

IN THE SUPREME COURT OF IOWA

No. 21–1992

GERI L. WHITE,

Plaintiff-Appellant,

vs.

**MICHAEL HARKRIDER, CITY OF IOWA CITY, CHRIS WISMAN and
JOHNSON COUNTY,**

Defendants-Cross-Appellants

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY
THE HONORABLE CHAD KEPROS, JUDGE**

APPELLANT’S FINAL BRIEF

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STATEMENT OF THE ISSUES

I. DO *GODFREY* CLAIMS APPLY TO MUNICIPALITIES OR THEIR EMPLOYEES??

Cases

Baldwin v. City of Estherville (Baldwin I), 915 N.W.2d 259 (Iowa 2018)

Baldwin v. City of Estherville (Baldwin II) 929 N.W.2d 691 (Iowa 2019)

Godfrey v. State, 898 N.W. 2d 844 (Iowa 2017)

Venckus v. City of Iowa, 930 N.W.2d 792 (Iowa 2019)

Wagner v State of Iowa, 952 N.W.2d 843 (Iowa 2020)

Weizberg v. City of Des Moines, 923 N.W.2d 200 (Iowa 2018)

Federal Cases

Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Statutes

Iowa Civil Rights Act (ICRA)

Iowa Code § 669.14(1)

Iowa Code § 670.1(4)

Iowa Code § 670.4(1)(c)

Iowa Code §670.12

Iowa Municipal Tort Claims Act (Chapter 670) (IMTCA)

Iowa Tort Claims Act (Chapter 669) (ITCA)

Constitutional Provisions

Iowa Const. Art. I, § 1

Iowa Const. Art. I, § 6

Iowa Const. Art. I, § 8

Iowa Const. Art. I, § 9

Other Authorities

Restatement (Second) of Torts section 874A

John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013)

II. ARE CONSTITUTIONAL TORT CLAIMS UNDER ART. I, §1 AND ART I, §8 PERMITTED?

Cases

Baldwin v. City of Estherville (Baldwin I), 915 N.W.2d 259 (Iowa 2018)

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)

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McClurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (Iowa 1904)

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Iowa Const. Art. I, § 8

Iowa Const. Art. I, § 9

U.S. Const. amend. IV (Fourth Amendment)

U.S. Const. amend. V (Fifth Amendment)

Other Authorities

Pettys, *The Iowa State Constitution*, p. 67 (2018)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents “substantial constitutional questions” that are fundamental issues of broad public importance requiring ultimate determination. Iowa R. App. P. 6.1101(2)(a) and (d).

STATEMENT OF THE CASE

NATURE OF THE CASE: This tort/constitutional tort action is brought by Geri White, arising out of an armed encirclement of her property by law enforcement. Ms. White asserts common law and constitutional tort claims arising out of the warrantless entry upon her private property and use of excessive force while on her property. The common law claims are for assault, trespass, and intentional infliction of emotional distress. The Constitutional tort claims include the right to freedom of movement as guaranteed by article I, §1 of the Iowa Constitution; the right to liberty and property guaranteed by article I, §1 of the Iowa Constitution; and the right against unreasonable seizure and to be free of excessive force guaranteed her by article I, §8 of the Iowa Constitution.

COURSE OF PROCEEDINGS: On May 21, 2021, Ms. White filed suit against two law enforcement officers and their respective municipalities.¹(Petition). The municipalities filed Motions to Dismiss on July 12, 202. (App. 9, 70). On

¹ The parties collectively will be referred to as “municipalities” for ease of use.

August 19, 2021, Ms. White filed an unresisted Motion to Amend the Petition to add a common law claim for trespass, which was granted on August 23, 2021. (App. 4).

On December 3, 2021, the Court entered a ruling denying the Motions to Dismiss as to the common law claims but granting the Motions as to Ms. White's Constitutional tort claims. (App. 86). On December 28, 2021, Ms. White filed an Application for Interlocutory Appeal. On January 7, 2022, the municipalities filed a Cross Application for Interlocutory Appeal. On April 14, 2022, this Court granted both applications.

STATEMENT OF THE FACTS²

On June 1, 2019, at approximately 530pm-545pm, the municipalities were involved in the investigation of a single motor vehicle accident in which the driver left the scene of the accident in the vehicle involved in the accident. (App. 5, ¶6).

