IN THE SUPREME COURT OF IOWA
Case No. 18-1856

GREGORY BALDWIN,
Plaintiff-Appellant,

vs.

CITY OF ESTHERVILLE, IOWA,
Defendant-Appellee.

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA
THE HONORABLE MARK W. BENNETT, JUDGE

STATE OF IOWA'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE

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No party or party's counsel authored this brief in whole or in part, nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

INTEREST OF THE AMICUS CURIAE

The State of Iowa is the largest employer of government officials in the state and has a significant interest in the outcome of the Court's ruling. The State of Iowa has filed numerous amicus curiae briefs in state and federal court on important issues impacting the State of Iowa and its citizens.

INTRODUCTION

This past term, this court considered, via certified question from a United States District Court, whether a defendant may raise a qualified immunity defense to a constitutional tort claim brought under article I, sections 1 and 8 of the Iowa Constitution. *See Baldwin v. City of Estherville*, 915 N.W.2d 259, 265 (Iowa 2018) (hereinafter "Baldwin I"). The court determined that "qualified immunity should be available to those defendants who plead and prove as an affirmative defense that they exercised all due care to conform to the requirements of the law." *Id.* at 279.

Following the decision, the case resumed in federal court. Judge Bennett, in ruling on a motion for summary judgment, determined that resolving the case required certifying six additional questions to the Iowa Supreme Court, with the goal of further defining the silhouette of Iowa's emerging constitutional tort doctrine. *Baldwin v. City of Estherville*, 336 F. Supp. 3d 948, 958–59 (N.D. Iowa 2018).

The State of Iowa has requested leave to file an amicus brief and will discuss each certified question in turn.

ARGUMENT

I. The Proper Scope of Municipal Liability for Constitutional Torts.

Judge Bennett first asks: "Can the City assert qualified immunity to a claim for damages for violation of the Iowa Constitution based on its officers' exercise of 'all due care'?" *Id.* at 958. This question raises two important issues: (1) whether *Monell* liability is appropriate for *Godfrey*-type claims against municipalities, *see Godfrey v. State*, 898 N.W.2d 844, 879 (Iowa 2017) (hereinafter "Godfrey II"), and (2) if not, whether municipalities are strictly liable for the constitutional torts of their officers.

A. *Monell* Is Consistent with Iowa Law, and Municipalities Should Only Be Liable for Constitutional Torts Visited Pursuant to a Governmental Policy or Custom.

Before the court may consider whether a municipality can assert qualified immunity to a constitutional tort claim based on officer misconduct, the court must first decide whether a municipality can be held vicariously liable for the constitutional torts of its employees at all. The court should hold that, as in *Monell v. Department of Social Services*, municipalities may only be liable for constitutional violations that arise from governmental policies or customs. *See* 436 U.S. 658, 694 (1978).

In *Monell*, female employees brought a § 1983 action alleging the Department of Social Services and the Board of Education of the City of New York routinely forced pregnant employees to take unpaid leaves of absence without medical justification. *Id.* at 660–61. The Supreme Court had previously held municipalities were not "persons" amenable to suit under § 1983, *see Monroe v. Pape*, 365 U.S. 167, 191–92 (1961), and the district court therefore found that the employees could not sustain claims for backpay against the City. *Monell*, 436 U.S. at 662. The employees' appeal reached the Supreme Court, which partially reversed *Monroe*. *Id.* at 663.

The Court explained "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a

deprivation of rights protected by the Constitution." *Id.* at 690. Yet, by the terms of § 1983, municipalities must also be responsible for any infringements that result from governmental "customs," regardless of any "formal approval through the body's official decision-making channels." *Id.* at 690–91.

Importantly, the Court held "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 692. Thus, the Court found liability should not exist in the absence of causation. *Id.* The Court ultimately held the scope of municipal liability for federal constitutional torts must be limited to those instances in which "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694.

In the cases following *Monell*, the Supreme Court announced several principles that aid the Court in addressing the doctrine's fundamental inquiry: whether the municipality is at fault. For example, a municipality's good-faith belief in the constitutionality of its policy or custom does not absolve it of responsibility for causing the plaintiff's injury. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Additionally, fault may be attributed to a municipality based on the decisions of officials with authority to make final

policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986). In such a case, the policymaking process is complete, and any resulting action is fairly attributable to the municipality. *Id.* at 483–84.

