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IN THE SUPREME COURT OF IOWA

No. 21-1992
Johnson County No. LACV082557

GERI L. WHITE, Plaintiff/Appellant

v.

MICHAEL HARKRIDER, CITY OF IOWA CITY, CHRIS WISMAN and JOHNSON COUNTY, Defendants/Appellees

INTERLOCUTORY APPEAL *from the* IOWA DISTRICT COURT *in and for* JOHNSON COUNTY

Honorable DISTRICT COURT JUDGE CHAD KEPROS, *Presiding*

Conditional AMICUS BRIEF of the IOWA ASSOCIATION FOR JUSTICE

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Chair, Amicus Brief Committee

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IDENTITY & INTEREST OF AMICUS CURIAE

As stated in the Iowa Association for Justice's (hereinafter "IAJ") Motion for Leave to File Amicus Curiae Brief filed contemporaneously with this brief, incorporated herein by reference, the IAJ is an organization comprised of over 700 attorneys primarily practicing on behalf of injured persons. Whether an injury occurs at work, on Iowa's roadways, on a snowy sidewalk, a dilapidated bike trail, a softball field, a school, in jail, at a mental health facility, or, in this case, at an innocent person's private home, on her private property, by policemen abusing their power and their tools and the *color* of their authority, IAJ is there to seek justice and ensure wrongs are righted.

For over a decade, from 2010 through 2021, IAJ member and former association President, Roxanne Conlin, and her team, worked tirelessly to ensure that where Iowa's Tort Claims Act failed, the Iowa Constitution succeeded. Through multiple appeals, hearings, depositions, trials, and remands, the Godfrey case established that even when the legislature neglects to grace us all with a *legislative* remedy for state constitutional violations, nonetheless,

the Iowa Bill of Rights is sufficiently self-executing that the judiciary has the power to infer a constitutional damages remedy. See Godfrey v. State, 898 N.W.2d 844 (Iowa 2017). This makes sense; our *constitutional* rights can never depend upon the mere action or inaction of a single branch of government.

Now comes part two of the Godrey saga. Whereas the *State* was claiming the Constitution was powerless in Godfrey, now here the *municipal* actors are claiming the same fake powerlessness of the Constitution for themselves. And, like the judiciary rejected the State's policy-based arguments in Godfrey and inferred an independent constitutional tort when a *state actor* violated Godfrey's rights, so too should this Court also infer that same level of protection for Ms. White whose rights were violated by municipal actors. The protection of the Constitution should be obvious: the Bill of Rights does not depend upon whether the tortfeasor works for the city or the state. Our rights are God-given and inalienable; they are not subject to the grace or restraint of others.

IAJ is committed to ensuring that the Bill of Rights in Iowa remains the "best" in the nation which was the intent of our framers. IAJ is committed to ensuring that civil constitutional law does not become a race to the bottom in Iowa. Immunizing possibly thousands or tens of thousands of municipal actors for their constitutional harms is contrary to the plain language of the Bill of Rights, is inconsistent with Iowa caselaw and federal precedent, and it would undermine *both* the deterrent and make-whole theories of the self-execution doctrine.

"Our liberties we prize and our rights we will maintain" is not just a catch phrase on a flag or a cliche we were all forced to memorize in third grade social studies class. That motto is our sacred creed; it is the command of our forefathers; it is what attorneys and the Iowa Supreme Court justices took an oath to protect, defend, and uphold. *No* law, nor any absence thereof, can

ever permute or destroy what is guaranteed to us by our Creator. The Iowa Supreme Court should reverse the district court, confirm that the Iowa Constitution restrains state actors and *municipal actors*, too. The case should be remanded for trial.

CERTIFICATE OF COMPLIANCE-AUTHORSHIP

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), counsel herein authored this brief in whole in combination with members of the Iowa Association for Justice Amicus Brief Committee, primarily including attorneys Jennifer Zupp and Stephen Ballard. No party's counsel 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.

/s/ Jessica A. Zupp. 7/25/2022

Jessica A. Zupp, Attorney/Chair, Date

Iowa Association For Justice Amicus Brief Committee

CERTIFICATE OF COMPLIANCE- BRIEF REQUIREMENTS

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this brief complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.906(4). This brief is prepared in Times New Roman, a proportionally spaced typeface, and contains 5,037 words, which is less than one-half the length permitted for Appellant's brief. See Iowa R. App. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface).