The vehicle, a Tan Toyota FJ Cruiser ("vehicle"), was reportedly driven by a male and was tracked to Ms. White's home in Iowa City. Ms. White was not the driver of the vehicle. (App. 5, ¶7-8).

² The statement of facts comes from the amended petition filed by Ms. White. These facts are deemed true for purposes of a motion to dismiss. *Hawkeye Foodservice Distrib. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608-609 (Iowa 2012).

The vehicle was described to law enforcement as being driven at an excessive speed and with substantial damage to the vehicle, including loss of a tire. (App. 5, ¶9).

At the scene of the accident, Wisman noted a beer can on the road and unused rifle ammunition in the ditch. At this point, Wisman suspected that the driver of the vehicle had lost control due to the use of alcohol and had left the scene to avoid detection. (App. 5, ¶s 10-11).

Deputy Wisman and many other Johnson County Deputies converged on Ms. White's home. In addition, Ofc. Harkrider and many other Iowa City Police Officers converged on Ms. White's home. Approximately ten (10) law enforcement vehicles parked their vehicles outside and near Ms. White's home. The municipalities also used a K9 dog. (App. 5, ¶s 12-14).

The combined law enforcement presence then proceeded to grab their weapons, both handguns and rifles/shotguns, and established a perimeter around the house. None of the law enforcement personnel knocked on the door. Rather, they called out to the home via public address system. (App. 5-6, ¶s15-17).

A District Court Associate Judge would later describe the scene as follows:

The home was surrounded by uniformed officers and marked patrol cars. The officers were armed, and the video shows their weapons were not holstered. After surrounding the home, officer used the sound amplification system to call to the occupants, and, at times, pointed to the home. (App. 6, ¶ 18)

When calling out to the home, Ofc. Harkrider stated: “Occupants of [the home], this is the Iowa City Police Department. Come to the front door. Slowly open it with your hands in the air, empty, and slowly step outside. Do it now.” (App. 6, ¶ 19).

Ms. White then opened the front door, stepped out onto the front stoop, and was met by numerous law enforcement officers crouched behind vehicles, trees, and other objects, with their weapons trained on Ms. White. At this point, Ofc. Harkrider and Deputy Wisman ordered Ms. White to come off the front stoop, leave her home, and approach the law enforcement vehicle in the driveway of her home. (App. 6, ¶s 20-21).

Initially, Ms. White refused to leave her home, asking for an explanation for the army in front of her home, but Ofc. Harkrider demanded that she leave her home and gave her a “lawful order” to do so. Ms. White complied with the “lawful order”, left the front stoop, and walked to the officer’s marked patrol car. (App. 5, ¶s 22-23).

Ms. White then spoke with Deputy Wisman and answered his questions. After she was interviewed, law enforcement disbanded its perimeter and overwhelming show of force, and Ms. White was permitted to return to her home. Ms. White was

never arrested. Ms. White’s husband was then arrested for OWI, a charge that would later be dismissed. (App. 6-7, ¶s24-27).

ARGUMENT

I. GODFREY CLAIMS APPLY TO MUNICIPALITIES OR THEIR EMPLOYEES.

Preservation of Error.

On December 3, 2021, the Court entered a ruling granting the Motions to Dismiss as to Ms. White’s Constitutional tort claims. (App. 86). On December 28, 2021, Ms. White filed an Application for Interlocutory Appeal. Ms. White preserved error for review.

Standard of Review.

“On a motion to dismiss, we review for corrections of errors at law, unless the motion to dismiss is on a constitutional issue, in which case our review is de novo.” *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018).

Merits.

A. District Court Ruling: In granting the Motion to Dismiss on the Iowa Constitutional tort claims, the district court made the following pronouncement:

Even when the Petition, on its face, is construed in the light most favorable to Plaintiff, the Court does not read any of the cases in the *Godfrey* line, as discussed in *Wagner*, as permitting direct constitutional claims against municipalities or municipal employees. Rather, these cases make clear that the only direct constitutional claims that have been authorized are against the State of Iowa and its employees. While Plaintiff correctly points out that

Baldwin did involve a municipality, the City of Estherville, the Court does not construe the *Baldwin* case as permitting constitutional claims against the municipality or its employees; instead, the Iowa Supreme Court held only that the Iowa Municipal Tort Claims Act applied to constitutional claims that had been stated by the Plaintiff, and as such, punitive damages and attorney fees could not be awarded.

