No. 17-1592

IN THE

SUPREME COURT OF IOWA

GREGORY BALDWIN,

Plaintiff-Appellee,

v.

CITY OF ESTHERVILLE, IOWA, MATT REINEKE, Individually and in his Official Capacity as an Officer of the Estherville Police Department, AND MATT HELLICKSON, Individually and in his Official Capacity as an Officer of the Estherville Police Department,

Defendant-Appellant.

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

APPELLEE'S BRIEF

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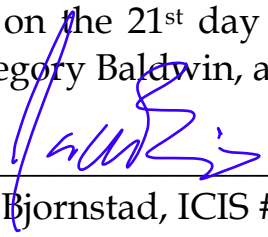

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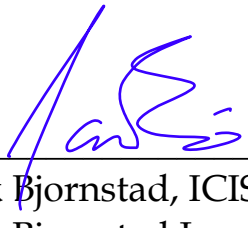
I further certify that on the 21st day of December, 2017, I did electronically file the Appellee's Brief.



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https://www.icapiowa.com
1 Civil Actions Against State Government, Its Divisions, Agencies, and Officers, Second Edition, § 4.2, p. 4-7 – 4-8 (J. Craig ed. 2002)
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Jefferson, T. Hunter, Constitutional Wrongs & Common Law Principles: The Case for Recognition of State Constitutional Tort Actions Against State Governments, 50 Vand. L. Rev. 1525 (1997)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case. The question of whether the federal doctrine of qualified immunity can be raised as a defense to a claim for damages invoking article I, sections 1 and 8 is a substantial constitutional issue of first impression. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is a certified question from the Honorable Mark W. Bennett, United States District Court for the Northern District of Iowa, Central Division.

B. FACTS.

The facts and proceedings are fully recounted in Judge Bennett's November 18, 2016 Memorandum Opinion and Order Regarding the Parties' Cross Motions for Summary Judgment. *See* App. 87-96. For the convenience of the Court, the Appellee provides a brief summary.

On November 10, 2013, officers Reineke and Hellickson processed a complaint that Greg Baldwin had been operating a 4-wheeler in a ditch. *See* App. 91. Officer Reineke filed a complaint for violation of city ordinance

"E321I.10," for operation on a highway. App. 92. Officer Reineke requested an arrest warrant. *See* App. 93. The magistrate issued the warrant. *See id*.

On November 11, 2013, Greg and his wife Lorainne were at their granddaughter's school parking lot for pickup/dropoff. *See id.* In front of a large group of people waiting in the parking lot, Officer Hellickson arrested Greg on the warrant for violating ordinance E321I.10. *See id*.

However, ordinance "E321I.10" did not exist. App. 92. The arresting officers created ordinance "E321I.10" ex nihilo. *Id*. Greg had violated no law whatsoever. *See id.*; App. 94.

Greg plead not guilty. *See* App. 93. The City Attorney, alerted that no ordinance E321I.10 existed, amended the offense to city ordinance 219-2(2), regulating "Place of Operation." *Id*. Greg's counsel filed a Motion For Adjudication Of Law Points And To Dismiss. *See* App. 94. The magistrate found "that the cited act is not in violation of the city code as written and the case is DISMISSED, costs assessed to the City of Estherville." *Id*.

C. Proceedings.

Greg felt his constitutional rights had been violated. On November 4, 2015, he filed a lawsuit against the City and its officers for violation of his article I, sections 1 and 8 rights, violation of his 4th Amendment rights

pursuant to 42 U.S.C. § 1983, and false arrest. *See id*.; App. 1-10.

Ruling on cross-motions for summary judgment, the Honorable Mark W. Bennett, United States District Court Judge for the Northern District of Iowa determined that the arresting officers made a *Heien* mistake of law. Judge Bennett found that an objectively reasonable officer could reasonably have had arguable probable cause for a violation of ordinance 219-2(2), despite the fact that Greg had not actually violated that ordinance, or any other. *See* App. 108-112. As a result, the officers were entitled to qualified immunity concerning Greg's 4th Amendment and false arrest claims. *See id*.

Greg's article I, section 1 and section 8 claims were stayed, however, until the Iowa Supreme Court addressed the issue of whether Iowa recognized a direct damages cause of action for violations of the Iowa Bill of Rights. *See* App. 113.

