ELECTRONICALLY FILED DEC 20, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

Supreme Court No. 17-1592
United States District Court, Northern District of Iowa, Central Division,
Case No. C 15-3168-MWB

GREGORY BALDWIN,
Plaintiff/Appellee

v.

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

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

FINAL AMICUS BRIEF of IOWA COMMUNITIES ASSURANCE POOL

Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
Phone: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

ATTORNEYS FOR AMICUS CURIAE

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE

The Iowa Communities Assurance Pool (ICAP)[1] is a self-insurance program for Iowa public entities that are covered under the Iowa Municipal Tort Claims Act. *See* Iowa Code § 670.7. ICAP's primary goal is to provide for the joint and cooperative action of its members (relative to their financial and administrative resources) for two purposes: to provide risk management services and risk-sharing facilities to members and their employees and to protect each member of the pool against liability.

The defendants in this case are a municipality and two of its law enforcement employees, but the issue here is much broader. Whether the municipalities will be subject to liability for good-faith and reasonable errors is relevant to every Iowan who is served by local governments across the State. ICAP members represent many of the stakeholders on the defense side of municipal liability cases. In his brief, Plaintiff-Appellee even attempts to use the fact ICAP provides property and casualty coverage to nearly 800 Iowa public entities to buttress his contention that officers do not need qualified immunity because damages would come from ICAP and not

[1] Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned indicates no counsel of record to any party authorized this brief or contributed money to fund the preparation or submission of the brief. ICAP is the only entity or person that contributed money to fund the preparation or submission of the brief.

the officers (following the often believed fallacy that because it is insurance or risk pool money potentially paying damages it does not matter to the covered entity). ICAP members ensure the rights of all persons are protected while promoting the safety of all persons. A priority of ICAP members is to use their resources to best meet this wide-reaching goal that is in the interest of all Iowa residents. Thus, ICAP submits this amicus brief in support of those governmental entities and their employees, who perform their governmental duties to the best of their abilities within the confines of their scarce resources, and who need the protection of qualified immunity from the potential onslaught of unfair and costly litigation.

ARGUMENT

In his dissent in *Godfrey v. State*, Justice Mansfield warned that while the consequence of the majority's decision may have limited impact on Mr. Godfrey's situation, "there should be no doubt about its far-reaching effects elsewhere." 898 N.W.2d 844, 899 (Iowa 2017) (J. Mansfield dissenting). In ICAP's amicus brief filed in *Godfrey*, the amici foretold the parade of future litigation around what a *Godfrey* claim would look like, including litigation concerning the role of qualified immunity and the appropriate standard for application of the immunity doctrine. This case is the first of a tide of future litigation attempting to reveal what a "*Godfrey* claim" actually is in the state of Iowa.

In light of the recent judicial recognition of a civil monetary remedy at law for violation of certain state constitutional rights, the Court must now analyze additional public policy principles pertinent to such claims. Upon reflection and analysis it is clear that public policy reasons strongly support the purpose and application of qualified immunity in *Godfrey* claims. Qualified immunity is well-established in the Iowa common law for these very public policy reasons. Additionally, the legislature has already recognized qualified immunity for non-constitutional claims, further indicative of the rationale and importance of recognizing qualified immunity

in *Godfrey* claims. Lastly, using federal law as guidance is wholly appropriate and instructive in the present case.

I. THE QUALIFIED IMMUNITY ANALYSIS IS ONLY APPLICABLE TO GOVERNMENT EMPLOYEES

The question certified by the U.S. District Court for the Northern District of Iowa is as follows: "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." This question came to pass as a result of the Defendants' Second Motion for Summary Judgment, in which it was argued there is no genuine issue of material fact with regards to conduct of the officers and that the City of Estherville is entitled to qualified immunity for the claims brought under the Iowa Constitution, article I, sections 1 and 8—Counts I and III of the underlying Petition. Importantly, that state constitutional claims—Counts I and III—are brought only against the City of Estherville as respondeat superior claims for the actions of the officers and not against the officers themselves. (Joint App. 005 ¶ 30, Joint App. 007 ¶ 42). Moreover, the Complaint does not allege the City of Estherville had a custom, pattern, or practice of depriving citizens of constitutional rights.