If there is to be a clearer statement of Iowa law on the issue of constitutional claims being directly stated against municipalities or their employees, it must come from the Iowa Supreme Court or Iowa Court of Appeals, and this Court is obligated to apply the law as it stands.

(App. 91-92).

Though Ms. White disputes the District Court’s analysis of the Supreme Court’s prior cases, this case presents the Court with the opportunity to confirm its prior rulings.

B. Existing Caselaw on Constitutional Claims against Municipalities:

This Court has recognized a “tort claim *under the Iowa Constitution* when the legislature has not provided an adequate remedy.” *Godfrey v. State*, 898 N.W.2d 844, 880 (Iowa 2017) (emphasis added) (“*Godfrey II*”).³ In *Godfrey II*, the Court allowed claims for violations of article I, §§6 and 9. *Godfrey II* at 871-72. The Court stated “[w]hen a constitutional violation is involved, more than mere allocation of

³ The shortcut names for *Godfrey* and *Baldwin* follow the numbering system utilized by this Court in *Wagner v State of Iowa*, 952 N.W.2d 843 (Iowa 2020). This numbering system is different than the system this Court used in *Baldwin I*.

risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future.” *Id.* at 877. “The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights.” *Id.*

In *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) (“*Baldwin I*”), this Court found that *Godfrey II* claims applied to article, I, §§1 and 8, subject to an affirmative defense of qualified immunity. *Baldwin I* at 260-61. This Court summarized its holding and the basis for its holding as follows:

We believe instead that qualified immunity should be shaped by the historical Iowa common law as appreciated by our framers and the principles discussed in *Restatement (Second) of Torts section 874A*.

This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution. And it is still the basic tort standard today. See *Restatement (Second) of Torts § 874A* (discussing reliance on analogous tort standards).

Because the question is one of immunity, the burden of proof should be on the defendant. Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.

We find support for our approach in a recent and thoughtful critique of *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)]. See John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013). Professor Jeffries notes, “The basic and essential remedy for most constitutional rights is the opportunity to assert them defensively against government coercion.” *Id.* at 242. Nevertheless, Professor Jeffries concludes that

"damages are appropriate to the vindication of constitutional rights, absent countervailing concerns, of which the most important and obvious would be superseding remedial legislation." *Id.* at 259 (footnotes omitted). "[C]onstitutional tort actions are presumptively appropriate." *Id.*

In the end, Professor Jeffries condemns *Harlow* as "an overly legalistic and therefore overly protective shield," but advocates for a more straightforward "protection for reasonable error." *Id.* at 258-60. "The problem with current law is its implicit equation of reasonable error with the space between decided cases." *Id.* at 260.

We agree. Constitutional torts are torts, not generally strict liability cases. **Accordingly, with respect to a damage claim under article I, sections 1 and 8, a government official** whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.

Baldwin I at 280-81 (emphasis added). Further, this Court stated the following regarding the application of immunities in Iowa Constitutional claims:

Iowa's tort claims acts already protect **government officials** in some instances when they exercise due care. See, e.g., Iowa Code § 669.14(1)...; § 670.4(1)(c)... The problem with these acts, though, is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts.

Baldwin I at 279-280. (Emphasis added). This Court did not distinguish between State and Municipal officials in describing "government officials."

In *Baldwin v. City of Estherville*, 929 N.W.2d 691(Iowa 2019) ("*Baldwin II*"), this Court answered additional certified questions. The Court concluded that a municipality could assert qualified immunity as a defense. *Baldwin II* at 695-98. It also found that punitive damages are not an available remedy in constitutional tort

actions against a municipality, but “common law attorney fees” can be awarded “if the opposing side ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Baldwin II* at 698-700.⁴ In doing so, this Court reaffirmed the existence of Iowa Constitutional tort claims against municipalities and their employees.

Further, this Court made clear that Constitutional claims against municipalities fall within Chapter 670, citing to the language of the statute itself to support its conclusion:

“*Tort*” means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and *includes* but is not restricted to *actions based upon* negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or *denial or impairment of any right under any constitutional provision*, statute or rule of law.

Iowa Code § 670.1(4) (2019) (emphasis added).

Baldwin v. City of Estherville, 929 N. W.2d at 697.

This Court’s most recent pronouncement on issues related to Iowa Constitutional claims is *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020). Once again, the Court was asked to answer certified questions. *Wagner* at 847. In beginning the discussion of the certified questions, Justice Mansfield summarized the case law involving Iowa Constitutional claims:

⁴ However, punitive damages are available against municipal employees. Iowa Code 670.12.