Moreover, plaintiffs must demonstrate that a municipality, "through its *deliberate* conduct[,] … was the 'moving force' behind the injury alleged." *Board of Cty. Com'rs v. Brown*, 520 U.S. 397, 404 (1997). "A plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* In short, when the municipality is "actually responsible," tort liability is appropriate. *Pembaur*, 475 U.S. at 479.

As in federal courts, so too in Iowa are the issues of causation, good faith, and fault at the forefront of our constitutional tort doctrine. In each of the three early common law tort cases discussed in *Godfrey II* and *Baldwin I*, recovery was premised on the presence of bad-faith conduct, and therefore, the existence of culpability. *See McClurg v. Brenton*, 98 N.W. 881, 881–82 (Iowa 1904) (permitting plaintiff to recover damages based on an illegal search of a home conducted without a warrant and in a boisterous, clearly excessive manner); *Krehbiel v. Henkle*, 121 N.W. 378, 380 (Iowa 1909) (allowing a damages claim to go forward for violating article I, section 8

"without reasonable ground therefor"); *Girard v. Anderson*, 257 N.W. 400, 400–03 (Iowa 1934) (discussing damages against private individuals for misconduct that included breaking and entering). Moreover, in *Hetfield v. Towsley*, the court declined to subject a constable and justice of the peace to liability for acts taken "in the performance of official duty … [u]nless they exceeded their jurisdiction, or acted corruptly, or without authority of law." 3 Greene 584, 585 (Iowa 1852). Thus, in our earliest cases, liability was always accompanied by causation.

In *Baldwin I*, the court considered the proper standard for affording qualified immunity to defendants in constitutional tort actions and opted to create the all-due-care standard. 915 N.W.2d at 279. The court recognized that while the *Harlow* standard correctly shields those officers whose only error is failing to predict constitutional law developments, it also shields those officers whose bad-faith misconduct fortuitously falls in the "space between decided cases." *Id.* at 281 (quoting John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 260 (2013)). The all-due-care standard, however, affords a "more nuanced" consideration of the defendant's conduct. *Id.* at 279. Where the defendant erred unreasonably, his or her culpability "may override some lack of clarity in the law." *Id.* Thus, by utilizing the "basic tort standard" of reasonableness, the court reaffirmed that

constitutional torts are torts, and in the absence of culpability, liability is inappropriate. *Id.* at 280.

The Supreme Court in *Owen* offered a succinct explanation of the proper fault-allocation scheme for constitutional torts, explaining the doctrine

> properly allocates … costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

445 U.S. at 657–58 (quoting *Monell*, 436 U.S. at 694). This scheme is appropriate for Iowa. Officers are incentivized to take care to comply with the law and municipalities are incentivized to guarantee their practices and customs are consistent with constitutional mandates. And an individual who is aggrieved by an officer acting outside the scope of his or her training by engaging in bad-faith misconduct, or by a local policy that is contrary to the constitution, will rightly recover damages from the culpable party. Thus, the

court should find that *Monell* is the appropriate scope of municipal liability for constitutional torts.

B. If the Court Declines to Incorporate *Monell*, Municipalities May Assert Qualified Immunity Based on Its Officers' Exercise of All Due Care.

Should the court nevertheless decline to apply the principles of *Monell*, the City of Estherville ("City") should be permitted to assert qualified immunity based on its officers' exercise of all due care.

As an initial matter, the City has always been the only defendant in Baldwin's constitutional tort action. In *Baldwin I*, when deciding to answer the certified question, the court found that resolving the question "may be determinative of the cause … pending in the certifying court." *Baldwin I*, 915 N.W.2d at 265 (quoting *Roth v. Evangelical Lutheran Good Samaritan Soc'y*, 886 N.W.2d 601, 605 (Iowa 2016)). Accordingly, the court necessarily concluded that its newly-minted qualified immunity standard may be available and determinative for the City.

Holding a municipality strictly liable for the constitutional torts of its officers is inappropriate. Qualified immunity, although largely understood as a protection for individual officers, in fact operates as an adjudication of "the [municipal] government's own failure to take sufficient measures to ensure compliance with the Constitution." Lawrence Rosenthal, *A Theory of*

Governmental Damages Liability: Torts, Constitutional Torts, and Takings, 9 U. Penn. J. Const. Law 797, 858 (2007). Indeed, qualified immunity would cover those entities who have "made reasonable investments in securing compliance with the Constitution." *Id.* There is "little justification for insisting on a greater allocation of public resources to loss prevention when the ability to reduce constitutional violations … is itself open to great doubt." *Id.* at 858–59.