On June 30, 2017, the Iowa Supreme Court addressed the issue in *Godfrey v. State*, 898 N.W.2d 844 (2017). On August 11, 2017, the City filed a Second Motion for Summary Judgment, raising a qualified immunity defense to Greg's article I, section 1 and 8 claims. *See* App. 114.

On October 2, 2017, Judge Bennett certified the following question to the Iowa Supreme Court: Can a defendant raise a defense of qualified

immunity to an individual's claim for damages for violation of article I, § 1 and § 8 of the Iowa Constitution?

ARGUMENT

I. QUALIFIED IMMUNITY IS INCOMPATIBLE WITH GREG BALDWIN'S DIRECT CONSTITUTIONAL DAMAGE CLAIMS UNDER THE IOWA BILL OF RIGHTS.

A. ERROR PRESERVATION.

Appellee agrees that error has been preserved.

B. SCOPE AND STANDARD OF REVIEW.

The Iowa Supreme Court has discretion with regard to the questions of law it will answer. It will decline to answer certified questions where the factual basis is not sufficiently set out; it will not answer "hypothetical" questions. *See Eley v. Pizza Hut*, 500 N.W.2d 61, 63 (Iowa 1993). Because constitutional issues are involved, review is de novo. *See State v. Eubanks*, 355 N.W.2d 57, 58 (Iowa 1984); *State v. Grant*, 614 N.W.2d 848, 852 (Iowa Ct. App. 2000).

C. MERITS.

1. SUMMARY OF THE ARGUMENT.

A qualified immunity defense is incompatible with Greg's damages action for violation of his article I, section 1 and section 8 rights. The Iowa

Bill of Rights is the ultimate and principal expression of public policy in Iowa. Qualified immunity is wholly underpinned by lesser public policy considerations. The public policy considerations supporting qualified immunity are necessarily subordinate to the ultimate and principal public policies embodied in the Iowa Bill of Rights.

The United States Supreme Court has opted to infer that Congress would have expressly said so if they had meant to prevent a common law qualified immunity defense from defeating a 42 U.S.C. § 1983 cause of action. In contrast, there is nothing in the text or history of article I, section 1 or section 8 indicating the framers intended Iowans' rights to be anything but inviolable. Immunity from suit may only be invoked subject to the inviolable protections of the Iowa Bill of Rights.

Iowa Supreme Court decisions, in both the civil and criminal context, have regularly placed the protections of the Iowa Bill of Rights ahead of competing public policies. Greg Baldwin comes before this Court, seeking to make effective the guarantees of article I, section 1 and section 8. This Court should affirm that all other doctrines and defenses must yield in the face of the inviolable protections of the Iowa Bill of Rights.

2. THE IOWA BILL OF RIGHTS IS THE ULTIMATE AND PRINCIPAL EXPRESSION OF PUBLIC POLICY IN IOWA.

The Iowa Bill of Rights is the ultimate and principal expression of public policy in Iowa. The framers placed the Bill of Rights at the beginning of the Iowa Constitution to emphasize its importance. *See State v. Ochoa*, 792 N.W.2d 260, 274 (Iowa 2010). The ultimate and principal public policy concerning illegal seizures is embodied in article I, section 8, which provides, in no uncertain terms:

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

Iowa Const. art. I, § 8 (emphasis added).

In this appeal we assume that Greg's article I, section I and section 8 rights have been violated. *See* App. 145. Because Greg's rights have been violated, "he has suffered a wrong for which the law will afford him substantial remedy." *McClurg v. Brenton*, 123 Iowa 368, 371, 98 N.W. 881, 882 (1904) (recognizing cause of action for violation of article I, section 8); *See also Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) (recognizing cause of action for violation of article I, section 9).

The City of Estherville, however, argues that this Court should foreclose any remedy to Greg. The City seeks a qualified immunity defense to Greg's claim invoking article I, section 1 and section 8 of the Iowa Constitution. The City advances a number of public policy considerations in support of their request.

The City's public policy arguments are no surprise. Qualified immunity is wholly underpinned by public policy. "The doctrine of [qualified immunity] rests on the public policy consideration that effective government requires officers and employees who are free to act independently, without deterrence and intimidation by the threat of personal liability and vexatious lawsuits." 1 Civil Actions Against State Government, Its Divisions, Agencies, and Officers, Second Edition, § 4.2, p. 4-7 – 4-8 (J. Craig ed. 2002).

