IN THE IOWA SUPREME COURT

No. 21-1992

GERI L. WHITE,

Plaintiff-Appellant,

v.

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

Defendants/Appellees/Cross Appellants

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

DEFENDANTS/APPELLEES/CROSS APPELLANTS' FINAL REPLY BRIEF

Elizabeth Craig ATM520022
Assistant City Attorney
Jennifer L. Schwickerath ATM520023
Assistant City Attorney
410 E. Washington Street
Iowa City, IA 52240
(319) 356-5030
icattorney@iowa-city.org
ATTORNEYS FOR MICHAEL HARKRIDER and CITY OF IOWA CITY

Wilford H. Stone AT0007699
Daniel Morgan AT0013452
Lynch Dallas, PC
526 Second Avenue, SE
P.O. Box 2457
Cedar Rapids, IA 52406-2457
(319) 365-9101
(319) 365-9512 Fax
wstone@lynchdallas.com
dmorgan@lynchdallas.com
ATTORNEYS FOR CHRIS WISMAN AND JOHNSON COUNTY

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ARGUMENT

III. WHITE HAS ADEQUATE COMMON LAW REMEDIES AND HER CLAIMS SHOULD BE DISMISSED UNDER BOTH STATUTORY AND *BALDWIN* QUALIFIED IMMUNITY.

A. Adequate Common Law Remedies

If understood correctly, White's argument is that the potential application of statutory immunities in Iowa Code Chapter 670, the Iowa Municipal Tort Claims Act (IMTCA), to her common law claims renders her common law remedies inadequate such that there must be constitutional tort claims available to her. That is, if her common law claims are legally inadequate under the IMTCA because of statutory immunity, then there must be an alternate, freestanding Iowa constitutional tort claim with no statutory immunities available.

Iowa constitutional tort claims aren't back-up theories for weak common law claims. But this is essentially White's position—implicit in her argument is the concession that her constitutional tort claims are factually the same as her common law claims but subject to different, more lenient standards under Iowa law. This approach is inconsistent with the Iowa Supreme Court's original conception of *Godfrey* claims as only being available "when the legislature has not provided an adequate remedy." *Godfrey v. State*, 898 N.W.2d 844, 880 (Iowa 2017) (Cady, J., concurring) ("*Godfrey II*"). Here, like Christopher Godfrey could not make out a claim that "an action under the ICRA [would] not adequately compensate him for

damages relating to" his claim for discrimination based on sexual orientation, White cannot articulate how her common law claims made under the IMTCA would not adequately compensate her for the alleged trespass and excessive force claims she makes under the Iowa Constitution. *Id.* at 881. Her potential remedies for intentional infliction of emotional distress, false arrest, and trespass, are "robust" and give her all the same potential damages as the constitutional claims she alleges. *Id.*

This is also not a case where White has *no* common law remedy for her allegations, like in *Wagner*. *Wagner v. State*, 952 N.W.2d 843, 861 (Iowa 2020). There, the plaintiff's excessive force claim was barred completely under the Iowa Tort Claims Act's intentional tort exception.[1] White's argument that she should have a free-form constitutional tort claim because statutory immunities make her common law claims harder to prevail on again does not fit the Iowa Supreme Court's rightfully wary approach to creating new causes of action—especially where there is already a remedy under Iowa's common law. *Cf. Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) (noting that the U.S. Supreme Court has implied a *Bivens* action only where an alternative remedy

[1] Even in *Wagner*, though, there could be an adequate remedy for the alleged wrongs through a Section 1983 claim under the U.S. Constitution.

against individual officers was "nonexistent" or where plaintiff "lacked *any alternative remedy* " at all).