The absence of individual claims against the law enforcement is important in this instance because this Court specifically summarized its holding in *Godfrey* as follows: "[A] majority of the court concludes that ***Bivens*** claims are available under the Iowa Constitution." 898 N.W.2d at 847 (emphasis added). *Bivens* claims must be brought against the individual government employee and cannot be sustained against the government itself. *Zigler v. Abbasi*, __ U.S. __, 137 S. Ct. 1843, 1861 (2017); *Minneci v. Pollard*, 565 U.S. 118, 130 (2012) ("And a *Bivens* plaintiff, unlike a state tort law plaintiff, normally could not apply principles of *respondeat superior* and thereby obtain recovery from a defendant's potentially deep-pocketed employer.") (citation omitted). The purpose of *Bivens* claims is to deter the officer and is brought against the individual officer for his or her own actions. *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994); *Zigler*, 137 S. Ct. at 161. A *Bivens* claim is not a vehicle to hold governmental entities to account. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

Illustrative of the parameters of a *Bivens* claim is the *Meyer* case, where the Supreme Court made clear the purpose of *Bivens* is to deter individual federal officers from committing constitutional violations through the threat of litigation and liability. 510 U.S. at 474, 485. *Meyer* further made clear the threat of suit against an individual's employer was not the

kind of deterrence contemplated by *Bivens*. *Id.* at 485 ("If we were to imply a damages action directly against federal agencies … there would be no reason for aggrieved parties to bring damages actions against individual officer, [and] the deterrent effects of the *Bivens* remedy would be lost.").

In the federal district court case underlying this certified question, the only claims made under the Iowa Constitution are against *the City of Estherville* as an employer, not the individual officers. Therefore, the qualified immunity question certified before the Court today is merely an academic exercise because whether the officers are entitled to qualified immunity has no bearing on the claims actually pleaded. While guidance on this issue will be needed eventually, there is no need for the Court to make a decision today and it should decline to answer the certified question. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) ("This court has repeatedly held that it neither has a duty nor the authority to render advisory opinions.").

II. THE GOVERNMENT AND ITS EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY.

Plaintiff has argued that nothing in the text or history of Iowa's Bill of Rights supports recognition of qualified immunity in the context of a constitutional tort claim. However, as recognized by the Iowa Supreme

Court in *Godfrey*, and by a multitude of courts in other jurisdictions that have similarly recognized tort claims based on self-executing constitutional provisions, the authority of the court to award monetary damages for violation of state constitutional rights is, itself, deeply rooted in the common law. *Godfrey*, 898 N.W.2d at 848 ("English common law long recognized a cause of action for damages for violation of rights secured by fundamental charters and constitutions."); *see also Gray v. Virginia Sec'y of Trans.*, 662 S.E.2d 66, 73 (Va. 2008) ("The fact that a self-executing constitutional provision is operative without the need for supplemental legislation means that the provision is enforceable in a common law action."); *Corum v. Univ. of North Carolina Through Bd. of Governors*, 413 S.E.2d 276, 289 (N.C. 1992) ("The provision of our Constitution which protects the right of freedom of speech is self-executing. . . . Therefore, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right."). In light of this common law origin of the civil monetary remedy, the court necessarily retains the right to further define the standards and circumstances under which such claims may proceed based on key considerations of public policy. *See, e.g.*, *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 481 (Utah 2011) ("Because the common law authority to award damages for constitutional

violations invokes policy considerations, a court's discretion in imposing monetary damages should be 'cautiously and soundly' exercised.").