In 2017, in *Godfrey II*, our court ruled that direct claims could be brought under the Iowa Constitution without legislative authorization. *Godfrey II* did not have a majority opinion. Casting the deciding vote, a concurrence in part made clear that the court should imply damage remedies under the Iowa Constitution only when the legislative remedies were inadequate. The concurrence in part joined the plurality opinion "to the extent it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy." The concurrence in part went on to find that the Iowa Civil Rights Act (ICRA) provided adequate remedies for Godfrey's claims of discrimination based on sexual orientation, and therefore those remedies were exclusive.

Apart from recognizing the existence of a direct constitutional claim for damages, *Godfrey II* "express[ed] no view on other potential defenses which may be available to the defendants." *Godfrey II*, as already noted, involved claims against the State and state employees acting in their official capacity.

The following term, the *Baldwin* case came before us for the first time. *Baldwin* was a federal court proceeding against a city and city officials where we were called upon to answer certified questions. In 2018, in *Baldwin I*, we **addressed whether a qualified immunity defense was available for a direct constitutional claim under article I, section 8 of the Iowa Constitution.** We declined to strictly follow the immunities in the Iowa Municipal Tort Claims Act (IMTCA)—or for that matter the ITCA. As we explained, "The problem with these acts . . . is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts." Instead, we determined that an official who had exercised "all due care" should not be liable for damages, a standard that bears resemblance to one of the immunities set forth in the ITCA and the IMTCA. *Baldwin I* expressly left open whether other provisions of the ITCA and the IMTCA would apply to constitutional tort claims against public officials and public agencies.

In 2019, in *Baldwin II*, we answered that open question as to the IMTCA. We held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action." Accordingly, we found that punitive damages and attorney fees could not be awarded against a

municipality because the IMTCA did not allow such awards. A partial dissent disagreed, arguing "it is critical that punitive damages be available against a government entity in a proper case in order to provide an adequate remedy to the state constitutional tort."

Just a few weeks later in *Venckus [v. City of Iowa City]*, 930 N.W.2d 792 (Iowa 2019)], another 2019 case involving claims against municipalities and municipal officials, **we reiterated that "[c]laims arising under the state constitution are subject to the IMTCA."** **Applying the IMTCA, we held in *Venckus* that the two-year statute of limitations in Iowa Code section 670.5 governed constitutional tort actions against a municipality and its employees acting in their official capacity.**

Wagner at 851-852 (Emphasis added in bold).

In *Wagner*, this Court held that the Iowa Tort Claims Act (Chapter 669) applied to Iowa Constitutional claims against the State of Iowa but limited its application to procedural matters, including the statute of limitations:

In *Godfrey II*, we concluded, at least implicitly, that the ITCA did not foreclose a direct constitutional damages claim against the State and state employees acting in their official capacity. The issue before us now is whether the procedural limits of the ITCA should nonetheless apply to such a claim. It is logical to hold that constitutional torts, like other torts, are subject to the procedures set forth in the ITCA. Just because the substantive barriers to liability in the ITCA do not apply, that does not mean we should dispense with the entire ITCA.

The procedural components of the ITCA, such as the requirement to present claims for adjustment and settlement before bringing suit and the two-year statute of limitations...do not deprive a plaintiff such as *Wagner* of an adequate remedy. Unlike the immunities set forth in the ITCA, these procedural requirements don't go to ultimate questions of liability and damages. The legislature intended the ITCA to be the only path for suing the State and state officials acting in their scope of employment on a tort claim. Consistent with *Godfrey II*, ITCA procedures should apply to constitutional torts.

Wagner v. State, 952 N.W.2d 843, 858-859

C. Application of Law to District Court Ruling: The District Court's conclusion is contradicted by the line of cases beginning with *Baldwin I*. If the District Court is correct, then this Court has established an affirmative defense (qualified immunity) for a claim that does not exist. There is absolutely no need to evaluate the potential application of qualified immunity to protect a governmental employee from a cause of action that is not available under the Iowa Constitution. The whole reason for qualified immunity is to protect governmental agents from liability under certain circumstances. No one needs qualified immunity from a non-existent cause of action.

It is hard to imagine how the District Court and the municipalities could have misunderstood the following clear statement made by this Court in *Wagner*:

In 2019, in *Baldwin II*... [W]e held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action."

Wagner at 852.