Should the City's proposed public policy considerations be placed before a remedy for violation of Greg's article I, section 1 and section 8 rights? For instance, should "concern about dampening the ardor of . . . public officers in the exercise of duties," foreclose liability for transgressing the ancient protections embodied in article I, section 1 and section 8? *Godfrey* at 879. Should concern about deterring talented candidates for

government jobs foreclose liability for constitutional wrongdoings? Should a convenient consistency with federal jurisprudence interpreting 42 U.S.C. 1983 deny a remedy to an Iowan whose constitutional rights have been violated, like Greg?

This Court should reaffirm that the Iowa Bill of Rights is the ultimate and principal expression of public policy in this State. This Court should reject the public policies advanced by the City as subordinate to the seminal public policy against unreasonable seizures embodied in article I, sections 1 and 8.

The fact that Greg's claim seeks to hold a government officer accountable for violating his article I, section 8 rights should not be the basis of a defense. To paraphrase the *McClurg* Court, the right of the citizen to be free from unreasonable search and seizure 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. *See McClurg* at 882. The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the

ordinary private citizen to seize and arrest Greg without probable cause. *See id*.

The *McClurg* and *Godfrey* Courts found that a violation of rights embodied in the Bill of Rights necessitates a damages award to make the plaintiff whole. In *Krehbiel v. Henkle*, the Iowa Supreme Court explained:

> In the invasion of his home for the purpose of finding stolen goods charged to be there secreted cast upon him the suspicion of complicity in larceny. If there was a wrongful invasion of the plaintiff's home, it was a willful wrong to his reputation and an insult, for which the law gives a remedy. It is a familiar rule that the law implies injury to the feelings, where there is serious personal injury or insult, and for such injury compensatory damages may be recovered.

Krehbiel v. Henkle, 152 Iowa 604, 129 N.W. 945 (Iowa 1911).

A compensatory damage action for violation of the protections of the Bill of Rights is vital to give those ancient rights force. A qualified immunity defense would render those rights toothless. Without a viable damages action, the Iowa Bill of Rights may be violated with impunity. As the Maryland Supreme Court explained:

> To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional

> provisions. It would also . . . largely render nugatory the cause of action for violation of constitutional rights recognized in *Widgeon*, *Mason*, *Heinze*, *Weyler*, and other cases.

Clea v. Mayor and City Council of Baltimore, 312 Md. 662, 684 (Md. 1986).

A grant of qualified immunity to officers who violate the Iowa Bill of Rights would leave Iowans, like Greg, remediless. Qualified immunity is entirely inconsistent with the promises and protections of the Iowa Bill of Rights. And a qualified immunity defense would enfeeble the cause of action recognized in *Godfrey*, *McClurg*, *Krehbiel* and other Iowa cases.

a. THE DENIAL OF A QUALIFIED IMMUNITY DEFENSE WILL NOT DAMPEN THE ARDOR OF OFFICIALS OR DETER TALENTED CANDIDATES.

The City points to a couple of public policies that need to be looked at in light of current Iowa law and common practice. The City wants officials to be able to make reasonable mistakes, even at the cost of violating Iowans' constitutional rights. The City also wants to avoid deterring talented candidates from accepting jobs as governmental officials. If government officials violate Iowans' rights, the City would prefer those officials not be burdened with litigation.

In light of current Iowa law and common practice, these concerns are more imagined than real. Under Iowa law, both State and Municipal employees are protected and indemnified from personal liability by the State Tort Claims Act and Municipal Tort Claims Act. *See generally* Iowa Code Chapter 669; 670. In Iowa, officers who violate Iowans' constitutional rights are not personally liable, with the exception of punitive damages. *Id*.

Further, the majority of Iowa's public entities are insured for the transgressions of their officers. The Iowa Community Assurance Pool (ICAP) "provides property and casualty coverage to nearly 800 Iowa public entities, including 73 of Iowa's 99 counties." https://www.icapiowa.com.

Because Iowa city, county, and state officials face no personal exposure under Iowa law, the City's purported public policy concerns are substantially diluted.

b. IOWA'S INDEPENDENT CONSTITUTIONAL PROVISIONS ARE NOT SUBJECT TO INTERPRETATION BY REFERENCE TO THE U.S. SUPREME COURT'S INTERPRETATION OF 42 U.S.C. § 1983.

