common-law negligence actions, the claims in this case are some of the few that would still survive.

Applying the *Harlow* qualified-immunity standard to negligence claims is why the idiom "square peg in a round hole" was coined. It does not fit, which is why the analysis ends there.

If, however, the parties are forced to live in the pretend world where qualified immunity does apply—where a plaintiff must identify a body of judicial precedent that clearly establishes that *particular conduct* constitutes negligence *as a matter of law*—then this is the rare negligence case that meets that standard (as whacky is that standard might be).

A. This Court's decisions in *Wilson v. Nepstad* and *Breese v. City of Burlington* clearly establish that the City Defendants breached their duty of care.

Forty-five years ago, in *Wilson v. Nepstad*, 282 N.W.2d 664, 666 (Iowa 1979), this Court faced a fact pattern very similar to (though not as egregious as) this one. In *Wilson*, the plaintiffs alleged the city's inspectors were negligent in inspecting a multi-story apartment building and declaring it safe. *Id.* 666, 672. The apartment burned, killing and injuring multiple residents. *Id.*

The City argued that it did not owe a duty of care to the building's residents because their duties were to the whole world, like "general police and fire protection." *Id.* (quotation omitted). This Court rejected that argument. Unlike "general police or fire protection," the Court reasoned, the breach of an inspector's "duties imposed by law" "involves a foreseeable risk of injury to an identifiable class to which the victim belongs," rather than to "the public generally." *Id.* at 671-72. The Court stated that it was "unimpressed by policy arguments" "that failure to exempt the municipality from its negligence would have a disastrous financial impact." *Id.* at 674. The Court doubted that was true but, in any event, stated that such policy arguments are better addressed by the legislature. *Id.*

Which they were. Less than three years after *Wilson*, the legislature added to the Municipal Tort Claims Act the immunity that is now codified at Iowa Code section 670.4(1)(f), which provides that a municipality and its employees are not liable for "[a]ny claim for damages caused by a municipality's failure to discover a latent defect in the course of in inspection." *See* 82 Acts, ch 1018, §4, 5.

Four years after that, in 1986, the legislature further refined the liability that could be imposed upon a city for negligent inspections, this time adding what is now Iowa Code section 670.4(1)(j), which provides immunity for any "claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, *inspection*, investigation, or otherwise . . . *if* the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense." *See* 86 Acts, ch. 1211, §33 (emphasis added).

Since the legislature made the policy decision to limit *Wilson's* holding in 1982 and 1986, the law has been the same—which is to say that it has be clear: Under *Wilson*, and limited *but not eliminated* by subparagraphs (f) and (j) of Iowa Code section 670.4(1), an inspector who negligently fails to discover or take action to warn residents of an open (as opposed to latent) defect is liable if the building was under their supervision or control or their actions or omissions constitute malice or a criminal offense.

That is this case. The defects in The Davenport's western wall were not latent; they were very much open, as the pictures above show. *See also* D0021 ¶ 232. And it wasn't that the City Defendants missed this open defect; they saw it, documented it, and (twice) ordered that the building be vacated. *Id.* ¶ 83. Yet, in a move that shocks the conscience, they did not tell the residents—as required by municipal code and common sense—*to vacate the building*. *Id.* ¶¶ 239, 245. So this case fits well within the holding of *Wilson*; in fact, it is difficult to image a stronger case of negligence against a city and its inspectors.

Even if *Wilson* had never been decided, the City Defendants would still have breached their duty of care under this Court's clearly established precedent because the City Defendants' actions went beyond a negligent inspection. The City, through Pradhan, actually took affirmative actions that put Plaintiffs in danger: (1) It *stopped* the repair work that was needed to keep the wall from collapsing; and, as noted above, (2) it affirmatively ordered the building vacated but was negligent in performing its statutory obligation to warn the residents by posting signs.

In *Johnson v. Humboldt County*, 913 N.W.2d 256, 267 (Iowa 2018), this Court suggested that a city owes a duty of due care when it "affirmatively acts and does so negligently." And two year later, in *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020), this Court adopted that suggestion as a holding: the public-doctrine does not apply—which is to say, a public employee *does* have a duty of care—if their negligent actions were based on an affirmative act. *Id.* at 20.

Stopping repair work is an affirmative act, and doing so when the danger is so great that the municipality had (just days earlier) declared the building too dangerous to inhabit, is negligent. The same is true for ordering that the building be vacated (it is an affirmative act) and then failing to post the required notice or otherwise warn the residents. Thus, even apart from *Wilson*, the City Defendants should have known that their affirmative, and extremely dangerous, actions would subject them to liability.

