IN THE SUPREME COURT OF IOWA

17-0367

STATE OF IOWA

Plaintiff-Appellee

v.

SCOTTIZE DANYELLE BROWN

Defendant-Appellant

Appeal from the Iowa District Court
for Black Hawk County
Hon. Nathan A. Callahan, Judge

Final Brief of Amicus Curiae Iowa County Attorneys Association in support of the State of Iowa

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Statement of Identity of Amicus Curiae

The Iowa County Attorneys Association (ICAA) is a nonpartisan association of Iowa's county attorneys and their assistants. The county attorney is the chief law enforcement officer for his or her county. The county attorney must, among other duties, litigate motions to suppress dealing with the constitutional validity of traffic stops. County attorneys are also called upon to give legal advice and training to law enforcement officers in the performance of their duties.

ICAA submits this brief to the Iowa Supreme Court as amicus curiae because of the broad importance of the issues raised in this case and the unique perspective that Iowa's county attorneys have on them. The rule proposed by amicus in support of the appellant would have substantial effects on both the administration of criminal justice and the civil liabilities of county employees.

Summary of the Argument

ICAA takes seriously the need to ensure equality of treatment to all persons who interact with law enforcement and the criminal justice system. As prosecutors we take an oath to enforce the law – not just the criminal code of Iowa but also the constitutional requirements of due process, equal protection, and the variety of criminal procedure rules contained in the U.S. and Iowa constitutions.

The U.S. Supreme Court has long held that so long as there is an objectively valid reason for a traffic stop the officer's subjective reason for the stop was not relevant to its constitutionality. This Court has frequently cited this proposition in cases affirming the denial of motions to suppress by the trial court.

Amicus supporting appellant Scottize Danyelle Brown ask this Court to find that the Iowa Constitution requires trial courts to make an inquiry into the subjective intentions of law enforcement officers and to suppress otherwise valid evidence if the trial court finds that those intentions were not sufficiently pure. In support of this request amicus submit

highly suspect statistical arguments, a scattershot of anecdotes, and precious little legal argument. Their request should be rejected as being contrary to legal precedent, valid social science, and the proper role of the courts.

Amicus supporting appellant also ask this Court to fashion a suppression remedy for pretextual stops. Amicus claim that suppression – a familiar remedy in criminal law – will be sufficient to redress the harms caused by a pretextual stop. But the implications of the amicus argument in combination with this Court's decision in *Godfrey v. State* last term mean that the remedies for a pretextual stop will not be limited to suppression of evidence. The rule proffered by amicus will cause unprecedented and crippling civil liability to law enforcement officers and their employers. The stakes of this issue cannot be overstated.

Argument

I. The study of race and policing demands rigorous social-science methodology to identify valid trends or causative factors. Amicus proffer their own home-brewed statistics based on flawed assumptions and incorrect analytical techniques. Should this Court require more?

Amicus supporting the appellant (referred to in this brief as the ACLU for the reader's convenience) have presented the Court with traffic-stop data obtained from records requests made to several Iowa law enforcement agencies. They compare the racial breakdown of traffic stops in these jurisdictions to demographic information derived from U.S. Census data.

It is unclear the basis by which the ACLU expects this Court to receive their statistical evidence. It has never been tested in a court proceeding. No expert statistician has supported the analysis with testimony. There has been no cross examination of any expert. The underlying stop data

itself is not even in the record.[1] In short, there are none of the procedural aspects which promote the truth-finding process through objective determination of the facts.

A. Constitutional fact finding by amicus briefs

There is no doubt that this Court may judicially notice "legislative facts." These - sometimes referred to as "constitutional facts" - are considered when the Court is asked to "craft[] rules of law based on social, economic, political, or scientific facts." *Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). Such facts are particularly relevant when evaluating the constitutionality of legislation, such as by evaluating whether a classification in law meets the level of scrutiny appropriate to the classification. *Id.* (considering whether legislative prohibition against same-sex marriage violated state constitutional equal protection clause).