The City's public policy argument that liability under article I, section 8 should be no greater than under § 1983 should also be rejected. In the main, state courts that have confronted the issue have refused to interpret

their independent state constitutional provisions by reference to the United States Supreme Court's interpretation of a federal statute of national application. *See Corum v. University of North Carolina*, 413 S.E.2d 276 (N.C. 1992); *Ritchie v. Donnelly*, 597 A.2d 432, 446 n.13 (Md. 1991) (holding a public official who violates state constitution entitled to no immunity); *Clea v. Mayor and City Council of Baltimore*, 541 A.2d 1303 (Md. 1988) (rejecting defense of qualified immunity in suit against police officer for unconstitutional search); *Jackson v. Dackman Co.*, 422 Md. 357, 30 A.3d 854, 866 (2011) (state constitution prohibits the legislature from enacting any immunity for a government or a government official from state constitutional rights violations); *Venegas v. County of Los Angeles,* 153 Cal.App. 1230 (Cal. App. 2007); *Elwood v. Rice*, 423 N.W. 2d 671, 677 (Minn. 1988); *But see Lloyd v. Borough of Stone Harbor*, 432 A.2d 572, 583 (N.J. Super Ct. Ch. Div. 1981) (state constitution damages actions construed identical to those under federal law "to avoid conflict").

Iowa, from the very beginning, has more often than not prized and maintained its responsibility to interpret its own constitution, without regard to federal uniformity. *See In re Ralph*, 1 Morris 1 (Iowa 1839).

> [T]he Federal Constitution merely sets a "constitutional floor" below which state constitutional interpretations may not sink. The states never surrendered the power to play an independent role in guaranteeing a greater measure of equality and liberty for their citizens. From a constitutional standpoint, it is a well-settled precept that states enjoy considerable freedom to depart from federal interpretations of analogous—even identically worded—federal constitutional provisions. Our own opinions have not only extolled the virtues of relying on independent state constitutional grounds, but have consistently utilized this vehicle on our journey for equal justice.

Mark S. Cady, *The Vanguard of Equality: The Iowa Supreme Court's Journey to Stay Ahead of the Curve on an Arc Bending Towards Justice,* 76 Alb. L. Rev. 1991, 1992-93 (2012-2013).

Iowa does not abandon its independent constitutional guarantees for the sake of conformity and uniformity. It should not start now.

3. IN A DIRECT ACTION UNDER THE IOWA CONSTITUTION, QUALIFIED IMMUNITY CANNOT BE INFERRED FROM CONGRESSIONAL INTENT.

If qualified immunity is underpinned only by public policy considerations that are necessarily subordinate to constitutional protections, how is it that qualified immunity applies in 42 U.S.C. § 1983 actions? There are many important differences between causes of action brought directly under the Iowa Constitution and an action brought under

42 USC § 1983. Concerning qualified immunity, however, the vital difference is the fact that § 1983 actions are statutory actions created by Congress. Inferred congressional intent to preserve judicially created, common law immunity is the source of qualified immunity. Congressional intent, however, is not applicable to the Iowa Bill of Rights.

Qualified immunity in a 42 U.S.C. § 1983 action is entirely a creature of U.S. Supreme Court creation:

> By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."
>
> *******
>
> However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, *found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine*." *Pierson v. Ray*, 386 U.S.

547, 555, 87 S.Ct. 1213 1218, 18 L.Ed.2d 288 (1967).

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> [In] *Pierson v. Ray* . . . local police officers were held to enjoy a "good faith and probable cause" defense to § 1983 suits similar to that which existed in false arrest actions at common law. 386 U.S., at 555-557, 87 S.Ct., at 1218-1219.

Owen v. City of Independence, Missouri, 445 U.S. 622, 636-37 (1980)(emphasis added).

The Supreme Court has regularly interpreted Congressional intent when construing § 1983, *a statute*. In so interpreting the statute, they imported the traditional common law immunities into the statute. The Supreme Court has grafted the common law immunities, including qualified immunity, right onto 42 U.S.C. § 1983. They remain there today, though mutated and changed by federal § 1983 jurisprudence over the years.

The common law immunities are not, however, grafted onto the provisions of the Iowa Bill of Rights. Greg's Iowa constitutional claims are not brought pursuant to any statute. There is no Congressional intent to interpret. Common law immunities may apply to statutory actions brought pursuant to § 1983. Common law immunities may apply to actions brought

pursuant to the common law, such as false arrest. But the protections of the Iowa Bill of Rights are inviolable. Common law immunities do not apply.