Turning back to the "clearly established" test, then: There is precedent directly on point that demonstrates, in two separate ways, that the City Defendants owed a duty of care to the residents

of The Davenport; the allegations in the petition, when accepted as true, show (under any standard imaginable) that the duty of care was breached and establish that the express immunities in section 470.4(1) do not apply. To the extent that any plaintiff can show that particular conduct was clearly established to be negligent, then Plaintiffs have.

The City Defendants make two arguments in response. They claim that *Wilson* has been undermined, to the point of being overruled. Br. 32-33. And they argue that Plaintiffs have not "plausibly" alleged that their action in stopping the repairs led to the collapse, so (in their view) *Breese v. City of Burlington* is inapplicable. Both of those arguments fail.

B. *Wilson* has not been overruled, nor should it be.

The City Defendants claim that *Wilson* was wrongly decided and "is no longer good law." Br. 32-33. That is not true; while this Court has walked back some of the broader statements in *Wilson* regarding the public-duty doctrine, it has continued to cite *Wilson*'s holding that a negligence action can be maintained against a municipality based on the duties that are "designed to protect a

"'special, identifiable group of persons,'" which includes inspections for the protection of apartment-building residents. *Est. of McFarlin v. State*, 881 N.W.2d 51, 62 (Iowa 2016) (quoting *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001), quoting *Wilson,* 282 N.W.2d at 672).

To the extent that the City Defendants are asking this Court to take the affirmative step to overrule *Wilson*, it should reject the invitation.

To begin, it is not clear that overruling precedent, in the name of deciding whether the law is "clearly established," is within the scope of the automatic appeal right for the denial of qualified immunity. *See* Iowa Code § 670.4A. That is why the City Defendants also asked for interlocutory appeal—because even they were not confident that their duty-of-care arguments fall within the automatic right of appeal under section 760.4A.

But even so, there is no reason to back away from *Wilson's* core holding, and stare decisis principles counsel against overruling it. To begin, and as noted above, it is consistent with the "special relationship" rule that this Court continues to apply. That is why this Court distinguished *Wilson* in *Estate of McFarlin*, *Kolbe*, and

Raas v. State.[16] Far from undermining the specific holding in *Wilson*, this Court has reaffirmed it.

Also, this is an area where the legislature has not been silent. In response to *Wilson*, the elected branches weighed the policy considerations of municipal liability for damages related to negligent inspections and, instead of immunizing cities altogether, decided only to limit the types of claims that can be brought. Thus, the elected branches believed it best to *continue* to allow claims for actions related to non-latent defects when the building is under the supervision or control of the municipality or the inspector's actions were done with malice or amounted to a criminal offense. *See* Iowa

[16] *Estate of McFarlin*, 881 N.W.2d at 62 (distinguishing the facts in *McFarlin* from *Wilson*, because "[u]nlike the residential apartment units leased to private tenants in Wilson, Storm Lake is open to the public."); *Kolbe*, 625 N.W.2d at 729 (acknowledging the *Wilson* court's conclusion that "the doctrine did not bar the plaintiff's suit because the statutes and ordinances in question *were not designed to protect the public*, but rather were designed to protect a 'special, identifiable group of persons") (emphasis in original); *Raas v. State*, 729 N.W.2d 444, 449 (Iowa 2007) (the statutes in *Wilson* "were not aimed at the public in general (as required by the public-duty doctrine), but to narrow groups of persons, thereby establishing special relationships and making the public-duty doctrine inapplicable.").

Code §§ 670.4(1)(f), (j). And as the City Defendants concede for the purposes of the motion to dismiss, those elements are met here.

Wilson, as limited by the legislature's actions, is still alive and well. Indeed, it is clearly established and should remain that way.

C. The petition's allegations regarding the City's work-stoppage order allege more than a plausible claim of negligence.

City Defendants also claim that it is not "plausible" that their affirmative actions, as alleged in the complaint, were a cause of the building collapse. Br. 43-45. That is a strained argument.

As this Court held in *Nahas*, the plausibility standard—like everything else is section 670.4A—was borrowed from federal law, so those same federal standards apply. *Nahas*, 991 N.W.2d at 781. A "plausible" petition does not need to spell out every detail of the case—there is still room for discovery, even under this slightly heightened pleading standard. Instead, the allegations need only allow "'the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft*, 556 U.S. at 678).