Restatement (Second) of Torts § 874A, cmt. d (1979), approvingly cited in *Godfrey*, lays bare the need for public policy considerations when civil remedies are provided by the court absent an otherwise without express provision for such a remedy—even when the remedy relates to purported violation of constitutional provisions. The Restatement notes court recognition of such a remedy "requires policy decisions by the court, and it should be aware of them and face them candidly." Restatement (Second) of Torts § 874A, cmt. d (1979). It is "judicial tradition" that grants the court authority to provide a civil remedy under appropriate circumstances. *Id.* In doing so, "[t]he court has discretion and it must be careful to exercise that discretion cautiously and soundly." *Id.*

Concepts of public policy are generally derived from "the community common sense and common conscience extended and applied throughout the state to matters of public morals; public health, public safety, public welfare, and the like." *Truax v. Ellett*, 15 N.W.2d 361, 367 (Iowa 1944). The courts "look to the constitution, statutes and ordinances for our written public policies, and our unwritten public policies rest largely in judicial judgment and public opinion." *Id.* Common law privileges and immunities predate

the enumeration of the rights in Iowa's Bill of Rights and are premised on profoundly strong public policy principles. *See Owen v. City of Independence, Missouri*, 445 U.S. 622, 637 (1980) (noting common law immunities can be traced to the 16th-century and are "firmly rooted in the common law and . . . [are] supported by strong public policy reasons"). Thus, such immunities should continue to be recognized as applicable defenses in the context of "*Bivens* claims . . . under the Iowa Constitution" that were recognized in *Godfrey*. *Godfrey*, 898 N.W.2d at 847.

A. Policy Reasons Strongly Support the Purpose and Vitality of Qualified Immunity in G*odfrey* Claims.

The key public policy reasons for recognition of the affirmative defense of qualified immunity have been stated in a multitude of cases across jurisdictions, including in the Iowa Supreme Court. Importantly, qualified immunity analysis begins with the recognition that "[w]hen government officials abuse their offices, actions for damage may offer the only realistic avenue of vindication of constitutional guarantees." *Leydens v. City of Des Moines*, 484 N.W.2d 594, 596 (Iowa 1992) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Yet, qualified immunity further recognizes that, "[o]n the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk

that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Id.* To balance these interests, qualified immunity shields government officials from civil damages liability "as long as their actions could reasonably have been thought consistent with the right they are alleged to have violated." *Id.* In addition to granting government officials peace of mind that their reasonable mistakes in their discretionary governmental capacities will not expose them to personal liability so they can do their jobs without fear, qualified immunity also reduces the need for full trials "and many insubstantial claims [can] be resolved by summary judgment." *Id.*

On a broad level, the importance of qualified immunity is that governmental officials have difficult jobs and, regardless of their ultimate decisions and actions, their conduct is unlikely to be the desired decision or action of *all* constituents. Following the *Godfrey* decision, if qualified immunity is abandoned, government will grind to a halt because virtually all decisions or actions of a government official will lead some person or interest group to assert a state constitutional violation of due process or equal protection and institute a civil claim for monetary damages. This is particularly true in the realm of law enforcement. Rare is the case that a person apprehended by law enforcement agrees that the officer is in the right

and the alleged perpetrator is in the wrong. Thus, in the absence of qualified immunity it is an inevitable that law enforcement officers will spend more time personally defending their actions in civil court proceedings than they will patrolling the state, investigating criminal conduct, and enforcing the law. In the end, turning away from qualified immunity in Iowa is likely to both deplete the treasury and deter any well-meaning person away from pursuing a career in criminal justice. Alternatively, in the absence of the protection of qualified immunity concerning state constitutional claims, well-intentioned law enforcement officers will become so fearful to act that they will not take any action and any number of unfortunate and tragic events will take place due to failure to take action.

For such reasons the United States Supreme Court has held law enforcement officers, such as the individual defendants in the case at bar, are particularly deserving of qualified immunity protections because, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Justification for this limited immunity was succinctly stated by Chief Justice Burger:

> One policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for

> the protection of the public . . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer v. Rhodes, 416 U.S. 232, 241–45 (1974).

Plaintiff oversimplifies the societal harm that the absence of qualified immunity will cause. As acknowledged by the Maryland Supreme Court:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.

Dehn Motor Sales, LLC v. Schultz, 96 A.3d 221, 239–40 (Md. Ct. App. 2014) (quotation marks and citations omitted). Similar concerns have been persuasively voiced as follows: "[T]he municipal corporation is different. It is not organized for any purpose of gain or profit, but it is a legal creation engaged in carrying on government and administering its details for the general good and as a matter of public necessity." *Brown v. State*, 89 N.Y.2d 172, 205 (N.Y. 1996) (J. Bellacosa dissenting) (citing *Sharapata v.*

Town of Islip, 437 N.E.2d 1104 (N.Y. 1987); *Costich v. City of Rochester*, 73 N.Y.S. 835 (N.Y. App. Div. 1902)).