The provisions of the Iowa Bill of Rights are not statutes. They are not laws passed by a congress. The peoples' rights predate the Iowa Constitution, the U.S. Constitution, and the Magna Carta. The Iowa Constitution does not create rights; it merely recognizes rights that already belong to the people. The framers were aware of the distinction. George Ells, Chair of the Committee on the Preamble and Bill of Rights, said:

> The British Constitution, that great bulwark of human freedom from which ours is mainly derived, is understood to be *simply a recognition of the rights and privileges originally enjoyed by the ancient Britons, and by them deemed as old as the human race itself*. When King John had usurped all the powers of the British government and had undermined every valuable institution in the land-had taken away from the people virtually the right of trial by jury-they arose in their might, and compelled him, at Runneymede, to charter their liberties; but in doing this, *they solemnly declared that they were not asserting any new principles, or demanding any new rights; that all they asked was a recognition of old rights, and a remedy for existing abuses.*

1 The Debates of the Constitutional Convention of the State of Iowa at 101 (W. Blair Lord rep., 1857) (emphasis added).

Because the drafters are not the creators of the people's rights, their

intent is not part of the calculus when determining whether a violation of those rights gives the injured person a damages cause of action. Likewise, the intent of a congress to include common law immunities is certainly irrelevant.

The City asks this Court for a qualified immunity defense. The City, however, points to nothing but public policy reasons to justify the defense. The City quotes *Moresi v. State Through Dept. of Wildlife and Fisheries*, 567 So. 2d 1081, 1093 (La. 1990):

> The same factors that compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution.

The problem with the *Moresi* reasoning is that the Supreme Court was only able to graft the public policy based good faith immunity defense onto § 1983 by inferring Congressional intent. *Nothing* in the text or history of article I, sections 1 and 8 leads this Court to the same conclusion. In fact, article I, section 8 strongly and in no uncertain terms provides:

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

Iowa Const. art. I, § 8 (emphasis added).

"Shall not be violated" does not leave room for this Court to make a public policy decision to allow a qualified immunity defense to an action invoking the inviolable protections of the Iowa Bill of Rights. The City cites no other basis for the defense. This Court should reject the City's request for a public policy based qualified immunity defense.

4. QUALIFIED IMMUNITY, LIKE SOVEREIGN IMMUNITY, IS NO BAR TO AN ACTION TO REMEDY CONSTITUTIONAL WRONGDOING.

Sovereign immunity has been rejected when invoked to avoid liability for constitutional transgressions. State judiciaries that have held that a direct cause of action exists against the state for violation of state constitutional rights have necessarily rejected the doctrine of common law sovereign immunity in reaching their conclusions.

Sovereign immunity is not intended to deny a remedy for constitutional wrongdoing. *See Corum v. University of North Carolina*, 413 S.E.2d 276, 292 (N.C. 1992) ("[w]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail"); *Dept. of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) (sovereign immunity does not exempt State from suit for violations of constitution). Sovereign immunity "should, as a matter of public policy,

lose its vitality when faced with unconstitutional acts of the state." *Smith v. Dept. of Public Health*, 410 N.W.2d 749, 794 (Mich. 1987).

Sovereign immunity does not pose an obstacle to government accountability for constitutional violations. *See* Bandes, Susan, Reinventing Bivens: The Self-Executing Constitution, 68 S. Cal L. Rev. 289, 343 (1991). Such immunity must simply give way in the face of constitutional claims. *See* Jefferson, T. Hunter, Constitutional Wrongs & Common Law Principles: The Case for Recognition of State Constitutional Tort Actions Against State Governments, 50 Vand. L. Rev. 1525, 1543 (1997).

Outside the 42 U.S.C. § 1983 context, the United States Supreme Court has stated:

> How 'uniquely amiss' it would be . . . if the government itself- the 'social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' -were permitted to disavow liability for the injury it has begotten. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Owen at 651 (holding that a municipality has no immunity from liability under the Civil Rights Act flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability).

Like sovereign immunity, qualified immunity is a common law doctrine which has protected the State's officers from liability. Like sovereign immunity, qualified immunity should not prevent Greg from going forward with his state constitutional claims. Judicially created common law doctrines cannot supersede Iowa's constitutional protections. *See* Iowa Const. art. XII, § 1.