/s/ Jessica A. Zupp. 7/25/2022
Jessica A. Zupp, Attorney/Chair, Date
Iowa Association For Justice Amicus Brief Committee

ARGUMENT & AUTHORITIES

I. DAMAGES ARE AVAILABLE TO REMEDIATE MUNICIPAL VIOLATIONS OF BOTH ART. I § 1 and ART. I § 8 OF THE IOWA CONSTITUTION.

A. Federal Constitutional Liberty and Property Rights are Self-Executing.

More than 70 years ago, the United States Supreme Court initially pondered whether the exclusionary rule should be applied in all the States as a matter of Fourth Amendment law. Wolf v. Colorado, 338 U.S. 25, 31 (1949). The Court concluded that applying the exclusionary rule was unnecessary because "the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion" would be sufficient to curb future constitutional abuses in the states." Id. After little more than a decade of failed experiments later, the Court reversed course, recognizing that State common law remedies were often "worthless and futile". Mapp v. Ohio, 367 U.S. 643, 652, 655 (1961). The Court applied the exclusionary rule to all the states, via the Fourteenth Amendment's Due Process Clause. Id.

Although the exclusionary rule minimized the harm caused in some cases, it did not remedy all constitutional harms. First, the exclusionary rule afforded no relief at all to those who were not criminally prosecuted. Second, for those who were criminally prosecuted, excluding evidence of criminality did not cure other potentially outrageous infringements of rights that often occurred simultaneously with the unconstitutional gathering of evidence, such as use of excessive or unreasonable force. Third, exclusion of evidence was not a deterrent against police practices that were purely designed to harass and intimidate, rather than investigate. For these reasons, 10 years after Mapp, the Supreme Court held that the Fourth Amendment's search and seizure protections were self-executing, permitting the aggrieved party to sue for money damages for a violation of Fourth Amendment rights. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Independent of the inadequacy of the exclusionary rule alone to protect Fourth Amendment rights, the Bivens Court focused on the different balance of power between a citizen and a private trespasser, on one hand, compared to a citizen and a law enforcement officer, on the other. Bivens, 403 U.S. at 391-92. Private citizens are empowered to refuse entry to or block trespassers from entering their homes, but "[t]he mere invocation of federal power by a federal law enforcement officer will normally render futile any attempt to resist an unlawful entry or arrest . . . and a claim of authority to enter is likely to unlock the door as well." Id. at 394. Simply excluding the fruits of unlawful entry in criminal proceedings does not provide full protection for Fourth Amendment rights.

Another reason for the Bivens Court's damages remedy was adherence to decades of precedent:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

Id. at 395 (citing Nixon v. Condon, 286 U.S. 73, 52 (1932); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487, 22 (1902); Wiley v. Sinkler, (1900); J. Landynski, Search and Seizure and the Supreme Court 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U.Pa.L.Rev. 1, 8—33 (1968); cf. West v. Cabell, 153 U.S. 78, 14 (1894); Lammon v. Feusier, 111 U.S. 17, (1884)).

The damages remedy is also easy for courts to apply: "[T]he experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of

injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights." Bivens, 403 U.S. at 409.

Bivens relied on an additional, textual basis for the damages remedy: unchecked constitutional violations thwarted the supremacy of the Constitution, contrary to its plain language. As the concurring opinion in Bivens reasoned,

> [t]hese arguments for a more stringent test to govern the grant of damages in constitutional cases seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of the constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

Bivens, 403 U.S. at 407 (Harlan, J., concurring).

As the Bivens Court noted, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" Id. at 397 (quoting Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Accordingly, the Court determined that Plaintiff stated a cause of action "under the Fourth Amendment" and could sue for money damages. Bivens, 403 U.S. at 397.

B. The Self-Executing Nature of Iowa's Equal Protection and Due Process Clauses Support Recognition that §§ 1 and 8 are Self-Executing, Too.