While constitutional facts "may be presented either formally or informally," *Welsh v. Branstad*, 470 N.W.2d 644, 648 (Iowa 1991), this hardly means that anything goes in this

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[1] ICAA requested the underlying data from counsel for ACLU of Iowa. Counsel promptly and graciously provided the data to ICAA.

process. This Court must "consider the actual truth content of constitutional facts." *Varnum*, 763 N.W.2d at 881. "Such facts are generally disputable, and courts must rely on the most compelling data in order to give needed intellectual legitimacy to the law or rule crafted by the court." *Id.*

The majority view is that amicus briefs may be particularly valuable when presenting a court with legislative or constitutional facts. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1760-61 (2014) (hereinafter Larsen). But this Court should exercise caution to ensure that the proffered facts represent sound social science methodology and are not overtly partisan to one side. The power represented by amicus briefs indicates their potential danger to proper adjudication.

There is no social science brief more famous than that filed by future U.S. Supreme Court Justice Louis Brandeis in *Mueller v. Oregon*, 208 U.S. 412, 419 (1908). Larsen at 1769-70. "His brief contained 2 pages of legal argument and 102 pages of evidence about how women needed special protection from the hazards of long work hours." While history (and law

students) well remembers this famous "Brandeis brief," less often remembered is the fact that essentially all of his social science evidence was faulty. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 106 (1993) (hereinafter Rustad & Koenig) ("Brandeis's brief would be assessed harshly as junk social science by today's standards.")

Although history would not be kind to the details of the future justice's brief, it is undeniable that it ushered in a new era of advocacy by amicus organizations. "The Brandeis brief has a significant impact on legal thought and marked a creative shift for the [U.S. Supreme] Court, introducing the use of vivid, factual detail as a way to break out of the formalist categories dominating the analysis." Larsen at 1771. The number of amicus briefs filed in the U.S. Supreme Court has increased 800% in the past 50 years. *Id.* at 1758. In that court's 2012 term 61 of 79 cases had an amicus brief which presented factual studies or data. *Id.* at 1762.

Amicus briefs appear to influence the opinion of the justices. One study "used plagiarism detection software to

assess whether language used in amicus briefs later turned up in majority opinions." *Id.* at 1780 (citing Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49(4) Law & Society Rev. 917-944 (2015)). The study found that "the justices systematically incorporate language from amicus briefs into the Court's majority opinions." *Id.* at 1780-81. Professor Larsen reviewed "124 citations to amicus briefs for factual claims" and found "97 of them that were used to answer…outcome-determinative questions." *Id.* at 1782.

The reliance by the U.S. Supreme Court on facts in amicus briefs raises the important question "would this extra-record evidence hold up on cross-examination had it come in at trial?" *Id.* at 1784. "After digging into amicus briefs that present factual information to the Court, I am convinced the answer to that question in many instances is no." *Id.* Professor Larsen cites numerous examples of amicus briefs citing to statistics or surveys on file with the organization rather than published in a peer-reviewed journal. *Id.* at 1784-88. Similarly, she observes that "amici commonly produce studies designed

for advocacy purposes." *Id.* at 1789 (citing Rustad & Koenig at 121). As an example, professors Rustad and Koenig explored a series of studies which appeared to have been produced for the specific purpose of arguing "that punitive damages awards have 'exploded' in size." Rustad & Koenig at 121. The professors noted "the empirical findings presented to the Justices have the aura of social science but do not follow the scientific truth-seeking norms that regulate valid research." *Id.* at 91.

B. The difficulty of establishing a baseline comparison for examinations of police activity

To understand the unreliability of the ACLU data let us first consider an exercise in statistics with which we are far more familiar. Every election season we are inundated with information about political polling. These polls seek to give us insight as to the state of a political race.

So, how are such polls conducted? It is obviously impractical for the pollster to call every single voter in the jurisdiction. The pollster must make her estimate of the state

of the race by sampling the population of voters. This sample will then be used to estimate how the election stands.