The Iowa Constitution provides a clear directive. No other law, whether common or statutory, shall trump the Constitution and the rights contained therein. "This Constitution shall be the supreme law of the state and any law inconsistent therewith, *shall be void*." Iowa Const. art. XII, § 1 (emphasis added). Neither the common law doctrines of sovereign immunity nor qualified immunity may defeat the enforcement of Greg's constitutional rights.

The federal, judicially-created, common law defense of qualified immunity should pose no barrier to Greg's Iowa constitutional claims, as his claims directly invoke article I, sections 1 and 8.

5. IOWA REJECTED A GOOD FAITH AND PROBABLE CAUSE DEFENSE TO CONSTITUTIONAL TORTS IN *MCCLURG*.

As explained above, the primordial version of the present-day federal qualified immunity defense was a good faith and probable cause defense, similar to that enjoyed at common law in false arrest and malicious prosecution actions. *See Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213 1218, 18 L.Ed.2d 288 (1967). Iowa, however, rejected a good faith and probable cause defense to an action invoking article I, section 8 over a hundred years ago.

In *McClurg v. Brenton*, the Mayor of Des Moines, his entourage, and their hounds, in search of stolen chickens, forced entry into McClurg's home. *See McClurg v. Brenton,* 98 N. W. 881, 882-83 (Iowa 1904). They had no warrant. *See id*. In their defense at trial, the various defendants sought to offer evidence that the trained dogs had indicated the chickens were in the McClurg home. The *McClurg* Court explained why the defendants' defense must be rejected:

> It must be borne in mind that this is not an action for malicious prosecution or malicious arrest, but for an alleged wrongful and unauthorized trespass upon plaintiff's home and property. In a case of the former kind, *an honest belief in the guilt* of the person prosecuted or arrested, and the facts and

> circumstances on which such belief is founded, are ordinarily proper matters of inquiry; and such circumstances, *if amounting to probable cause* for the proceeding complained of, will constitute a complete defense to a suit for damages. But in a case like the one at bar *the doctrine or rule of probable cause has no application*. To illustrate, in an action for damages for malicious prosecution for theft the defendant may plead and prove that plaintiff was in fact guilty of the crime charged against him, and thus establish a perfect defense. *But in an action for an unlawful search it is no defense whatever to say that plaintiff was a thief, or did in fact have the stolen property upon his premises. The fact may be admitted, but the right of action remains.*

McClurg at 882-83 (emphasis added).

The *McClurg* Court rejected the proposed good faith and probable cause defense available in false arrest cases. The *McClurg* Court distinguished the constitutional tort at issue from common law torts like malicious prosecution. In an Iowa action for violation of article I, section 8, the offender cannot hide behind a good faith and probable cause defense.

In this case, Greg's 42 U.S.C. § 1983 claims were dismissed. Judge Bennett went through the federal two-step-in-any-order analysis. *See* App. 109 *citing Heien* at ___. One question is whether there a 4th Amendment violation. *See id*. A second question is whether the officer is entitled to

qualified immunity. *See id*. The second question involves a "more forgiving" inquiry. *See id*. *citing Heien* at ___.

The *McClurg* Court, however, determined there is no second inquiry. Whether the chickens were in the home, or whether the Mayor and his entourage had some other good faith excuse or probable cause were not at issue. Good faith and probable cause, the primordial qualified immunity defense, was no defense. The *only* inquiry was whether article I, section 8 was violated, making the search unlawful.

The *McClurg* Court's rejection of a good faith and probable cause somewhat resembles the state of the law envisioned by Justice Sotomayor, dissenting in *Heien*:

> What matters . . . are the facts . . . and the rule of law—not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law.

Heien v. North Carolina, ___ U.S. ___, 135 S. Ct. 530, 542 (2014) (Sotomayor, J. dissenting).

While an Officer's mistake of fact may be a permissible inquiry concerning whether the federal constitution was violated,

> [t]he same cannot be said about legal exegesis. After all, the meaning of the law is not probabilistic in the

> same way that factual determinations are. Rather, "the notion that the law is definite and knowable" sits at the foundation of our legal system. *Cheek v. United States*, 498 U. S. 192, 199 (1991). And it is courts, not officers, that are in the best position to interpret the laws.