If a constitutional violation occurs, but it was not the product of unreasonable error, and thus neither the official nor the municipality–employer could be said to have acted unreasonably, then the *tort* action must fail. After all, "constitutional torts are torts, not generally strict liability cases," and in the absence of fault, vicarious municipal liability is inappropriate. *Baldwin I*, 915 N.W.2d at 281.

Importantly, "the right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself." *Id.* at 278. The tort's reasonableness inquiry is not born from "the law of constitutional rights, but from the law of constitutional torts—that is, from the use of compensatory damages to vindicate constitutional violations." John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich. L. Rev. 82, 100 (1989). Applying traditional

tort principles to constitutional torts "does not imply a redefinition of the rights themselves nor any limitation of their traditional application." *Id.*

Finally, Iowa's Municipal Tort Claims Act (IMTCA) does not require strict vicarious municipal liability. The IMTCA indeed eliminated all prior common-law immunities enjoyed by governmental subdivisions. *See* Iowa Code § 670.2(1) (2018). However, the position that a municipality can therefore *never* be immune from a constitutional tort claim is inconsistent with *Baldwin I*'s clear pronouncement that the court shall, in crafting these torts, rely on existing tort principles when appropriate. *See Baldwin I*, 915 N.W.2d at 280.

In *Baldwin I*, the court declined to follow those states that simply define qualified immunity by those immunities contained within state tort claims acts. *See id.* (discussing states where "[o]fficials … receive the immunities contained within the tort claims act and are liable only when the act would render them liable"). The court reasoned that Chapters 669 and 670 "contain a grab bag of immunities reflecting certain *legislative* priorities. *Some* of those are unsuitable for *constitutional* torts." *Id.* (second emphasis added). Yet, although *some* of the Chapter 669 and 670 immunities may be ill-suited for constitutional torts, and thus the court could not wholesale define liability by those instances authorized by the state tort claims acts, it does not follow

that *none* of the immunities contained in chapters 669 and 670 are appropriate for constitutional torts. To the contrary, the court plays a vital "role in crafting [the] remedy" for constitutional torts, and in so crafting, the court is free to adopt any of the statutory immunities contained within Chapters 669 and 670 that it deems appropriate. *Id.* at 276.

For example, one such immunity presently accorded to municipalities is immunity from claims "based upon an act or omission of an officer or employee of the municipality, *exercising due care*, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid." Iowa Code § 670.4(1)(*c*) (emphasis added). This provision

> acts as a check on the [municipality's] exercise of police power to enforce the criminal laws. This is because a municipality cannot avail itself of the immunity provisions … if the government employees do not exercise due care in executing a statute in the first instance. Thus, the possibility remains that a property owner may be entitled to compensation for damage to property when law enforcement officers fail to use due care in performing their statutory duties ….

Kelley v. Story County Sheriff, 611 N.W.2d 475, 484 (Iowa 2000) (en banc). Because vicarious municipal qualified immunity would (1) affirm the fundamental premises of constitutional torts and qualified immunity by only attaching liability when fault is present, and (2) be consistent with the statutory immunities currently afforded to municipalities when officers act with due care, this court should find that the City may assert a qualified

immunity defense to constitutional torts based on the care exercised by its officers.

II. Applying All-Due-Care Immunity.

Judge Bennett next asks the court:

> If the City can assert such a defense, on the facts presented in this case, does the City have "all due care" qualified immunity to liability for damages for the violation of Baldwin's right to be free from an unreasonable search and seizure under article I of the Iowa Constitution? This question necessarily includes questions about the extent to which reliance on a warrant may satisfy the "all due care" standard and whether the "all due care" analysis considers alternative bases for probable cause or a warrant on which the officers did not rely.

336 F. Supp. 3d at 958.

Should the court decide *Monell* is appropriate, there is no need to reach this issue. However, if the court decides the all-due-care standard is suitable for municipalities, this case presents an opportunity to explore how the all-due-care standard operates at the critical junction of summary judgment.