Further, the application of IMTCA statutory immunity to common law claims does not make the common law tort remedies inadequate. First, the IMTCA applies to constitutional claims, too, assuming such claims exist. *Baldwin v. Estherville*, 929 N.W.2d 691, 697 (Iowa 2019) (holding "the due care exemption under section 670.4(1)(c) could provide the City immunity" against a constitutional tort claim). Second, a common law tort remedy is not inadequate just because state tort law "may sometimes prove less generous than would a *Bivens* action, say, by capping damages . . . forbidding recovery for emotional suffering unconnected with physical harm . . . or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels. . . ." *Minneci v. Pollard*, 565 U.S. 118, 129—30, 132 S. Ct. 617, 181 L.Ed.2d 606 (2012) (refusing to imply a *Bivens* remedy where a federal prisoner sought damages from privately employed personnel working at a privately operated federal prison, where the conduct was of a kind that typically falls within the scope of traditional state tort law). For example, in *Godfrey II*, Justice Cady found that despite punitive damages being unavailable for a claim of sexual orientation discrimination under the ICRA, Godfrey's remedies were still adequate. *Godfrey II*, 898 N.W.2d at 881. In *Estate of Frazier v. Miller*, the Montana Supreme Court found a negligence theory provided "an adequate remedy for any damages

caused" by a police officer's allegedly unlawful search and seizure, despite Montana having an immunity statute and a damages cap on government liability. 484 P.3d 912, 921—22 (Mont. 2021); Mont. Code Ann. §§ 2-9-305 ("Immunization, defense, and indemnification of employees") and 2-9-108 ("Limitation on governmental liability for damages in tort"). And, in addition to compensation, tort claims have a deterrent effect. *Minneci*, 565 U.S. 118, 127 ("State tort law, after all, can help to deter constitutional violations as well as to provide compensation to a violation's victim.").

White submits her own test for adequate remedies: "protection . . . from the mischief of the legislature." (White Reply Brief, p. 13). What White dismisses as "mischief" by the legislature is regarded by others as the lawful public policy of our state decided by the people's representatives regarding how taxpayer dollars should be spent on tort claims. White prefers her own policy judgments about how tort claims should be handled. But though White may not agree that her common law and constitutional claims should be subject to the rigors of the Iowa Municipal Tort Claims Act, she still has a full array of legal remedies available to her for the wrongs she alleges—and that makes her remedies adequate.

B. Qualified Immunity

Preliminarily, White argues it is inappropriate to raise *Baldwin* qualified immunity at the motion to dismiss stage. But qualified immunity is more than a

mere defense to liability—it is an immunity from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Nelson v. Lindaman*, 867 N.W.2d 208, 215 (Iowa 1996) (finding Iowa Code section 232.73 offers a type of "qualified immunity" and explaining "[q]alified immunity is a question of law for the court")). Further, the description of *Baldwin* qualified immunity as an "affirmative defense" that must be "plead[ed]" is identical to the description of federal qualified immunity, which is universally litigated and resolved at the motion to dismiss stage. *See Dickerson v. Mertz*, 547 N.W.2d 208, 215 (Iowa 1996) ("[Federal] qualified immunity is an affirmative defense which the defendant official must plead.").

White then claims statutory immunity under Iowa Code Section 670.4A doesn't apply to her case because "it cannot be applied retroactively since the event and filing of the lawsuit pre-dates the enactment of this statute . . . ." (White Reply Brief, p. 14). But this isn't a "retroactive" application. "[T]he event" and "the filing of the lawsuit" are not regulated by the application of qualified immunity test under Section 670.4A. The event of legal consequence is the district court's application of Iowa Code Section 670.4A, and this is adjudicative conduct that will occur *during* litigation. *See Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021). "[A]pplication of a statute to conduct occurring after the effective date is in fact a prospective and not retrospective application." *Hrbek*, 958 N.W.2d at 783. And nothing about White's underlying claims has changed because "[q]ualified immunity is conceptually