In 2017, the Iowa Supreme Court made clear that individuals may pursue claims against State actors for violations of the Iowa Constitution. Godfrey v. State, 898 N.W.2d 844 (Iowa 2017). The Court determined that the Equal Protection Clause and Due Process Clause of the Iowa Constitution (Art. I, §§ 6 and 9, respectively) are "self-executing". Godfrey, 898 N.W.2d at 871. The Godfrey Court rested its holding in large part upon the rationale of Bivens: there was

no legislative remedy for Godfrey, who had been discriminated against in his employment because of his sexual orientation, and exclusion of evidence was not an effective remedy for Godfrey because he had not been charged with any crime. Id. at 848-49 (citing Bivens, 403 U.S. at 405).

The Godfrey Court substantially relied upon its prior enforcement of the protections set forth in Iowa's Bill of Rights. Id. at 849-50 (citing Girard v. Anderson, 257 N.W. 400 (Iowa 1934) (recognizing damages remedy for search and seizure violations of Iowa's Bill of Rights, Art. I, § 8); McClurg v. Brenton, 98 N.W. 881 (Iowa 1904) (same)). In McClurg, which is strikingly similar to Bivens, Plaintiff McClurg filed a civil suit against the Mayor of the City of Des Moines, Brenton, for violating McClurg's search and seizure rights. Many of the same concerns noted by the Bivens court were present in McClurg. For example, Mayor Benton, with a posse, came to McClurg's home to search for stolen chickens without a warrant. McClurg, 98 N.W. at 881-82. When McClurg answered the door by cracking it open a mere five or six inches, the Mayor stuck his foot in the door and told McClurg, "None of that goes here. I am mayor of the city of Des Moines, and we are here on official business." Id. at 882. "Naturally", the Iowa Supreme Court noted that this show of force by the Mayor "tended to chill the ardor of the defense, and the door was soon opened…." Id. In allowing the damages case to proceed, the Court concluded that "[i]f plaintiff's home was invaded in the manner claimed by him, he has suffered a wrong for which the law will afford him substantial remedy." Id. The Court continued:

> 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.

Id. (emphasis supplied).

The McClurg Court also relied on an additional concern identified in Bivens: excessive force used during otherwise-authorized searches. "There is testimony, also, that the search was conducted, by some of the party, at least, in a loud and boisterous manner, and with little regard for the sensibilities of the plaintiff and his family." McClurg, 98 N.W. at 882. One member of the search party confessed that he had been "a little enthused" during the search, and another searcher "demanded to know whether there was 'any beer in the cellar'" an object obviously distinct from the allegation of stolen chickens. Id.

Ultimately, the Godfrey Court, echoing the same power imbalance and inadequate deterrent concerns identified in Bivens, determined that the "search and seizure provisions of the Iowa Constitution are self-executing." Godfrey, 898 N.W.2d at 862-63 (citing McClurg, 98 N.W. at 882). Godfrey reasoned as follows:

> We think it clear that section 1 of the schedule article cannot swallow up the power of the judicial branch to craft remedies for constitutional violations of article 1. The rights established in the Iowa Bill of Rights are not established by legislative grace, but by the people in adoption the constitution.

Id. at 869 (emphasis supplied). "In short, we have found the due process clause of article 1, section 9 enforceable in a wide variety of settings." Id. at 871. Likewise, "[o]ur cases clearly show that our equal protection clause has always been considered to be self-executing. We therefore reaffirm the equal protection clause of the Iowa Constitution is self-executing." Id. at 872.

1. *Bivens* and *McClurg* compel the conclusion that Art. 1, § 8 is self-executing.

Just as McClurg enforced Art. I, § 8 against the Mayor of Des Moines for his unlawful search and seizure, and just as Godfrey enforced §§ 6 and 9 against the State for equal protection

and substantive due process, so too should this Court determine that § 8 is enforceable against the City in the present matter. Several reasons compel this conclusion.

First, this is a personal liberty and physical property case involving a warrantless entry upon land and seizure of the person. Thus, the facts touch at the heart of § 8's guarantees and prohibitions. Iowa Const. Art. I, § 8 (The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated[.]") No part of § 8 has been amended since McClurg that would dictate a different result. The Court should recognize that § 8 is self-executing as a simple matter of *stare decisis*. In fact, if anything, constitutional protection for property has increased with the Court's recent holding that the Iowa Constitution even protects people's privacy interests in their garbage. State of Iowa v. Wright, 961 N.W.2d 396 (Iowa 2021). If one's garbage gets constitutional protection, then certainly one's person and one's home get the same protection, or more.