Id. at 543.

In Iowa, under *McClurg*, the constitutional violation is measured by the rule of law. The issue is not the officer's good faith, or some fictional reasonable officer's arguable, not actual, probable cause. Instead, the issue is whether constitutional rights were violated. As the *McClurg* Court explained, in a wrongful search case, even if the plaintiff committed the crime at issue, the unconstitutional and wrongful search is still actionable. If the constitution was violated, *arguable* probable cause is no defense.

In Greg's case under article I section 8, it does not matter if a reasonable officer may have had arguable probable cause to believe a violation of ordinance 219-2(2) had taken place. The fact is Greg did not violate any law. And the only question that matters is whether Greg's rights were violated.

6. A QUALIFIED IMMUNITY DEFENSE DOESN'T SQUARE WITH EITHER IOWA'S REJECTION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE OR WITH IOWA'S REJECTION OF *HEIEN* MISTAKES OF LAW SUPPORTING PROBABLE CAUSE TO ARREST.

Ruling on the 4th Amendment summary judgement issue, Judge Bennett stated that "'[p]roof of an arrest without probable cause is both the substance of Greg's claim and the first issue for the defendants' defense of qualified immunity.'" App. 103. Judge Bennett granted summary judgment on Greg's 4th Amendment claim, finding the officers had "arguable," not actual, probable cause to arrest for "some other law." App. 105-112. Greg's claims under the Iowa Bill of Rights, however, are not subject to the same 4th Amendment analysis. Greg's claims must be analyzed under article I, section 1 and section 8.

The Iowa Supreme Court recently explained that there is a difference between a 4th Amendment mistake of law analysis and an article I, section 8 mistake of law analysis in *State v. Coleman*:

> After *Tyler*, the United States Supreme Court determined that a reasonable mistake of law could support reasonable suspicion for a traffic stop. *Heien v. North Carolina*, 574 U.S. ___, ___, 135 S. Ct. 530 (2014). Of course, the ruling in *Tyler* under the Iowa Constitution is unaffected by *Heien*. Further, the approach in *Heien* would be very difficult to square with our rejection of the good faith exception to the exclusionary rule under article I, section 8 of the Iowa Constitution in *Cline*, 617 N.W.2 d at 293.

State v. Coleman, ___ N.W.2d ___, ___ fn. 2 (Iowa 2017) citing *State v. Tyler*,

830 N.W.2d 288 (Iowa 2013); *State v. Cline*, 617 N.W.2d 277 (Iowa 2000); *See also State v. Scheffert,* ___ N.W.2d ___ (Iowa 2017).

Tyler held simply that "a mistake of law is not sufficient to justify a stop." *Tyler* at 294. Under article I, section 8, when an officer is "mistaken as to the law, then probable cause based on that mistake cannot be asserted to justify the stop, and without further justification, the evidence obtained as a result of that stop must be suppressed." *Id.* at 294. Thus, under article I, section 8, *a mistake of law, reasonable or not, does not support probable cause.*

Judge Bennett concluded that the Officer made a *Heien* mistake of law, which supported the arguable probable cause under the 4th Amendment necessary to support a qualified immunity defense.

> The Iowa District Court's constructions would establish no more than a mistake of law as to the applicability of the *prohibition* in Ordinance 219-2(2) to Baldwin's driving his ATV in the ditch. That mistake was of the same kind as the mistake of law at issue in *Heien*, involving an *arguable* reading of uncertain language in the law. *See Heien*, 135 S. Ct. at 540. The Iowa District Court's after-the-fact constructions do not establish that a prudent person could not have believed, at the time of Baldwin's alleged offense, that he had committed a violation of Ordinance 219-2(2). *Williams*, 772 F.3d at 1310. Again, "the issue is whether the police officers had probable cause to arrest [Baldwin] for violating [Ordinance 219-2(2)], not whether he would have

> been convicted for violating [that law]." *Hawkins*, 830 F.3d at 746. The officers had probable cause to arrest Baldwin for a violation of Ordinance 219-2(2).

App. 108 (emphasis original).

The Iowa Supreme Court, however, has reaffirmed that a *Heien* mistake cannot justify probable cause under article I, section 8. And as the Iowa Supreme Court noted, any such *Heien* "arguable probable cause" justification would be nearly impossible to square with Iowa's rejection of the federal good faith exception to the exclusionary rule in *Cline*.