Summary judgment is the proper vehicle for resolving qualified immunity issues. Qualified immunity is "*immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, immunity questions are intrinsically amenable to summary disposition and should be decided "by the court long before trial" to

preserve the defendant's right to avoid the burdens of litigation. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). *See also Nelson v. Lindaman*, 867 N.W.2d 1, 7 (Iowa 2015) (finding Iowa Code section 232.73 offers a type of "qualified immunity" and explaining "'[q]ualified immunity is a question of law for the court and the issue may be decided by summary judgment.'") (quoting *Dickerson v. Mertz*, 547 N.W.2d 208, 215 (Iowa 1996)).

It is virtually axiomatic that qualified immunity is a purely objective inquiry. Should the court introduce a subjective component to qualified immunity, it would inflict "special costs" on local governments and their officers. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). "Judicial inquiry into subjective motivation … entail[s] broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Id.* at 817. If all-due-care immunity contained a subjective component, and thereby "inherently require[ed] resolution by a jury," the right to immunity from suit would be little more than words on a page. "Objective legal reasonableness" must be the polestar. *Id.* at 819.

While the United States Supreme Court measures objective reasonableness by the degree to which the underlying constitutional law was settled at the time of the infringement, this court chose to measure

reasonableness by the steps a reasonable officer would take to conform to the requirements of the law. *Baldwin I*, 915 N.W.2d at 279–81. In deviating from the Supreme Court's *measure* of reasonableness, however, the court in no way deviated from the doctrine's fundamental purposes—to promptly resolve lawsuits and promote the unflinching discharge of lawful duties. All-due-care immunity, therefore, is an objective standard properly resolved by the court through summary judgment.

Turning to the standard's application, although the court declined to comprehensively adopt the *Harlow* doctrine, it explained that *Harlow* "in some ways resembles an immunity for officers who act with due care." *Id.* at 279. Indeed, all-due-care immunity necessarily contemplates the degree to which the law was settled at the time of the infringement. After all, if it was unclear at the time of action whether an officer's conduct offended the constitution, and the plaintiff's injury therefore stemmed from an officer's "failure to predict the course of [the court's] constitutional jurisprudence," then the officer's conduct was clearly not unreasonable. *Monell*, 436 U.S. at 717 (Rehnquist, J., dissenting). And if an officer acted contrary to clear, well-settled law, such evidence would likely support a finding that the officer committed an unreasonable error.

Of course, *Baldwin I* understood that *exclusively* defining reasonableness by the degree to which the underlying law was settled at the time of the infringement may inadvertently shield those officers who otherwise fail to act with due care. 915 N.W.2d at 280. Thus, all-due-care immunity reflects "several considerations," which include the state of the law and other factors relevant to the objective reasonableness of the officer's conduct. *Id.* at 279.

As Judge Bennett recognized in his certified question, this case contains additional factors beyond the state of the law that are relevant to the question of whether the officers' conduct was consistent with what reasonable officers would have done to conform to the requirements of the law. First, all-due-care immunity likely considers the existence of an alternative basis for probable cause. Here, although probable cause could not have existed to arrest Baldwin under the cited ordinance, Judge Bennett concluded, when discussing the merits of Baldwin's Fourth Amendment claim, that the "officers had probable cause to arrest Baldwin for a violation of" a separate, valid ordinance. *Baldwin v. City of Estherville*, 218 F. Supp. 3d 987, 1001 (N.D. Iowa 2016).

Iowa law permits the state to justify a stop or arrest with additional reasons beyond those identified by the investigating officer. *State v. Tyler*,

830 N.W.2d 288, 295 (Iowa 2013). Importantly, *Baldwin I* confirmed the "right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself." 915 N.W.2d at 278. Even if a good-faith mistake of law does not cure the underlying constitutional violation, *see State v. Cline*, 617 N.W.2d 277, 292–93 (Iowa 2000), the court may still find that *tort damages* are inappropriate when a violation was the product of objective good faith. Indeed, if an officer's actions were consistent with what a reasonable officer would have done, based on the information or conduct known to the officer, tort liability for a resulting error is inappropriate. Thus, the existence of alternative bases for probable cause, which directly relate to whether a reasonable officer would have similarly concluded a warrant should issue, likely has a place within the court's all-due-care analysis.