Second, the Iowa Supreme Court has already found that the Fourth Amendment is nearly identical to Art. I, § 8, with the main difference being only that one uses a comma (Fourth Amendment) whereas the other uses a semicolon (Art. I, § 8). State v. Brown, 930 N.W2.d 840, 846 (Iowa 2019). Notwithstanding the punctuation difference, the Iowa Supreme Court has recognized that the framers of Iowa's Constitution desired to "provide similar protection to the Federal Bill of rights when they adopted similar language." Brown, 930 N.W.2d at 846. Given that the United States Supreme Court recognized a Bivens claim as the only way to ensure adequate Fourth Amendment protection, so too should Iowa recognize that Iowa's Art. I, § 8 is self-executing, so that a damages remedy can be sought under the Iowa Constitution, too.

2. The text and the structure of the Bill of Rights support a finding that Art. I, § 1 is self-executing.

This Court has not yet expressly extended self-execution principles to the "inalienable rights" clause of Art. I, § 1. Some of the Court's § 1 jurisprudence, however, clearly shows that those rights implicated by that clause should be protected by an explicit determination in this case that the clause is self-executing and may be enforced here.

The Iowa Supreme Court already has held that § 1 rights are self-executing; depending upon the nature of the right asserted, however, varying levels of scrutiny apply. See City of Sioux City v. Jacobsma, 862 N.W.2d 335 (Iowa 2015). In Jacobsma, the Court noted that the inalienable rights clause was "not a mere glittering generality without substance or meaning." Id. at 349. Rather, the clause was designed to "secure citizens' pre-existing common law rights (sometimes known as 'natural rights') from unwarranted government restrictions." Id. at 349. Although the Supreme Court ultimately found there was no constitutional violation of Jacobsma's property rights in fact, the Court nonetheless recognized that Jacobsma possessed constitutional rights protected by Art. I, § 1. Id. at 345 (noting that rational basis review was appropriate because Jacobsma did not argue that his rights were fundamental).

In addition, the Court distinguished Jacobsma's mere property claim from what might have been stronger § 1 claims in other cases, including deprivations of liberty. Jacobsma, 862 N.W.2d at 345 ("While Jacobsma may not have a liberty interest, he certainly has a property interest in not being subject to irrational monetary fines rather than a liberty interest impairing some right of self-fulfillment."). Had Jacobsma made a stronger showing of a liberty interest – a fundamental right – the standard of review would have been higher than rational basis. In any event, Jacobsma stands for the proposition that the rights in § 1 are meaningful and deserving of constitutional protection.

Likewise, the Iowa Supreme Court has held that depriving persons of a "remedy" for a "taking" of their property is not a constitutional exercise of police power, and any statute that purported to effectuate such a result would be struck down. Gacke v. Pork Xtra, LLC, 684 N.W.2d 168, 171 (Iowa 2004). Gacke involved the constitutionality of Iowa's nuisance immunity statutes as applied to smelly hog confinements that infringed on neighbors' quiet use and enjoyment of their property. Gacke, 684 N.W.2d at 170-71. A statute, Iowa Code § 657.11, purported to eliminate the right to sue for such a claim. The Gacke Plaintiffs sued, claiming that the statute's immunity provisions unreasonably deprived them of their property and, therefore, exceeded the state's police powers and violated Art. I, § 1 of the Iowa Bill of Rights. Id. at 171. Notably, the Gacke Court determined the statute was an unreasonable exercise of police power even though there was no physical invasion of property by the state. Id. at 173. The implication is that physical invasions of land are more unreasonable than non-physical invasions, although both are proscribed by Art. I, § 1.

Gacke also digested past decisions and scholarly articles about protections similar to Art. I, § 1 in other state constitutions. The Court highlighted Hoover v. Iowa State Highway Comm'n, 222 N.W.438, 439 (Iowa 1928) where the Court concluded that the framers intended that Art. I, § 1 was "to be enforced by the judiciary." Id. at 176. Likewise, the Court noted a law review article, which surveyed state constitutions and found that "most courts have assumed that the inalienable rights clauses have some judicially enforceable content." Id. (citing Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 22 (1997)). Finally, the Court noted its own precedent, which affirmed that § 1 included the right to "acquire, possess, and enjoy property." Id. (citing State v. Osborne, 154 N.W. 294, 301 (Iowa 1915)).