These policy reasons supporting qualified immunity are equally applicable in Iowa. Government officials should not have to question every action for fear of suit. Moreover, accepting the position offered by Plaintiff would mean every time evidence is suppressed in a criminal matter or a criminal case is dismissed, the officer would inevitably—if not automatically—be exposed to lengthy civil litigation of an alleged constitutional violation. Ultimately, the strong weight of public policy militates in favor of recognizing qualified immunity for claims for money damages under the Iowa Constitution.

B. Qualified Immunity is Well-Established in the Iowa Common Law for these Same Public Policy Reasons.

In *Godfrey*, this Court rightly suggested it would recognize qualified immunity to address concerns about dampening the ardor of government officials in exercising their duties, stating: "In any event, 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." *Godfrey*, 898 N.W.2d at 879. This is rightfully so because qualified immunity was

established and recognized in the common law for important public policy reasons even before the ratification of the Iowa Constitution.

In his dissent in *Godfrey*, Justice Mansfield quoted four delegates from the drafting of the Iowa Constitution. *Godfrey*, 898 N.W.2d at 855 (J. Mansfield dissenting). Justice Mansfield summarized these framers by finding, "the key point is this: these framers understood the State generally could not be sued, even on a constitutional claim, without express authorization from the constitution itself or form the general assembly." *Id.* While this is from the dissent and we know now the Court recognizes a *Bivens*-type action in Iowa, these quotes show the immunities to constitutional torts, including qualified immunity, existed in the common law and were understood to be critically important.

Support for such immunity is found even in a block quote from *Owen v. City of Independence, Missouri*, 445 U.S. 622, 636–37 (1980) that is cited by Plaintiff's brief. There, the Supreme Court found the tradition of immunity was so firmly rooted in the common law that Congress would have addressed it in drafting Section 1983 had it intended on abolishing these bedrock principles. *Owen*, 445 U.S. at 636. The Court reasoned that because the officers were entitled to good faith and probable cause as a defense to a false arrest action at common law, they were entitled to that

defense in a Section 1983 context. *Id.* (citing *Pierson v. Ray*, 386 U.S. 547, 555–557 (1967)).

The same is true in Iowa. For example, in Iowa, the standard for probable cause for the purpose of civil actions for false arrest was discussed in *Children v. Burton*, 331 N.W.2d 673, 680 (Iowa) *cert. denied* 464 U.S. 848 (1983). For civil actions of false arrest, to justify a warrantless arrest for a crime not committed in an officer's presence, a police officer must allege and prove: (1) the officer acted in good faith believed that the person arrested had committed the crime, and (2) the officer's belief was reasonable. *Id.* at 680. In considering these two factors, courts look to the facts within the officer's knowledge at the time the arrest was made. *Id.* Plainly, if law enforcement officers are entitled to a good faith standard for civil false arrest cases, it would be unreasonable and incongruous to fail to recognize a similar standard (i.e., qualified immunity) in civil claims under the Iowa Constitution.

The *Children* case also exemplifies how Plaintiff's reliance on criminal case law is not persuasive concerning the determination of the applicability of qualified immunity in civil monetary remedy cases. The Court has already accepted a different definition of probable cause for civil cases rather than the probable cause standard used in criminal cases. The

reliance on criminal cases to define the parameters of the civil claim is unwarranted.

Multiple times in his brief, Plaintiff emphasizes there is no qualified immunity because the language of article I, section 8 if the Iowa Constitution is mandatory in that the rights enumerated therein "shall not be violated." However, Plaintiff fails to acknowledge that the exact same language is used in the Fourth Amendment to the United States Constitution: the Fourth Amendment rights "shall not be violated." US. Const. Amend. IV.