The allegations here are pretty straightforward. The repair work was needed, and Pradhan knew it; indeed, she designated it as an emergency. D0021 ¶¶ 48, 59, 224. Pradhan stopped the emergency work because of the City's aesthetic guidelines. *Id.* ¶¶ 224-24, 382. The work was never performed,[17] and the City never challenged that refusal or took other action (*id.* ⁋⁋ 67, 223-225), yet Pradhan did not warn the residents to leave the building, even though she knew of the danger. *Id.* ¶ 388. The building collapsed, killing three people and injuring others.

We are at a loss as to what is so implausible about the causal link.

In *Breese v. City of Burlington*, where this Court held that the public-duty doctrine does not shield city employees from their affirmative acts (like stopping emergency repair work while refusing to warn the residents of the grave danger they were in), this Court quoted and relied upon the Utah Supreme Court's

[17] The City Defendants suggest, at page 43, that the report work that Pradhan stopped was eventually completed. That is false, and it is not what the petition alleges. The work was not completed, as alleged in the very paragraph that the City Defendants cite. *See* D0021 ¶ 69.

decision in *Cope v. Utah Valley State College*, 342 P.3d 243 (Utah 2014), which held that "active misfeasance" on the part of a governmental entity "is not confined to situations where an affirmative act directly causes harm to the plaintiff." *Id.* at 255. In reaching that conclusion, the Utah Supreme Court quoted Justice Cardozo:

> The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all.... If conduct has gone forward to such a stage that [inaction] would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.... The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.

Id. (quoting *H.R. Moch Co. v. Rensselaer Water Co.,* 247 N.Y. 160, 159 N.E. 896, 898 (1928)). To rephase that sentiment for this case: The City of Davenport is certainly entitled to enforce its aesthetic guidelines, as silly as that might be when the building is about to collapse. But once the City does enforce those rules—once it stops *emergency* repair work on a wall that has seriously deteriorated and is in danger of collapsing—then, at the very least,

the City has a duty to warn the residents that they need to leave the premises. The City cannot, as Justice Cardozo said, "withdraw with impunity."

The allegations of the City Defendants' affirmative acts create more than a plausible theory of negligence. The argument should be rejected.

* * *

Nothing in this section is relevant to this appeal—which is to say that the Court can ignore it all—because the qualified-immunity provisions in Iowa Code section 670.4A do not apply to negligence claims. Once that issue is correctly resolved, the rest of the City Defendants' arguments (e.g., whether there is a duty of care) are interlocutory merits arguments that must wait until the development of the record and final judgment.

But if we are forced to play the City Defendants' game—if Plaintiffs must go down the rabbit hole and fit a negligence claim into the standard that requires them to show a clearly established violation of a right—then Plaintiffs have done so, as well as any

plaintiff in a negligence case can. The Court can therefore affirm the district court on that basis—but it should not get that far.

CONCLUSION

Now that *Godfrey* claims are no more, it would be strange indeed if Iowa Code section 670.4A's sole function was to bar nearly every negligence action against the State and local governments—to bring us back to complete sovereign immunity. That is certainly something the legislature *can* do, but it is not something they chose to do in the Back the Blue Act.

The "deprivation" of a "right, privilege, or immunity" does not refer to a common-law negligence claim. That is clear enough, based on the legal terms of art in section 670.4A and the federal body of law from which they were borrowed. If the legislature really wanted to nearly abrogate the State Tort Claims Act and the Municipal Tort Claims Act by applying the "clearly established" qualified-immunity test to negligence claims, then it should have—and indeed would have—been more direct about it.

Qualified immunity does not apply to negligence claims, so it does not apply to Plaintiffs' claims against the City Defendants. The Court should rule as much and dismiss this appeal.

Ryan G. Koopmans, AT0009366
KOOPMANS LAW GROUP LLC
500 East Court Ave., Suite 420
Des Moines, IA 50309
Telephone: (515) 978-1140
Email: ryan@koopmansgroup.com

Ronald A. May
R. Douglas Wells
GOMEZ MAY, LLP
2322 E. Kimberly Road,
Suite 120 West
Davenport, IA 52807
Phone: (563) 359-3591
Facsimile: (563) 359-4230
mayr@gomezmaylaw.com
wellsd@gomezmaylaw.com

ATTORNEYS FOR CONSOLIDATED PLAINTIFFS-APPELLEES

PROOF OF SERVICE

I certify that on the 6th day of November, 2024, I electronically filed this brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following.

/s/ Ryan Koopmans

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g) and 6.903(1)(i)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 9,859 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1)

/s/ Ryan Koopmans