distinct from the merits of the plaintiff's claim that his rights have been violated."[2] *Mitchell*, 472 U.S. at 527, 105 S. Ct. at 2816, 86 L.Ed.2d 411. Other examples of the "prospective application of current law" were collected in *Hrbek* and included the application of a new presumption in a Social Security case; the application of a new standard of appellate review; and the application of a mandatory minimum sentence. *See Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640, 648–49 (6th Cir. 2006) ("A focus on the 'relevant activity' in this case leads inexorably to the conclusion that the change in the regulation was not impermissibly retroactive. ... [T]he regulatory change had no retroactive effect because the presumption defined by the listing is a rule of adjudication and therefore has its effect on claims at the time of adjudication."); *United States v. Nunemacher*, 362 F.3d 682, 685–86 (10th Cir. 2004) (new standard of appellate review applied notwithstanding that it was adopted after the proceedings in the trial court were concluded); *United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003) (same); *United States v. Holloman*, 765 F. Supp. 2d 1087, 1091 (C.D. Ill. 2011) ("Therefore, the relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of

[2] White cites *Wagner* in alleging that qualified immunity affects her "substantive rights." (White Reply Brief, p. 16). But the reference to the development of "substantive law" in *Wagner* referred to the development of the substantive law of the doctrine of qualified immunity in regard to Iowa constitutional tort claims, not to any particular right enjoyed under the Iowa Constitution or common law. Of course, there is no "right" held by any person to "qualified immunity"—it is a legal doctrine only relevant after a cause of action has been commenced.

a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the FSA is the prospective application of current law, not a retroactive exercise." (emphasis omitted)). The general presumption against retroactivity should therefore not bar application of Iowa Code Section 670.4A.

White's argument that statutory qualified immunity can't apply to her because her "claims were vested at the time of the event in 2019" also cannot withstand scrutiny. (White Reply Brief, p. 16). She has no vested right in the continuance of a specific formulation of the qualified immunity defense to *Godfrey II* claims. *Cf. Baldwin v. City of Waterloo*, 372 N.W.2d 48, 492 (Iowa 1985) ("Plaintiff had no vested right in a particular result of this litigation or in the continuation of the principle of unlimited joint and several liability."). In *Baldwin v. Waterloo*, the supreme court applied the statutory version of joint and several liability from the newly enacted Iowa Code Chapter 668 to the plaintiff's pending lawsuit and held there was no violation of the plaintiff's substantive due process rights. *Id.* Prior to the enactment of Chapter 668, joint and several liability was governed by the common law and was "unlimited." *Id.* Effectively, the statutory version of joint and several liability changed the common law by narrowing whom plaintiffs could recover the entire judgment from. *Id.* But the supreme court nonetheless held there was no violation of the plaintiff's substantive due process rights because the rule of

joint and several liability was the "legal machinery by which the substantive law is enforced or made effective." *Id.* at 491.

Likewise, in this case, the statutory qualified immunity defense does not impact the substance of White's claims, which was—and still is—based upon her alleged violations of the Iowa Constitution. A court deciding whether her claim is "clearly established" under Iowa law so as to avoid the application of statutory qualified immunity is the "legal machinery" at work. Contrast this to the case cited by White, *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989), which involved the legislature's substantive amendment to Iowa Code Section 123.92 (dram shop liability) to eliminate the branch of statutory liability for the "selling or giving" of beer. *Id.* at 460. That amendment destroyed the plaintiff's claim entirely. *Id.* Plaintiff's claim in this case is not like the plaintiff in *Thorp*; the statutory change did not eliminate the basis for liability. The statutory qualified immunity defense instead works as an adjudicative check on insubstantial claims. Plaintiff has no vested rights in the judicial formulation of the qualified immunity defense. The application of Iowa Code § 670.4A therefore would not violate Plaintiff's substantive due process rights.