Imagine two polls about an upcoming election. In the first poll the pollster goes to the local mall on a weekday at 4:00 p.m. The pollster asks the first 20 people he encounters in the food court about who they intend to support. The second poll involves calling 600 randomly-selected households of known registered voters. After verifying that the pollster is speaking to someone who intends to vote in the upcoming election the pollster asks the likely voter who he or she intends to support.

One would not need an advanced degree in statistics or political science to recognize that the food court poll is much less rigorous. We would all agree that calling 600 likely voters will produce a result which is more in line with the actual views of the population.

The trouble with the ACLU brief is that collection of traffic stop data is much more like the food court poll. To be sure, the traffic stop data are generated in more than one location, but there is nothing like the randomization in the sample process as there is in our telephonic-poll example.

Whatever it is that the police are doing they are not randomly pulling cars over. Something has elicited a police response.

But this actually understates the problem with the ACLU brief. Let's go back to our example of the two polls of the upcoming election and assume that the polls have produced the following results:

Food court poll		Telephonic poll	
Candidate A	Candidate B	Candidate A	Candidate B
11	9	330	270
55%	45%	55%	45%

So, in this example both polls have produced the same result. This happenstance does not, of course, undermine our earlier view that going to the food court is an unsound polling technique.

But let's dig deeper. Here is where the methodology behind the ACLU brief would make a second error. The ACLU brief would argue that the telephonic poll is wrong because we already know the race is 50-50. The finding of 55-45 means there is something wrong with our telephonic poll. In other words, the ACLU brief uses census data to judge racial bias in

the sampling technique without first addressing whether the census data are a valid comparison. What is the evidence that census data reflect the demographics of persons operating motor vehicles? Or those who commit traffic violations? Or that the characteristics of motorists are the same at all places and at all times?

The difficulties in assessing whether traffic stops are racially biased have attracted significant academic attention. The research strongly supports not using raw census data for benchmarking police activity. "Census estimates provide only the racial distribution of residents and not how these numbers vary by time of day, business attractors such as shopping centers, daily traffic patterns involving commuters, etc." Greg Ridgeway and John MacDonald, *Methods for Assessing Racially Biased Policing*, 4 (2010) (hereinafter RAND study).[2] "Communing patterns, for example, can easily exaggerate the racial disparities in traffic stops." *Id.*

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[2] This paper appeared as Chapter 7 in S. Rice and M. White (eds.), 2010, *Race, Ethnicity, and Policing: New and Essential Readings* (NYU Press) pp. 180-204.

The RAND study collects literature describing academic efforts to overcome the weaknesses in using census data. For example, one study "used data on the location of traffic accidents and the race of the not at-fault drivers to estimate the race distribution of the at-risk population." *Id.* at 5 (citing Alpert, G. P., Smith, M. R., and Dunham, R. G. (2003), "*Toward a Better Benchmark: Assessing the Utility of Not-at-Fault Traffic Crash Data in Racial Profiling Research*," in Confronting Racial Profiling in the 21st Century: Implications for Racial Justice, Boston.) Another study compared traffic stops initiated by aerial patrols to ground traffic officers. *Id.* at 6 (citing McConnell, E. H., and Scheidegger, A. R. (2001), "*Race and Speeding Citations: Comparing Speeding Citations Issued by Air Traffic Officers With Those Issued by Ground Traffic Officers*," paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Washington, DC, April 4–8.)

Accurate data of the racial distribution of drivers are essential to the study of this issue. "Given that the police are not likely to stop people at random, comparisons of racial

distribution of stops to the residential population or the driving population on the roadways tells one very little about the race neutrality of the police." *Id.* The RAND study identifies several promising approaches to studying the presence or absence of police racial bias. Among these are studies which take advantage of the change from daylight-savings time. *Id.* at 11-12.