Second, this case also raises the degree to which all-due-care immunity contemplates reliance on a facially valid warrant. In Iowa, an officer's good-faith reliance on a facially valid warrant cannot cure an unconstitutional search, and the exclusionary rule applies despite any reasonable reliance on a warrant. *State v. Prior*, 617 N.W.2d 260, 268 (Iowa 2000). However, the principles animating the exclusionary rule are distinct from those animating our qualified immunity doctrine. Even if reasonable reliance on a warrant

does not alleviate a constitutional violation, the court may still find that *tort damages* for that violation are inappropriate against an officer who reasonably relied on a neutral magistrate's probable-cause determination.

In *Prior*, the court found that "the integrity of the judicial process and an individuals' rights under our state constitution" required applying the exclusionary rule, despite any good-faith reliance by the executing officers. 617 N.W.2d at 268. Yet, in practice, "officer[s] cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *United States v. Leon*, 468 U.S. 897, 921 (1984). "'[O]nce the warrant issues, there is literally nothing more the [officer] can do in seeking to comply with the law.'" *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 495 (1976) (Burger, C.J., concurring)) (first alteration in original).

When tort liability, rather than the state's ability to convict, is at issue, the reasonableness of the officer's conduct becomes the gravamen of the action. And when a neutral magistrate issues a warrant, this fact is often "the clearest indication that the officers acted in an objectively reasonable manner." *Williams v. City of Alexander*, 772 F.3d 1307, 1311 (8th Cir. 2014). Moreover, evidence relating to whether a "reasonably well-trained officer would have known that the arrest was illegal despite the magistrate's

authorization" is directly probative of whether an officer took all due care to comply with the law. *Stigall v. Madden*, 26 F.3d 867, 869 (8th Cir. 1994). Accordingly, the court should find that, its exclusionary doctrine notwithstanding, all-due-care immunity considers the reasonableness of an officer's reliance on a valid warrant.

III. Punitive Damages Should Not Be Permitted Against the Municipality that Employed the Individual Officer.

Judge Bennett's third question asks:

> If punitive damages are an available remedy against an individual defendant for a violation of a plaintiff's rights under the Iowa Constitution, can punitive damages be awarded against a municipality that employed the individual defendant and, if so, under what standard?

Baldwin, 336 F. Supp. 3d at 958. As noted above, no individual defendants are named in Baldwin's constitutional tort claim. Thus, there is no occasion to consider whether punitive damages could be an available remedy against an individual defendant for violating a plaintiff's rights under article I, sections 1 and 8 of the Iowa Constitution. The only question is whether the municipal employer could be subject to punitive damages in such a constitutional tort action. The court should find that punitive damages cannot be awarded.

Prior to 1968, Iowa municipalities generally enjoyed common-law immunity from tort suits. *See Godfrey v. State*, 847 N.W.2d 578, 582 (Iowa

2014) (explaining the doctrine of sovereign immunity not only "prohibited tort suits against the State of Iowa," but also "applied to governmental subdivisions," including municipalities). Through the IMTCA, the legislature abrogated general common-law governmental tort immunity in favor of a statutory scheme that specifically identified the instances in which a municipality is amenable to suit. Iowa Code § 670.4. Municipal immunity from punitive damages awards was never waived—with good reason. *See id.* §§ 670.4(1)(*e*), 670.8(1).

Punitive damages do not make the victim whole, but instead punish the tortfeasors in the hope of deterring future misconduct. Restatement (Second) of Torts, § 908 (1979). Assessing punitive damages against a municipality ultimately "burden[s] the very taxpayers and citizens for whose benefit the wrongdoer [is] being chastised." *City of Newport v. Fact Concerns, Inc.*, 453 U.S. 247, 263 (1981). In 1846, the Louisiana Supreme Court declined to subject the City of Lafayette to a punitive damages award, despite the egregious misconduct of its mayor, explaining,

> Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case … , being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must

> repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

McGary v. President & Council of the City of Lafayette, 12 Rob. 668, 674 (La. 1846); *see also Wilson v. City of Wheeling*, 19 W. Va. 323, 350 (1882) ("The city is not a spoliator and should not be visited by vindictive or punitive damages.").