Finally, White argues Iowa Code Section 670.4A is unconstitutional because "[t]he Iowa legislature is acting outside the scope of its authority in attempting to define the meaning of the Iowa Constitution." (White Reply Brief, p. 17). She

alleges "[t]he legislature's attempt to overrule *Baldwin I* must fail as an unconstitutional intrusion into the Iowa Supreme Court's role of the final arbiter of the Iowa Constitution." (White Reply Brief, p. 27). Plaintiff cannot meet her burden to prove, beyond a reasonable doubt, that the statute is unconstitutional and must "negate every reasonable basis upon which [the court] could hold a statute constitutional." *See Klouda v. Sixth Jud. Dist.*, 642 N.W.2d 255, 260 (Iowa 2002). The legislature has the right to regulate constitutional damage claims, and nothing about the qualified immunity provision in Section 670.4A "overrules" *Baldwin I.* In fact, the statute itself explicitly states that "This section shall apply **in addition** to any other statutory or common law immunity." Iowa Code § 670.4A(5) (emphasis added). Further, there is nothing in Iowa Code Section 670.4A that even refers to the Iowa Constitution, much less attempts to define its meaning.

White's allegation that the statutory qualified immunity standard violates separation of powers principles is ironic, given that in *Godfrey II* several members of the supreme court criticized the judicial creation of a constitutional tort claim as assuming the role of the *legislature*. *Godfrey II*, 898 N.W.2d at 883-884 (Mansfield, J., dissenting, joined by Waterman, J. and Zager, J.) ("What we have not done in the past 160 years is to go beyond declaring unconstitutional actions "void," which we are authorized to do . . . and assume the *legislature's* role . . . .") (emphasis in original). There is no separation of powers violation created by Section 670.4A. In

State v. Thompson, 954 N.W.2d 402 (Iowa 2021) the Iowa Supreme Court noted that although the judicial department can make rules of practice and procedure, "the legislative department continues to legislate on the topics of who can participate in judicial proceedings, what information or evidence can be present in judicial proceedings, and what information or evidence can be considered in judicial proceedings." *Id.* at 413. In *Wagner* the supreme court likewise specifically acknowledged the legislature's right to regulate constitutional tort claims, stating: "we are guided by the principle that the legislature has the right to regulate claims against the State and state officials, including damage claims under the Iowa Constitution, so long as it does not deny an adequate remedy to the plaintiff for constitutional violations." *Wagner*, 952 N.W.2d at 847. Iowa Code Section 670.4A regulates damage claims against municipalities and municipal officials in several ways, qualified immunity of which is one. It is the province of the legislature, not the courts, to determine whether and under what circumstances municipalities are subject to tort liability. *Boyer v. Iowa High School Athletic Ass'n*, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (Iowa 1964) ("[W]hether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state."). The argument that the legislature cannot

even regulate constitutional tort claims through a statutory version of qualified immunity lacks merit.

IV. WHITE'S PERSONAL INVOLVEMENT IN HER HUSBAND'S CRIMINAL CASE BARS HER COMMON LAW CLAIMS.

Geri White can't have it both ways—to be a part of Daniel White's criminal case when there's a benefit, and to be separate from it when there's not. During his O.W.I. case Daniel specifically argued that he had standing to allege Geri's rights were violated. Daniel argued: "Defendant can challenge the illegal seizure of his wife because it was exploited to allow the officers entrance into the home and thus any evidence found would be considered fruit of that original unlawful seizure." *State v. Daniel White*, OWCR122719, Motion to Reconsider filed 1/20/20, p. 8. The district court ruled the seizure of Daniel was lawful, despite Daniel's argument that the alleged illegal seizure of Geri rendered his own seizure unlawful. App. 80.

Now, in her civil case filed just 44 days after Daniel's plea agreement, based on the same facts—and even quoting the ruling on her husband's failed motion to suppress in her petition—Geri White claims money damages and says that whether "there was no legal basis to trespass upon her property and to engage in excessive force was not a legal issue that was litigated in the criminal case against Mr. White." (Reply Brief, 21). This Court should not review Geri's claims in a vacuum. Daniel featured the very same facts in his motion to suppress, motion to reconsider, and application for interlocutory review that Geri features in her Amended Petition.