The time-change studies control for driving-pattern differences in the area where the stops take place. By studying traffic-stop data before and after daylight savings time ends the researchers can compare police behavior when the race of the driver is more observable to when it is less observable. In one study conducted in Oakland, California researchers found that during daylight hours 55% of stops involved black drivers. During darkness 58% of the stops involved black drivers. This is "a slight difference and, if anything, runs counter to the racial profiling hypothesis." *Id.* at 13 (citing Grogger, J., & Ridgeway, G. (2006). *Testing for racial profiling in traffic stops from behind a veil of darkness*. Journal of the American Statistical Association, 101, 878-887.) A three-year study of

traffic stops in Cincinnati, Ohio produced the same result: no statistical evidence of racial bias in traffic stops. *Id.* at 14 (citing Schell, Terry L., Greg Ridgeway, Travis L. Dixon, Susan Turner, K. Jack Riley (2007). *Police-Community Relations in Cincinnati: Year Three Evaluation Report.* RAND TR-535-CC.)

C. *Faulty data in the ACLU brief*

Now that we understand the potential for mischief in using raw census data let's turn to the analysis in the ACLU brief. The brief presents data from five jurisdictions: Iowa City Police Department, Linn County Sheriff's Office, Scott County Sheriff's Office, Black Hawk County Sheriff's Office, and the Waterloo Police Department. For Iowa City the brief references a study and summarizes its findings in one paragraph. We will return to the Iowa City findings in a moment.

For the remaining jurisdictions a simple comparison is presented: the ratio of the percentage of drivers stopped to the census percentage of the population. From these numbers there is a "disparity" calculation. The brief defines this term as "calculated by dividing the share of stops by the percentage of the population. A disparity value of less than one indicates

underrepresentation; a disparity value of one indicates no disparity; and a disparity value greater than one indicates overrepresentation."

Here is what the brief provides for the Linn County Sheriff's Office:

Linn County Sheriff's Office Traffic Stop Data January 1, 2015 to September 30, 2017					
	Share	**Percent**		**Disposition**	
Race	**Stops**	**Pop.**	**Disparity[6]**	**Warning**	**Citation**
White[7]	91.1%	87.8%	1.04	55.5%	44.5%
Black	6.4	4.9	1.31	44.3	55.7
Asian/Pacific Islander	0.6	2.7	.22	48.5	51.5
Unknown	1.8	n/a	n/a	43.2	56.8

ACLU Brief, 18.

Note that the comparison is being made between the percentage of traffic stops of whites (91.1%) and blacks (6.4%). Anyone who has suffered through undergraduate statistics should recognize a problem: we are comparing one number to another number which is 15 times larger. This means that the unavoidable variation in the sampling method will not affect the results equally. As an illustration, suppose that the stop percentages were just one percentage point lower for both groups:

	Race	Stops	Population	Disparity
Original	White	91.10%	87.80%	1.04
Original	Black	6.40%	4.90%	1.31
-1.00	White	90.10%	87.80%	1.03
-1.00	Black	5.40%	4.90%	1.10

A one percentage point reduction results in the disparity for blacks dropping from 1.31 to 1.10 and the disparity for whites from 1.04 to 1.03. The result will be similar if the percentage of black motorists is just slightly higher. Imagine the census data underestimate black motorists by one percentage point:

	Race	Stops	Population	Disparity
Original	White	91.10%	87.80%	1.04
Original	Black	6.40%	4.90%	1.31
Original	White	91.1%	87.80%	1.04
+1.00	Black	6.40%	5.90%	1.08

The result from such a small difference is that the disparity plummets even further: from 1.31 to 1.08 (and is only 0.04 higher than the white disparity figure).

How likely is it that the ACLU data are unrepresentative of actual conditions? The Scott County traffic stop data

reflects 3,491 traffic stops for 2015-17. Only 2,562 involve a driver who carried an Iowa driver's license. In other words, a data set which contains 27% non-Iowa drivers is being compared to the census data of Scott County. The remaining data sets contain no information about the driver's state of licensure (let alone an indication that the person lives in that city or county).