Nevertheless, it is necessary for this Court to state unequivocally that the Iowa Constitution is worthy of protection from all government officials, not just those who work for the State. Accordingly, Ms. White requests that this Court reverse the

District Court and conclude that Ms. White is permitted to assert Iowa Constitutional tort claims against municipalities and their employees or agents.

II. THIS COURT HAS ALREADY RECOGNIZED CONSTITUTIONAL TORT CLAIMS UNDER ART. I, §1 AND ART. I, §8 OF THE IOWA CONSTITUTION.

Preservation of Error.

On December 3, 2021, the Court entered a ruling granting the Motions to Dismiss as to Ms. White’s Constitutional tort claims. (App. 86). On December 28, 2021, Ms. White filed an Application for Interlocutory Appeal. Ms. White preserved error for review.

Standard of Review.

“On a motion to dismiss, we review for corrections of errors at law, unless the motion to dismiss is on a constitutional issue, in which case our review is de novo.” *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018).

Merits.

A. District Court Ruling: In addition to finding that there are no Iowa Constitutional tort claims available against municipalities and their employees, the District Court also concluded that article I, §1, and article I, §8 are not self-executing and therefore direct claims cannot be made:

The sections of the Iowa Constitution relied on by Plaintiff to state her constitutional claims are Article I, section 1, the inalienable rights

clause, and Article I, section 8, the search and seizure clause. The Court is not persuaded that there is any Iowa authority that supports a conclusions [sic] that either of these sections is self-executing.

(App. 92).

B. Existing Caselaw on Constitutional Claims: *Baldwin I* involved claims under both §§1 and 8 of article I of the Iowa Constitution and this Court permitted such claims, subject to the affirmative defense of qualified immunity. Further, *Wagner* involved a claim for excessive force under art. I, §8 (as well as a claim under article I, §9) and held that such claims are procedurally governed by the Iowa Tort Claims Act (Chapter 669).

In *Godfrey*, the Court made the following statement:

For the reasons expressed below, a majority of the court concludes that *Bivens* claims are available under the Iowa Constitution and that the claims raised by plaintiff in Counts VI and VII were improperly dismissed.

Id. at 847. The reference to *Bivens* is to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case involved a Fourth Amendment claim for *unlawful search and seizure*. The United States Supreme Court concluded that an individual alleging a violation of the search and seizure provisions of the United States Constitution can assert a claim against a Federal official:

The Fourth Amendment provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

In *Bell v. Hood*, 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

Bivens at 389.

Iowa's version of the Fourth Amendment is art. I, §8. Accordingly, a claim for the violation of an individual's right to be free from improper search or seizure is a claim akin to *Bivens* and therefore self-executing. It would be incongruent to conclude that *Godfrey* claims for violation of art. I, §8 are not cognizable as *Bivens*-type claims when the *Bivens* claims itself was for the same violation.

There is no case that holds to the contrary and this Court has established a line of cases that makes clear that Iowa Constitutional claims exist against those entities and government officials (State or Municipal) that violate constitutional rights. It is also noteworthy that this Court has stated that "neither the ITCA nor the IMTCA itself creates a cause of action." *Wagner* at 853.

In *State v. Wright*, 961 N.W.2d 396 (Iowa 2021), this Court stated the following which is of direct relevance to this case:

As we long ago explained, "The term 'unreasonable' in the constitutions of the States, has allusion to what had been practiced before our revolution, and especially to general search warrants, in which the person, place or thing was not described."

Consistent with this understanding, we have long held that a peace officer engaged in general criminal investigation acted unreasonably and unlawfully when he trespassed against a citizen without first obtaining a warrant based on probable cause. In the colorful case of *McClurg v. Brenton*, the mayor, "the chief of police, the captain of the night force, a city alderman, the city physician, the 'man with the hounds,' and various other gentlemen, presumably volunteers in the cause of retributive justice," showed up at the plaintiff's home at night without a warrant to search for allegedly stolen chickens. They gained entry into the home and the chicken house and conducted what was described as a "boisterous" search. The plaintiff sued for trespass. In that case, we stated the great principle underlying the prohibition against unreasonable search and seizure:

The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every court in the English-speaking world, from Magna Charta down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own republic.

The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose. No amount of incriminating evidence, whatever its source, will supply the place of such warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open.

McClurg involved the search of a home and outbuildings, but the same prohibition against unlawful seizures and searches extended outside the home to seizures of and interferences with personal property.