While it may initially seem alluring to arm constitutional-tort plaintiffs with a teeming arsenal of remedies, more can be at stake. "[P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction in public services for the citizens footing the bill." *Fact Concerns, Inc.*, 453 U.S. at 267.[1] When public funds have already been distributed to wholly remedy

[1] *See also* John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 76, 76–78 (1998) (discussing incentives for government actors and "the political tendency to give great weight to costs that must be accounted for in the budget and to discount costs that fall elsewhere. On-budget costs mean higher taxes, and the political penalties for raising taxes can be severe. Acts that give rise to Section 1983 claims trigger on-budget costs and are therefore subject to the political disincentives of higher taxes. Government inaction may be just as costly, but the burdens fall elsewhere. The failure to arrest a suspected criminal or to discipline an unruly student may have error costs just as great as would result from taking those actions, but those costs are borne by subsequent crime victims or by other students. If, as seems likely, the political culture punishes on-budget costs more than those that are borne elsewhere, government managers may reinforce their workers' incentives toward caution and constraint" (footnotes omitted)).

the plaintiff, "neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* It would be incongruous to at once insist that punitive damages are necessary to protect the public, while also requiring that same public to foot the engorged bill.

Significantly, the United States Supreme Court has considered the issue of subjecting municipalities to punitive damages in § 1983 actions and ultimately found that the dual aims of punitive damages—retribution and deterrence—would not be advanced. *Id.* at 266–71. With respect to punishment, the Court has explained "municipalities … can have no malice independent of the malice of its officials. Damages awarded for *punitive* purpose, therefore, are not sensibly assessed against the governmental entity itself." *Id.* at 267. In fact, the Court found "the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages." *Id.* at 268.

With respect to deterrence, the Court identified several factors that counsel against allowing punitive damages. First, "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *Id.* Second, a

compensatory damages award is itself a type of corrective action, which may "induce the public to vote the wrongdoers out of office." *Id.* at 269. The Court emphasized that other corrective actions, such as discharging the malicious employee, will likely occur regardless of the imposition of punitive damages. *Id.*

Finally, the Court stressed the "very real" costs of subjecting municipal corporations to punitive damages awards for constitutional torts. *Fact Concerns, Inc.*, 453 U.S. at 270. Creating the additional "burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities." *Id.* Indeed, this court has also emphasized that "[m]unicipalities have finite resources and a limited ability to raise more resources." *Doe v. New London Comm. Sch. Dist.*, 848 N.W.2d 347, 357 (Iowa 2014).[2]

Godfrey II makes clear that the essential function of constitutional torts is to guarantee that constitutional rights are genuine barriers to governmental overreach. In crafting the remedies for constitutional torts, the court must take care to select those that will uphold the action's fundamental purpose not merely in theory, but in fact. If imposing punitive damages against a

[2] The burden of punitive damages will likely fall most heavily on Iowa's rural towns, where the cost will be spread across a small group of taxpayers.

municipality will not in fact meaningfully safeguard our fundamental liberties, there is no justification for their imposition. Accordingly, the court should find that punitive damages may not be awarded against the municipality that employed the offending officer in constitutional tort actions.

IV. Even if Punitive Damages Are Available, Plaintiff Has Not Adduced Sufficient Evidence to Generate a Jury Question, and the Court Should Find as a Matter of Law that Punitive Damages Are Not Warranted in This Case.

Judge Bennett next asks: "If punitive damages are available in answer to the previous question, would a reasonable jury be able to find that the applicable standard was met on the facts presented in this case?" *Baldwin*, 336 F. Supp. 3d at 958. In his order, Judge Bennett clarified that this question only asks "*whether Baldwin had generated a jury question* on punitive damages under the standard that the Iowa Supreme Court determines is applicable." *Id.* at 956–57. Thus, if the court nevertheless determines that punitive damages may be assessed against the municipal employer, the court must then consider (1) what is the appropriate standard for awarding punitive damages, and (2) has Baldwin alleged sufficient facts to generate a jury question on the issue?

A. The Court Can Award Punitive Damages Only Upon A Showing the Defendant's Conduct was Motivated by Evil Motive or Intent or Involved Reckless or Callous Indifference to Constitutionally Protected Rights.

When selecting the appropriate standard for assessing punitive damages in state constitutional tort actions, two paths are available. First, the court could follow the federal § 1983 standard, articulated in *Smith v. Wade,* and find that punitive damages may be awarded if the "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U.S. 30, 56 (1983). Second, the court could follow the statutory standard contained within the Iowa Code and find that punitive damages may be awarded if, "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arise constituted a willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1. While there is undoubtedly significant overlap between the two standards, the court should nevertheless opt to employ the federal approach.

The § 1983 punitive damages standard was designed for constitutional torts and recognizes the distinctions between public and private defendants. Unlike the punitive damages caselaw pursuant to section 668A.1, which has developed largely in the context of private defendants, *Smith* and its progeny give municipal officers a pre-existing body of caselaw from which to

anticipate the likelihood of exemplary damages in many law enforcement situations.