Once the recognized property right was established, the Gacke Court then had to determine whether the complete absence of a remedy was a "reasonable" exercise of power. Gacke, 684 N.W.2d at 177. Restrictions that are "prohibitive, oppressive or highly injurious . . . are invalid." Id. at 177 (citing Steinberg-Baum & Co. v. Countryman, 77 N.W.2d 15, 19 (Iowa 1956)). A statute must be "reasonably necessary" to achieving a public end and not be "unduly oppressive". Id. at 178. Where there is "no benefit" to the person whose rights are violated, then the means are "unduly oppressive." Id. Property cannot be "arbitrarily interfered with or taken away without just compensation." Id. Analogizing to substantive due process cases, the Gacke Court held that statutes which "give an injured person, in essence, no right of recovery" are not constitutional. Id. at 179.

Applying Gacke and Jacobsma to this case, the Iowa Supreme Court should now determine that damages are available to enforce a violation of White's liberty and property rights under Art. I § 1 for several reasons. First, there was a physical invasion of White's land–and not by just one person, but by several. Second, the police used megaphones and displayed firearms, pointing them at White and her home; no one can "enjoy" her property in the midst of that kind of melee. Third, there is no remedy for White, at least according to the district court. Under these circumstances, there is an utter excess of police power to the undue detriment of a private person, and if there is no remedy for White, then the violation of her rights is "unduly oppressive" and unconstitutional under Gacke.

Fourth, the plain text of § 1 shows that it should be recognized as self-executing. The operative language in Art. I, § 1 is nearly identical to the self-executing language in § 8:

Art. I, § 8	Art. 1, § 1
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated[.]	All men and women…have certain inalienable rights–among which are those of enjoying and defending…and protecting property[.]

Property is an object of protection in both sections, and use of the word "inalienable" in § 1 is akin to use of the phrase "shall not be violated" in § 8. There is no logical, reasonable, or principled basis to distinguish one from the other in terms of self-execution. If property rights are self-executing in § 8 and under McClurg, and property cannot be taken absent due process in § 9 and under Godfrey, then likewise, the right to protect one's property in § 1 is, and must be, self-executing. A contrary holding would pervert if not ignore the plain meaning of the word "inalienable." See Jacobsma, 862 N.W.2d at 349-50 (surveying and discussing inalienable rights clauses).

Accordingly, the Iowa Supreme Court should hold that § 1 of the Iowa Bill of Rights is self-executing and that victims may sue municipal actors for damages in state court for violations of their constitutional rights.

II. THE MUNICIPAL TORT CLAIMS ACT DOES NOT OBVIATE THE NEED TO DETERMINE AND DECLARE THAT Art. I §§ 1 and 8 ARE SELF-EXECUTING.

A. The Act's Grace is No Substitute for the Constitution's Demands.

There is a suggestion in Godfrey that, perhaps, if there were already a state statute that allowed a damages claim to be brought for the violation of constitutional rights, then there would not be a need to recognize an independent constitutional tort action. See Godfrey, 962 N.W.2d at 115. In fact, the Municipal Tort Claims Act, in contrast to the Iowa Tort Claims Act, does purport to provide a remedy for "constitutional" harms. Iowa Code § 670.1(4) (defining "tort" to include "denial or impairment of any right under any constitutional provision") (emphasis supplied). Notwithstanding this clear definition by the Legislature, this Court should decline the

invitation to allow White's case only to proceed under the statute rather than under the Constitution.