It is also not clear that the ACLU census data for Linn County[3] are even correct. The U.S. Census American

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[3] The brief states that blacks are 4.9% of the population of Linn County after subtracting the population of Cedar Rapids however the data chart presented in the brief does not seem to actually have this "correction." The Cedar Rapids ACS data show that the vast majority of the black population of Linn County (10,816 out of 13,561) live within the city limits of Cedar Rapids. The population figures are quoted for the category "race alone or in combination with one or more other races." Census data are available for numerous racial subclassifications and for persons who identify as more than one race. It is unlikely that a police officer at roadside will record race data at this level of detail. This brief uses the more broadly-defined racial classifications in census data.
https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/DP05/1600000US1912000 (last visited 12/15/2017).

Community Survey data[4] for Linn County for 2016 shows that the total white population is 200,423. This is 91.9% of the county population. The total of the black population is 13,561, or 6.2%. The margin of error for the black population estimate is +/- 0.02% points. Thus, the Linn County SO traffic stop data (blacks are 6.4% of traffic stops) are within the margin of error for the estimated black population of the county. *In other words, there is no statistically-significant disparity in that county.*

The census data used by the ACLU for Linn County Sheriff's Office, Scott County Sheriff's Office, Black Hawk County Sheriff's Office, and the Waterloo Police Department are highly suspect. For each sheriff's office the brief argues that the population of the largest city within each jurisdiction should be eliminated on the apparent belief that deputies never go inside city limits. The Linn and Scott County data do

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[4] https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/DP05/0500000US19113 (last visited 12/15/2017).

not include location information[5] on the traffic stops. The Black Hawk county data contain a summary description such as "W 4TH ST/WASHINGTON ST." A casual survey of the location information reveals numerous locations where Black Hawk County deputies made traffic stops within the city limits of Waterloo. It should be also noted that the proposed "corrections" to the data sets serve only to exacerbate any apparent disparities. There is no benefit of the doubt being given to these law enforcement agencies.

Professor Larsen posed the question "would this extra-record evidence hold up on cross-examination had it come in at trial?" Larsen at 1784. For Linn County Sheriff's Office, Scott County Sheriff's Office, Black Hawk County Sheriff's Office, and the Waterloo Police Department the answer should be an emphatic "no." There is simply no reliable basis for the comparison proffered in the ACLU brief.

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[5] None of the public records requests made to these law enforcement agencies specifically requested information on the location of the traffic stop or the residence of the motorist.

D. The most current Iowa City data do not support the ACLU's claims

Let's return to the Iowa City data. The ACLU cites to a study[6] conducted by Professor Chris Barnum of St. Ambrose University. The study evaluated traffic stop data for two separate three-year periods. Pointedly, the study did not rely simply on census or department of transportation data for the baseline comparison. "These techniques are often ineffective for various reasons, including differences between races in the amount of time spent driving (driving quantity), racial differences in offending rates and thus police attention (driving quality), and the racial composition of neighboring communities whose citizens may travel through the population of interest (driver mobility)." Barnum study, 10. The Barnum study, by its own language, should cause the ACLU's analysis of the other jurisdictions to be rejected.

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[6] https://www8.iowa-city.org/weblink/0/doc/1481387/Electronic.aspx (last visited 12/15/2017)

Professor Barnum's study used observations of traffic patterns – actually measuring the racial composition of the motoring public at particular locations and different times. *Id.* at 11. Although the traffic observational data generally corresponded to overall census data, it was markedly different in certain high-crime areas which received substantial police attention. *Id.* at 13.