Moreover, the § 1983 standard permits punitive damages to be "imposed not only against those defendants who acted in subjective bad faith, but also against those who acted in aggravated objective bad faith." Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 Cal. L. Rev. 1242, 1281 (1979) (advocating for the standard ultimately adopted by the Supreme Court). Indeed, this standard "maximizes the deterrent impact of punitive damages awards in constitutional tort litigation without departing from established common law principles." *Id.* Because the § 1983 standard would capture those defendants who engage in egregious misconduct, while also providing a wealth of caselaw that litigants may turn to for guidance, the court should find that it is the appropriate standard for Iowa's constitutional torts.

B. A Reasonable Juror Could Not Conclude that the Officers Acted with Evil Intent or with Callous Indifference to Baldwin's Constitutional Rights.

Applying the *Smith* standard to the facts presented in this case, Baldwin has not generated a jury question on the issue of punitive damages, and the court should find as a matter of law that punitive damages are not warranted in this case.

Baldwin has alleged no facts to suggest the officers acted with an evil motive, nor that their actions amounted to a reckless disregard for his rights. The officers were mistaken as to whether the City had incorporated chapter 321I, but in coming to their conclusion, they reviewed the Iowa Code, consulted with a widely-used handbook, and verified their conclusion with two superiors, including the Chief of Police. Subsequently, a neutral magistrate similarly believed in the existence of the ordinance and issued a warrant for Baldwin's arrest. The officers and magistrate erred, but their mistake was certainly not the product of recklessness. In the absence of any evidence suggesting the mistake was due to a malicious motive or wholesale disregard for the law, the court must find that punitive damages are unwarranted in this case.

V. Attorney Fees Are Not Presently Available Against the Municipality that Employed the Individual Officer.

Judge Bennett's fifth question asks:

> If an award of attorney's fees would have been available against an individual defendant for a plaintiff who attains some degree of success on a claim of a violation of a plaintiff's rights under the Iowa Constitution, would they be available against a municipality that employed the individual defendant and, if so, under what standard?

Baldwin, 336 F. Supp. 3d at 958–59. The court should find that an award of attorney fees is presently unavailable for *Godfrey*-type claims.

Iowa follows the American rule and does not require the defeated litigant to pay the victor's attorney fees, absent a clear statute or contractual provision to the contrary. *See, e.g.*, *Lee v. State*, 906 N.W.2d 186, 197 (Iowa 2018); *Branstad v. State*, 871 N.W.2d 291, 294 (Iowa 2015); *NevadaCare, Inc. v. Dep't. of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010); *Miller v. Rohling*, 720 N.W.2d 562, 573 (Iowa 2006); *Audus v. Sabre Comm. Corp.*, 554 N.W.2d 868, 874 (Iowa 1996); *Kickteig v. Iowa Dep't of Transp.*, 356 N.W.2d 205, 212 (Iowa 1984); *Virginia Manor, Inc. v. Sioux City*, 261 N.W.2d 510, 513 (Iowa 1978); *Harris v. Short*, 115 N.W.2d 865, 866 (Iowa 1962).

In federal court, successful § 1983 plaintiffs may recover attorney fees because Congress specifically enacted § 1988, or the Civil Rights Attorney's Fee Awards Act of 1976. 42 U.S.C. § 1988 (2018). The Act was intended to incentivize attorneys to bring civil rights actions under certain statutes, including § 1983. *See Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983). Yet, the Act does not incorporate *Bivens* plaintiffs, and the United States Supreme Court has not yet decided whether attorney fees may be recovered in *Bivens* actions. *See Bush v. Lucas*, 462 U.S. 367, 372 n.9 (1983). Courts that have considered the question, however, have found that attorney fees are unavailable to *Bivens* plaintiffs because no statute specifically authorizes

them. *See, e.g.*, *Kreines v. United States*, 33 F.3d 1105, 1107–09 (9th Cir. 1994) (finding neither the plain language, legislative history, policy rationales, nor the similarity to § 1983 actions, justifies awarding attorney fees to *Bivens* plaintiffs under 28 U.S.C. § 2412(b)).