(*State v. Daniel White*, OWCR122719, Brief in Support of Motion to Suppress (filed 11/29/19), pp. 1-5), Motion to Reconsider (filed 1/20/20), p. 8), Application for Interlocutory Review (filed 3/26/20, p. 4—5). He argued "the loudspeaker, multiple squad cars with flashing lights, and surrounding of the house by armed and uniformed officers were all ultimately directed at seizing Danny White." (*State v. Daniel White*, OWCR122719, Brief in Support of Motion to Suppress, p. 9). He argued Geri White's consent to enter the home was involuntary because of police coercion due to the use of the loudspeaker and the officers' presence with their weapons—a "threatening situation." (*Id.* p. 8) The issues Geri raises now were not just litigated by Daniel, they were litigated extensively, and she played a starring role in his defense.

White alleges that claim preclusion does not apply here, but the legal reason her claim is barred is not claim preclusion—it is public policy. Public policy disallows White's attempt to leverage the circumstances of husband's criminal conduct into a damage claim of her own. *Tate v. Derifeld*, 510 N.W.2d 885 (Iowa 1994). *Tate* involved a similar fact pattern. Plaintiff Denise Tate filed a petition for loss of consortium damages resulting from her husband, Jerry Tate's, incarceration. *Id.* at 887. Denise Tate claimed that law enforcement unlawfully obtained the warrant that led to a search of the shared Tate residence, and that the evidence against Jerry was obtained during an allegedly unlawful search. *Id.* Jerry was arrested and

ultimately pled guilty. *Id.* The supreme court held the dismissal of Denise's damage claim was "dictated by public policy." *Id.* at 888. It reasoned that because Jerry Tate could not have brought an action based on his own wrongdoing, neither could his spouse. *Id.* The "general rule" is that "a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party . . . ." *Id.* (citing *Cole v. Taylor*, 301 N.W.2d 766, 768 (Iowa 1981) (spouse could not maintain consortium claim against psychologist for filing to prevent other spouse from committing murder)).

Here, it doesn't matter that Geri has made common law tort claims, versus a consortium claim. The rationale applies with equal force to Geri White's claims, because all the claims turn on the same facts and circumstances that underly and supported Daniel's lawful arrest. Even her "excessive force" claim was litigated as part of Daniel's argument that the officers' drawing their weapons invalidated Geri's consent. Her common law claims are therefore barred by public policy, in addition to qualified immunity and failure to state a claim.

CONCLUSION

Defendants request the Court affirm the district court's ruling dismissing Geri White's Iowa constitutional claims. But Defendants submit the district court erred in denying their motion to dismiss White's common law claims.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument in this matter.

Respectfully submitted,

/s/ Elizabeth Craig
Elizabeth Craig ATM520022
Assistant City Attorney

/s/ Jennifer L. Schwickerath
Jennifer L. Schwickerath ATM520023
Assistant City Attorney
410 E. Washington Street
Iowa City, IA 52240
(319) 356-5030
icattorney@iowa-city.org
ATTORNEYS FOR MICHAEL HARKRIDER and CITY OF IOWA CITY

/s/ Wilford H. Stone
Wilford H. Stone AT0007699

/s/ Daniel Morgan
Daniel Morgan AT0013452
Lynch Dallas, PC
526 Second Avenue, SE
P.O. Box 2457
Cedar Rapids, IA 52406-2457
(319) 365-9101
(319) 365-9512 Fax
wstone@lynchdallas.com
dmorgan@lynchdallas.com
ATTORNEYS FOR CHRIS WISMAN AND JOHNSON COUNTY

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/s/ Elizabeth Craig
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The undersigned certifies that Defendants/Appellees/Cross Appellants' Final Reply Brief was filed with the Clerk of the Iowa Supreme Court and served on all counsel of record by using the EDMS filing system.

/s/ Elizabeth Craig
Elizabeth Craig

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The undersigned certifies that there was no cost associated with the production of this Final Reply Brief.

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