Professor Barnum's study is worth reading in detail. It demonstrates what robust social science should look like. The study demonstrates that issues confronting police are complicated and disproportionality in traffic stop data may reflect nothing more than disproportionality in the commission and victimization of crime. "We believe that a modification of [Iowa City Police Department] patrol procedures and tactics – especially on beat two – generated increased levels of disproportionality. This change in policing occurred between 2007 and 2010 and was concurrent with a spike in violent crime that occurred in 2008 and 2009." *Id.* at 29.

Professor Barnum's report contained several recommendations for collection of additional data to allow

more robust analysis. *Id.* at 8. These recommendations were followed and resulted in a 2015 follow-up study[7] by Professor Barnum. It is unfortunate that the ACLU brief did not cite to this study in its brief.

The follow-up study included additional observations of traffic patterns, concentrated in the areas of the city where police made the most traffic stops. *Id.* at 1. Location data for traffic stops was improved by designating one-square-mile zones throughout the city. *Id.* The overall data showed that the police were stopping minority drivers approximately 5% more than the baseline would suggest, but with an important caveat. "It is important to keep in mind that the roadside observations that form the benchmark are generated from a *sample* of the drivers on the roads. As such, the index values should be treated as *estimates* and interpreted with a generous degree of latitude in terms of margin of error." *Id.* at 4 (emphasis original).

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[7] https://www8.iowa-city.org/weblink/0/doc/1524345/Electronic.aspx (last visited 12/15/2017)

It should be noted, of course, that Professor Barnum's study makes no effort to measure whether the observational benchmark reflects the proportion of motorists committing an objectively-valid violation of the traffic laws. In other words, his study measures disproportionality, not racial bias.

Consider equipment and registration violations as an example of this phenomenon. Logic would indicate there is an inverse correlation between household income and the mechanical condition of the vehicles owned by members of the household. The same should be true for valid registration. We would expect that the wealthier an individual is the newer and better maintained her car would be and the more reliably she pays the vehicle registration fee on time. U.S. Census data[8] show that median household income in 2016 for non-Hispanic whites was $63,155. For blacks it was $38,555. Could there be some explanation for a 5% disproportionality in traffic stops

[8] https://census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-02.pdf (last visited 12/15/2017)

for reasons that have nothing to do with racial bias on the part of the Iowa City police? One would certainly think so.

E. Overt policy considerations should not form the basis for constitutional adjudication

The ACLU brief is laden with overt policy arguments. The brief leaps from pretext stops to the size of the U.S. prison population to the average court debt caused by a criminal conviction and to the disenfranchisement of convicted felons. The brief then astoundingly draws a connection to officer-involved fatal shootings (including cases where officers were prosecuted or fired for misconduct).

Everyone involved in the criminal justice system should be unafraid to discuss the important issue of race. The members of ICAA are on the front lines of ensuring that the system works for everyone – regardless of race. And the word "everyone" means more than just treating criminal suspects and defendants equally. It also means treating the victims of crime and the community in general with equality, fairness, and respect.

We should not lose sight of a serious and disturbing disparity in the criminal justice system: the fact that minorities are the victims of crime in general and violent crime in particular at disproportionately high rates. To give just a few examples, in 2016 the risk for blacks of being the victim of serious violent crime (rape, robbery, and aggravated assault) was approximately 25% higher than for whites.[9] The data for murder are even worse. In 2015 a total of 13,455 Americans were murdered.[10] The racial breakdown was 5,854 whites and 7,039 blacks. In 2015 blacks were 13.8% of the U.S. population but 52% of the people who were murdered.

In any policy debate the actors must always consider the danger of unintended consequences. Would creating a pretextual stop framework hinder legitimate law enforcement

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[9] U.S. Dept. of Justice, National Crime Victimization Study, *Criminal Victimization 2016*. https://www.bjs.gov/content/pub/pdf/cv16.pdf (last visited 12/15/2017)

[10] FBI Uniform Crime Report, *2015 Crime in the United States*. https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_2_murder_victims_by_age_sex_and_race_2015.xls (last visited 12/15/2017).

efforts? Remember the Iowa City data discussed above. The report identifies a surge of traffic stops in certain areas ***in response to a spate of shootings and other violence which terrorized a neighborhood***. Don't we want the police to have lawful tools available to prevent crime? This is an important conversation which needs to take place at the local, state, and national level. And, to the extent that amicus wish to have a policy discussion, it should take place on the other side of Court Avenue.