The *Cline* Court determined the federal good faith exception to the exclusionary rule was incompatible with article I, section 8 for a multitude of reasons:

> [T]he exclusionary rule serves a deterrent function even when the police officers act in good faith. Consequently, to adopt a good faith exception would only encourage lax practices by government officials in all three branches of government.
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> *******
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> Adopting a good faith exception would effectively defeat the purpose of the search and seizure clause. In the future, so long as the police act in good faith, probable cause would not be required for a warrant. As one court has observed, the probable cause standard would be replaced by a standard of "close enough is good enough." *Marsala*, 579 A.2d at 68; accord *Sundling*, 395 N.W.2d at 314 (noting that

> adoption of a good faith exception "`would, in effect, remove the probable cause requirement from the Fourth Amendment'" (quoting *People v. David*, 119 Mich.App. 289, 326 N.W.2d 485, 488 (1982))); *see also Carter*, 370 S.E.2d at 559 ("The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure."); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 899 (1991) ("To adopt a `good faith' exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years."). The New Mexico Supreme Court aptly observed that the framers of the New Mexico Constitution "meant to create more than `a code of ethics under an honor system.'" *Gutierrez*, 863 P.2d at 1067. We think the framers of the Iowa Constitution had something more substantial in mind as well.
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> *******
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> The reasonableness of a police officer's belief that the illegal search is lawful does not lessen the constitutional violation. For the reasons we have already discussed, the United States Supreme Court's rationale justifying the adoption of a good faith exception is neither sound nor persuasive. Therefore, we hold that the good faith exception is incompatible with the Iowa Constitution.

Cline at 290-92.

The *Cline* Court's reasons for denying a good faith exception are just as applicable to a qualified immunity defense. Applying a qualified

immunity defense is the equivalent of "close enough is good enough," whether rights are in fact violated or not. In the real world, however, the arguable reasonableness of the Officer's *Heien* mistake of law *does not lessen the constitutional violation suffered by Greg*. To allow the City defendants to escape liability based on an arguable probable cause to arrest for violation of an ordinance that was never charged would "elevate the goals of law enforcement above our citizens' constitutional rights, a result not supported by any principle of constitutional law." *Cline* at 293. The City may be able to support its requested qualified immunity defense with lesser public policy considerations, *but qualified immunity is not supported by any principle of constitutional law.*

A § 1983 an action against an officer who applied for a warrant may be maintained only if "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue[.]" *Saterdalen v. Spencer*, 725 F.3d 838, 841 (8th Cir. 2013) (quoting *Malley v. Briggs*, 475 U.S. 335, 345–46 (1986)). However, such a rule is incompatible with article I, section 8. Putting the focus on whether a reasonably competent officer would have "arguable," not actual, probable cause is "very difficult to square with [Iowa's] rejection of the good faith

exception to the exclusionary rule under article I, section 8 of the Iowa Constitution in *Cline*." *Coleman* at ___ fn. 2. It is also very difficult to square with Iowa's rejection of *Heien* mistakes of law supporting probable cause.

In Greg's case, under article I, section 8, *it is a futile exercise* to ask whether a reasonable officer would have concluded a warrant would issue under Ordinance 219-2(2), because we know that Greg did not violate Ordinance 219-2(2). *See* App. 94. In Iowa, arrest warrants issue only when probable cause exists. *See* Iowa Code § 804.1. However, under article I, section 8, when an officer is "mistaken as to the law, then probable cause based on that mistake cannot be asserted." *Tyler* at 294. Under Iowa law, then, what "reasonable officer" could conclude a warrant would issue, *when we know Greg violated no law and probable cause cannot be founded on a mistake of law*?

Under article I, section 8 the focus should be on whether the arrest violated Greg's rights, not arguable probable cause under *Heien*. The focus should be on "the rule of law—not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law." *Heien* at 542.

CONCLUSION

This Court should reject a federal qualified immunity defense to actions invoking the Iowa Bill of Rights. The Bill of Rights embodies Iowans' seminal expression of public policy. There is no support in the text, history, or jurisprudence of the Iowa Bill of Rights for allowing constitutional violations to pass without remedy for the harm done. To leave Greg Baldwin remediless when his constitutional rights have been violated would be absolutely incompatible with the protections of the Iowa Bill of Rights.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument.

Respectfully submitted,

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