First, on its face, the MTCA by its terms does not create any new causes of action; instead, the MTCA only provides a mechanism for enforcing actions that already exist. Iowa Code § 670.4(3) ("This section does not expand any existing cause of action or create any new cause of action against a municipality."). In fact, the language of the statute itself says that MTCA shall "not be construed to be a waiver of sovereign immunity for a claim for money damages[.]" Iowa Code § 670.14. Therefore, it would be futile to allow White to state a constitutional tort claim under the MTCA if, in fact, no such claim actually even exists in the first place. First the claim must be recognized, then the claim may be stated; anything else is out of order. Second, the legislature remains free, at any time, to repeal, in whole or in part, the waiver of sovereign immunity and dispense with MTCA entirely. If that happens, then there is no statutory redress at all, which revives the ultimate constitutional issue: whether our rights are self-executing or not. Enforcement of rights protected by the Iowa Constitution must not be left to Legislative action.

Third, everyone witnessed last year how the legislature gutted the MTCA by inserting new pleading requirements and imposing dismissal-with-prejudice consequences for the unwise or unwary. If damages for constitutional torts – if redress for deprivation of constitutional rights– is solely dependent upon the MTCA and there is no stand-alone constitutional remedy– then constitutional rights are subjugated to legislative whims. Purported "inalienable rights", permanent by their nature, are transformed into "mere wishes", subject to change at any time. What the Legislature giveth, the Legislature may taketh away. This should not be the case for

the Iowa Bill of Rights: this Court–not the Legislature–protects constitutional rights and determines constitutional remedies.

B. The Act's Liability-Shifting Provisions Undermine Deterrence.

The MTCA's remedies also fall short of the Mapp analysis, to wit: there should be an effective deterrent against constitutional abuses. Mapp v. Ohio, 367 U.S. 643 (1961). At common law, municipal officers could be sued personally for their torts, such as trespass if entering upon land without a warrant or consent. See, e.g., Krehbiel v. Henkle, 129 N.W.2d 945, 945 (1911). Under the MTCA, however, officers are not personally liable for their constitutional harms except for punitive damages. Iowa Code § 670.12. Thus, MTCA insulates officers from liability for their wrongdoing and simultaneously undermines the deterrence goal of self-execution. Accordingly, to the extent deterrence is a measure of the adequacy of constitutional remedies, this Court should determine that the liability-shift in MTCA, from people to the government, produces an inadequate deterrent. The Court should recognize the necessity of deterrence as a component of full redress for constitutional torts.

C. The Construct of Sovereign Immunity is Overwhelmed by the Plain Text of the Bill of Rights.

In 2005, Pennsylvania courts grappled with the question presented here. Jones v. City of Philadelphia, 2005 WL 49234659 (Pa. Com. Pl. 3/18/05) (Trial Court Order). There, Jones was seen driving a stolen car through the streets of Philadelphia. Ultimately, eight officers fired 41 bullets at or near Jones, as well as punched and kicked Jones multiple times while effectuating his arrest. Jones, 2005 WL 49234659. Jones sued, alleging violation of his constitutional rights under Art. I, §§ 8 and 9 of the Pennsylvania Constitution. Id. The City moved to dismiss the claim on grounds that no cause of action for money damages could be asserted under the Pennsylvania Constitution. Id.

Concluding that an individual can sue for money damages for use of excessive force by government officials, the Court noted that Art. I, § 11 of Pennsylvania's Declaration of Rights provides that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Id. The court noted that Jones was injured and the Constitution required that he "shall have remedy . . . without . . . denial." Id. To preclude a remedy for constitutional violations would require the court to ignore the self-executing language in the Pennsylvania Constitution: that physical injuries must have remedies. Denying a remedy would reduce fundamental constitutional rights to a status lower than common law torts, defying the Constitution's prohibition against denying civil rights to its citizens and relegating constitutional rights to an unimportant status in the hierarchy of rights. Id. The court held that to allow common law remedies for torts against ordinary citizens, but to deny remedies for torts against governmental officials would "distort the Pennsylvania Constitution beyond recognition." Id.

In upholding Jones's claim for damages for violation of his constitutional rights, the court held that Art. I, § 1 of the Pennsylvania Constitution was self-executing:

> This clause, unlike many others in the constitution, needs no affirmative legislation, civil or criminal, for its enforcement in the civil courts. Wherever a court of common pleas can be reached by the citizen, these great and essential principles of free government must be recognized and vindicated by that court, and the indefeasible right of liberty and the right to acquire property must be protected under the common-law judicial power of the court. Nor does it need statutory authority to frame its decrees or statutory process to enforce them against the violators of constitutional rights.