II. Recent precedent of this Court suggests that there is a cause of action under the Iowa Constitution for a violation of the prohibition against unreasonable searches and seizures. Amicus state that suppression of evidence gained in a pretextual traffic stop will be the sole remedy. Is the question of the appropriate remedy so simple?

Amicus suggest a framework for deciding whether a traffic stop is pretextual. Such a framework would require a suppression hearing for any criminal case where a traffic stop occurred. The impact to the judiciary and bar would, of course, be extensive. ICAA fully expects that the State of Iowa's brief will fully explore why the proposed test of the ACLU is unworkable and contrary to precedent.

The ACLU brief devotes two paragraphs to a discussion as to the appropriate remedy for a pretextual traffic stop. The brief states that suppression would be required when a court finds that evidence was produced by a prextetual traffic stop. But the question of the remedy, in light of this Court's recent

holding in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), needs further examination.

A. Godfrey *creates liability for violation of the Iowa Constitution, including punitive damages claims*

Godfrey resulted in a 3-1-3 split in this Court. Three justices held the Iowa Constitution to be self-executing – that it was unnecessary for the general assembly to exercise its power under Iowa Const. art. XII, § 1 to "pass all laws necessary to carry this constitution into effect." *Id.* 869-70. In essence, these justices found that there is a *Bivens*-type remedy under the Iowa Constitution. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Three justices held that the legislature was required to enact legislation (such as the Iowa Civil Rights Act) to create a cause of action under the constitution. The dissenting justices noted the long history of U.S. Supreme Court decisions limiting the holding of *Bivens*. *Id.* at 888-89. The dissenting justices also disagreed that the State had waived its sovereign immunity to be liable for punitive damages. *Id.* at 893.

Chief Justice Cady concurred in part and dissented in part. His opinion forms the precedential opinion as it concurs in the judgment on the narrowest grounds. Bryan Garner, et al., *The Law of Judicial Precedent*, 200-01 (2016) ("one opinion can be meaningfully regarded as 'narrower' than another…when one opinion is a logical subset of other broader opinions.") The Chief Justice would allow a *Bivens*-type claim to proceed on Godfrey's claim for a due process violation based on partisan political considerations. There was no statutory remedy for such a claim and therefore no basis to conclude he had an adequate means to vindicate his constitutional interest.

The Chief Justice found that the remedy for Godfrey's claim for sexual-orientation discrimination was covered by the Iowa Civil Rights Act. *Godfrey*, 898 N.W.2d at 880. "Godfrey may only assert an independent claim under the Iowa Constitution if he can establish the remedy provided by the ICRA is inadequate to vindicate his constitutional rights." *Id.* "[T]he remedies provided in the ICRA are robust, even without punitive damages. I find these remedies suffice as an adequate

deterrent of any alleged unconstitutional conduct." *Id.* at 881. "When the claimed harm is largely monetary in nature and does not involve any infringement of physical security, privacy, bodily integrity, or the right to participate in government, and instead is against the State in its capacity as an employer, the ICRA exists to vindicate the constitutional right to be free from discrimination." *Id.*

The case was remanded back to district court for trial on Godfrey's due process claim (along with his ICRA and common law tort claims). It remains pending in the district court.