Here, Baldwin requests "attorney fees and costs under the private attorney general doctrine," because the court recently cited the doctrine "with approval" in *Lee v. State*, 874 N.W.2d 631 (Iowa 2016). This is incorrect. In *Lee*, the court acknowledged the "private attorney general *rationale*" that animates *Congress's* decisions to enact attorney fee statutes. *Id.* at 642 (emphasis added). The court has never adopted a standalone private attorney general doctrine for awarding attorney fees independent of a statute or contractual provision. Rather, "[i]t is well settled in this and other jurisdictions that neither a court of law nor equity has inherent power to tax costs [including attorney fees] to the losing party in any action." *In re R.S.N.*, 706 N.W.2d 705, 708 (Iowa 2005) (alteration in original) (quoting *Harris*, 115 N.W.2d at 867).

Additionally, Baldwin misstates the availability of attorney fees under the Iowa Tort Claims Act (which, in any event, does not apply to municipalities), and inappositely cites the Iowa Civil Rights Act (which is a distinct cause of action) and § 1988 (which excludes *Bivens* plaintiffs) in an

effort to argue that it would be "inexplicable" to not award attorney fees in *Bivens*-type constitutional torts. Of course, each statute represents the legislature's decision to make attorney fees available, not the court's judgment. And the right to attorney fees cannot be born from mere inference. Indeed, mandating that all constitutional tort plaintiffs receive attorney fees because the legislature in other circumstances decided fees were warranted is an inference too far, given the broad-ranging consequences.

In the wake of *Godfrey II*, the legislature may decide that, like Congress, it too wishes to incentivize attorneys to bring constitutional tort actions by adopting legislation authorizing attorney fees in *Godfrey*-type cases. Until such time, its declination must be given weight, and the court should not undermine its long-established attorney-fees doctrine to accelerate the availability of attorney fees in constitutional tort actions. Accordingly, the court should find that attorney fees may not be awarded.

VI. If the Court Answers Either Question No. 3 or Question No. 5 in the Affirmative, Retroactive Application May Not Be Appropriate.

Finally, Judge Bennett asks the court: "If the answer to either Question No. 3 or Question No. 5 (or both) is in the affirmative, will retroactive application to the pending case be appropriate?" *Baldwin*, 336 F. Supp. 3d at 959.

Generally, "judicial decisions, including overruling decisions, operate both retroactively and prospectively." *Beeck v. S.R. Smith Co.*, 359 N.W.2d 482, 484 (Iowa 1984). However, the court is empowered to find "that a particular overruling decision should in fairness have only prospective application." *Id.* Notably, the holdings in *Godfrey II* and *Baldwin I* have been applied retroactively to Baldwin's case without objection.

Should the court reach this issue, it may find *Vinson v. Linn-Mar Community School District* applicable by analogy. *See* 360 N.W.2d 108, 120–21 (Iowa 1984). In *Vinson*, the court considered whether a statutory amendment to the IMTCA, which immunized governmental subdivisions from punitive damages awards, applied retroactively to causes of action arising prior to the statute's enactment. *Id.* The court found the amendment took "away a right of recovery that previously existed and [did] not give a party a remedy where none or a different one existed previously." *Id.* at 121. Thus, the provision only applied prospectively. *Id.*

Here, the certified question asks the court to consider the inverse issue of whether the existing right not to pay attorney fees and immunity from punitive damages awards in tort actions are inapplicable in the context of constitutional torts. In *Vinson*'s terms, should the court find that punitive damages or attorney fees may be recovered, such a holding may *take away*

freedoms that previously existed. Accordingly, should the court answer either Question No. 3 or No. 5 in the affirmative, the court may conclude that, in fairness, its holdings should apply prospectively.

CONCLUSION

For the reasons set forth above, the court should find (1) *Monell* is appropriate for municipal liability, or in the alternative, that all-due-care immunity is available for the City; (2) all-due-care immunity is an objective inquiry that may be decided by the court at summary judgment; (3) punitive damages cannot be awarded against municipalities in constitutional tort actions; and (4) attorney fees are not currently available for the prevailing party in constitutional tort actions.

REQUEST FOR ORAL SUBMISSION

The State of Iowa has received consent from the City to participate in oral argument, and respectfully requests to participate in oral argument pursuant to Iowa Rule of Appellate Procedure 6.906(1).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-face requirements and type-volume limitations of Iowa Rules Appellate Procedure 6.903(1)(d), 6.903(1)(g)(1), and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point and contains 6857 words,

excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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