Id. (emphasis supplied).

Finally, the court determined that "the state cannot choose to immunize municipalities for state constitutional violations under the pretext of sovereign immunity principals." Id. It held

that the legislature does not have the power under the Constitution to take away a state constitutional right. Id. Thus, if the Tort Claims Act grants immunity from excessive use of force by the government, then the Act is unconstitutional. Id. Based upon the history of the Pennsylvania Constitution (Art. I, § 8 specifically), together with the language of Art. I, § 1 (people "have certain inherent and indefeasible rights"), the court held the legislature was prohibited from granting immunity for violations of fundamental state constitutional rights.

Many other states have recognized claims for damages based upon violations of constitutional rights rather than limiting such claims to the "common law" or statutory world only. For example, in Binette v. Sabo, Plaintiffs alleged that police officers entered their home without a warrant and threatened and assaulted them. 710 A.2d 688, 689-90 (Conn. 1998). The Court embraced the constitutional protection: "Endorsing the rationale underlying Bivens, we decline, as a matter of policy, to treat the harm that results from the abuse of governmental power as equivalent to that which arises from the commission of a battery or trespass by a private citizen." Binette, 710 A.2d at 700. Because the constitutional violation stemmed from the actions of police acting under authority of the government, the court found it necessary to recognize a right of action "under the state constitution and award money damages." Id.

In Maryland, the court recognized a right of action for damages under the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution when plaintiff alleged a deprivation of life, liberty, and property after being taken to a hospital against his will. Widgeon v. Eastern Short Hospital Center, 479 A.2d 921, 923 (Md. 1984). In Illinois, the court held that a Plaintiff successfully stated a cause of action for money damages under Art. I, § 6 of the Illinois Constitution when officers forced him to strip off his clothes and ride to the police station, and threatened him that if he failed to do so, he would be shot. Newell v. City of Elgin, 340 N.E.2d

344, 346 (Ill. App. Ct. 1976). Although Plaintiff lost on the merits, the court in Louisiana held that "damages may be obtained by an individual for injuries or loss caused by a violation of Article I, Section 5 of the Louisiana Constitution." Moresi v. Department of Wildlife & Fisheries, 567 So.2d 1081, 1091 (La. 1990). New Jersey has also recognized a constitutional claim for money damages for due process violations. Strauss v. State, 330 A.2d 646 (N.J. Super. Ct. Law Div. 1974). North Carolina allowed a money damages claim under the state constitution for violation of free speech rights. Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992). Utah, Colorado, California, Ohio, New Hampshire, and Vermont have also upheld claims for damages for constitutional violations. See Jones v. City of Philadelphia, 2005 WL 4924659 (Pa. Com. Pl. 3/18/05) (Trial Court Order) (digesting cases). As the court put it in Jones,

> [a] state gives the impression that it does not value its own constitution when it refuses to grant any form of relief to its aggrieved citizens or when it tells its citizens to seek a common law tort suit. … [a]warding damages will serve to confirm [a state's] stance that it takes the state constitution seriously. Constitutional rights represent the very essence of what it means to be a free individual. Many times injunctive relief comes too late…[a]warding damages at least evinces an attempt by the state to acknowledge its wrongdoing and gives the plaintiff some compensation.

Id.

CONCLUSION

This Court has already enforced Art. I, §§ 1 and 8 in Gacke and McClurg, and the Court should enforce the same protections again in this case. The same rights that were protected in Bivens are also at issue here: liberty, property, and freedom from unreasonable seizures. Likewise, the right to protect and defend liberty and property should be secured with a damages remedy cognizable under the Iowa Constitution according to Art. I., §§ 1 and 8. The words in our Bill of Rights are "mere form" and "wishes" in the absence of an adequate, enforceable remedy. The sovereign should never be totally "immune" and left free to violate our

constitutional rights. Any holding to the contrary fails to effectuate the supremacy of the Bill of Rights, fails to deter, and fails to appreciate the power differential between victims of private tortfeasors and victims of governmental tortfeasors.

The Iowa Supreme Court should determine that Art. I, §§ 1 and 8 of the Iowa Constitution are self-executing against municipal actors. The Court should reverse the district court's conclusion to the contrary and remand the case for further proceedings.