B. How would a Godfrey *claim apply to an allegedly pretextual traffic stop?*

In the post-*Godfrey* world there are several questions which remain. Chief among these is the question of qualified immunity. "An amicus brief raises the concern about dampening the ardor of the Governor and other public officers in the exercise of their duties…to the extent that a *Bivens*-type action might inhibit their duties, the doctrine of qualified immunity is the appropriate vehicle to address those

concerns." *Id.* at 879. "The issue of qualified immunity, however, is not before the court today." *Id.*

The doctrine "entitles executive branch officials, who are sued for allegedly committing unconstitutional acts while carrying out their official duties, to immunity from suit rather than a mere defense to liability." *Dickerson v. Mertz*, 547 N.W.2d 208 (Iowa 1996). Qualified immunity "shields government agents from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Id.* A qualified immunity claim raises "a question of law for the court and the issue may be decided by summary judgment." *Id.* at 215. The issue of "objective legal reasonableness…permit[s] the defeat of insubstantial claims without resort to trial." *Id.*

The doctrine "balances two important competing interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform

their duties reasonably." *Minor v. State*, 819 N.W.2d 383, 400 (Iowa 2012).

So how would a *Godfrey* claim work if this Court adopts the analytic framework suggested by ACLU? Imagine a police officer sees a person driving a car with a broken taillight. The officer pulls the person over and issues a written warning to have the taillight fixed. There are no criminal charges filed in connection with the traffic stop.

What would stop the motorist from driving down to the courthouse to file suit against the officer? The motorist could admit in his petition that the taillight was broken – the petition would claim that the real motivation for the traffic stop was to look for some other violation. The motorist could also demand punitive damages from the officer.

The police officer would not have any other statutory remedy to point to in an effort to fall under the Chief Justice's opinion in *Godfrey*. The police officer could not claim that the motorist had a remedy under the ICRA. There would not be a criminal case where suppression could be a remedy (and there would be no basis for damages in a criminal action). The

officer's defense would be greatly hurt by the portion of the Chief Justice's opinion which distinguished Godfrey's ICRA claim for sexual orientation discrimination with cases involving "infringement of physical security" or "privacy." *Godfrey*, 898 N.W.2d at 881.

Indeed, the logic of *Godfrey* would not necessarily be limited to cases involving a written warning over an equipment violation. Would the suppression of evidence or dismissal of charges truly be a sufficient remedy for the violation? The Chief Justice's opinion seems to equate money damages and attorney's fees under the ICRA with the availability of punitive damages with no fee-shifting provision. Could the motorist claim an entitlement to punitive damages since there is no mechanism to shift fees in a criminal case?

And what about qualified immunity? Although ICAA certainly believes it is important for this Court to find that qualified immunity is available against all *Godfrey* claims, it would have little meaningful application in a suit over an allegedly pretextual traffic stop. Under today's law the existence of probable cause would be dispositive. A judge faced

with the motorist's suit would look at the concession in the petition that the taillight was broken and quickly determine that the officer was entitled to qualified immunity. The existence of probable cause – no matter how minor the offense – would justify the traffic stop. *State v. Hoskins*, 711 N.W.2d 720, 726 (Iowa 2006).

The test proposed by ACLU would mandate a trial on the motorist's lawsuit. The test would require the court to "decide whether the officer's motive for the stop was unrelated to the objective existence of reasonable suspicion or probable cause." ACLU Brief, 35. If so, the defendant would then have the burden to "show pretext based on the totality of the circumstances." *Id.* If the defendant succeeded the officer would then be asked to show that "even without that unrelated motive, the officer would have stopped the defendant." *Id.*

Under such a fact-bound test how could a court evaluate "objective legal reasonableness" in order to "permit the defeat of insubstantial claims without resort to trial"? *Dickerson*, 547 N.W.2d at 215. We would leave a world where executive

branch officers face liability for unconstitutional *actions* and enter a world where they face liability for unconstitutional *intentions*.

Of course, the motorist would be happy to settle the case for $2,500…

Conclusion

Amicus supporting appellant have proffered statistical evidence which does not carry the burden placed on it. Their other policy-laden arguments are misplaced here. In addition, the remedy they propose would create unprecedented and crippling liability to law enforcement agencies.

The judgment of the district court should be affirmed.

Respectfully submitted,

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