[T]here is no evidence at all that [the Framers] intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.

As our precedents demonstrate, under Iowa law "[a] trespassing officer is liable for all wrong done in an illegal search or seizure. The constitutional provision is a sacred right, and one which the courts will rigidly enforce." *State v. Tonn*, 195 Iowa 94, 106, 191 N.W. 530, 535 (1923), *abrogated by State v. Hagen*, 258 Iowa 196, 137 N.W.2d 895 (1965); *see also Godfrey*, 898 N.W.2d at 887 (explaining police conduct was regulated by common law trespass actions).

State v. Wright at 406.

This Court then held:

As discussed above, a survey of the relevant text, history, and precedents shows article I, section 8's prohibition against unreasonable searches and seizures was tied to common law trespass. In light of that understanding, *we hold a peace officer engaged in general criminal investigation acts unreasonably under article I, section 8 when the peace officer commits a trespass against a citizen's house, papers, or effects without first obtaining a warrant based "on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."* Iowa Const. art. I, § 8.

State v. Wright, at 412. (Emphasis added).

Similarly, *Baldwin I* recognized a claim against a municipality for a violation of article 1, §1 of the Iowa Constitution. *Baldwin I* at 281. Known more commonly as the Inalienable Rights provision of the Iowa Constitution, it is the first section of the first article of the Iowa Constitution. It is the heart of the Iowa Constitution. It outlines the premiere importance of life, liberty, property and the pursuit of

happiness.⁵ Often, this section is partnered with article I, § 9, the due process section of the Iowa Constitution and much of the case law focuses on §9. Pettys, *The Iowa State Constitution*, p. 67 (2018). Nevertheless, the inalienable rights provision can be separate support for the conclusion that arbitrary and unreasonable conduct by the government can violate this section of the Iowa Constitution. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004); *State v. Osborne*, 154 N.W. 294, 299 (Iowa 1915).

In *Gacke*, this Court noted that the inalienable rights provision "is not a mere glittering generality without substance or meaning." It was "intended to secure citizens' pre-existing common law rights (sometimes known as "natural rights") from unwarranted government restrictions." However, the Clause is "subject to reasonable regulation by the state in the exercise of its police power." Therefore, "in determining whether the challenged statute violates article I, section 1 of the Iowa Constitution, we must determine (1) whether the right asserted by the plaintiffs is protected by this clause, and (2) whether [a statute] is a reasonable exercise of the state's police power. *Gacke* at 176).

⁵ The U.S. Constitution 5th Amendment makes no mention of the pursuit of happiness. See Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1 1997-1998.

Accordingly, to assert a claim under article I, §1, the plaintiff must establish that the right asserted is protected and that the conduct of the government is arbitrary and capricious, and not a reasonable exercise of the state's police power. There is no doubt that trespassing upon land without a warrant, being threatened with physical harm, and deprived of one's freedom of movement implicates a fundamental right ingrained in liberty and the pursuit of happiness. Such a right is not absolute and is subject to the reasonable police power of the State. But the exercise of the state's police power must be reasonable. It cannot be arbitrary and capricious.

As noted by the Court in *Gacke*, liberty implies the absence of arbitrary restraint. The facts outlined by the Petition assert arbitrary restraint.

C. Application of Law to District Court Ruling: The District Court's conclusion that there is no claim available under article I, §1 or §8 is incorrect. This Court has recognized claims under each of these Constitutional provisions. Specifically, this Court has elevated the family home to unique and special protection. It has said that it will "rigidly enforce" any trespass upon the protection of the home. This case provides the Court with an opportunity to reinforce a homeowner's Iowa Constitution right to privacy by the offensive use of the Iowa Constitution. In fact, since Ms. White was never charged with a crime, to limit Constitutional protections to the defensive use would result in a violation of her Iowa Constitutional rights without a corresponding remedy for that violation.

CONCLUSION

The District Court's ruling dismissing Ms. White's Constitutional claims is a clear misunderstanding of this Court's precedents and necessitates this Court's intervention to avoid the widespread misapplication or inconsistent application of the law in similar cases. Ms. White respectfully requests that the Court reverse the District Court and reinstate Ms. White's Iowa Constitutional claims.

REQUEST FOR ORAL ARGUMENT

Ms. White requests to be heard if oral argument is scheduled.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Proof Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

 /s/ Martin A. Diaz

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I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Proof Brief.

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This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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 /s/ Martin A. Diaz