Plaintiff also mis-frames his analysis and argues the recognition of qualified immunity would foreclose any remedy for Constitutional violations. This is not accurate. As Justice Harlan opined in his concurrence in *Bivens*: "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (J. Harlan concurring) (emphasis added). Here, through the recognition of a *Bivens* action, there is no automatic closure of the courthouse doors. The opposite is true: plaintiffs' constitutional claims will no longer be thrown

out on motions to dismiss. The recognition of qualified immunity is merely defining what it means to commit a constitutional tort for purposes of money damages on the basis of considerations of public policy. Qualified immunity does not foreclose remedies; the acceptance of qualified immunity simply sets a reasonable standard that must be satisfied in order for monetary recovery to be allowed.

C. Legislative Recognition of Qualified Immunity is further Indicative of the Rationale and Importance of Recognizing Qualified Immunity in *Godfrey*-Type Claims

As noted previously, the court may rightfully look to "statutes and ordinances for our written public policies." *Truax*, 15 N.W.2d at 367. In Iowa, the legislature has already defined when the state and municipalities can be sued, not only in Chapter 669 and 670, but in other areas of law. *See e.g.* Iowa Code § 804.8 (providing immunity for peace officer's use of force is the officers reasonably believes the force necessary to effect the arrest). Moreover, Plaintiff here admits the immunities in Chapter 669 and 670 are applicable in support of his position that not allowing qualified immunity will not have the dire impact the City of Estherville (and this amicus) anticipates.

For example, to receive qualified immunity for a Section 1983 claim, the officer must first show that he acted within his discretionary authority.

Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). Under state law, an officer is immune if the claim is based on the officer's exercise of a discretionary function. Iowa Code § 670.4(1)(c) (municipal); Iowa Code § 669.14(1) (state).

The Court of Appeals of Maryland held qualified immunity afforded to state personnel under the Maryland Tort Claims Act encompasses both intentional torts and constitutional torts. *Lee v. Cline*, 863 A.2d 297 (Md. 2004). In a case of first impression, the court concluded the Maryland Torts Claims Act insulates state personnel from all types of tort claims absent a sufficient showing of actual malice. *Id*. at 302. As the Indiana Supreme Court has reasoned, "Unless the state Constitution precludes statutory limitations of remedies for constitutional violations, the damage remedy is itself subject to those statutory restrictions." *Cantrell*, 849 N.E.2d at 506–07.

When the Constitution does not mandate any specific remedy for violations, balancing the competing interest is a matter within the power of the General Assembly, and they have done so through Chapter 667 and Chapter 670. *See id.* at 507.

D. Using Federal Law as Guidance is Appropriate

Plaintiff has argued Iowa's independent constitutional provisions are not subject to interpretation by reference to the United States Supreme Court's interpretations of Section 1983 (and presumably *Bivens* too because qualified immunity is applicable in *Bivens* actions). It is plain and clear that the Iowa Supreme Court is free to interpret the Iowa Constitution in a manner different than the United States Supreme Court's interpretation of the Constitution of the United States, and the undersigned do not contend otherwise. Nonetheless, as offered by a recent article in the University of Iowa Law Review, "Even where state and federal provisions are identically worded, 'the right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.'" Eric M. Hartmann, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 Iowa L. Rev. 2265, 2272 (2017) (citations omitted). "Notably, consistent independence does not necessarily mean divergence from parallel federal rulings: it implies nothing in particular about results. Using independent interpretation, a court might reach the same or a different result than a federal one, using the same or different standards or theories." *Id.*

(citations omitted). Here, this Court is free to apply the Iowa standard and can still come to the conclusion that qualified immunity is appropriate for claims for money damages under the Iowa Constitution.

Not only would application of qualified immunity to state constitutional claims be consistent with the federal courts, such a decision would be similarly consistent with a litany of sister states. In fact, other states with their unique constitutions have decided to walk lockstep with federal law. For example, in defining the defenses available in judicially created damage actions for deprivation of rights secured by the New Jersey Constitution, the Superior Court of New Jersey reasoned "[a] conflict between New Jersey law and federal law with respect to immunity rules is not in the public interest. It follows . . . that the immunities of municipalities and their officials sued directly under our constitution are identical to those provided by federal law." *Lloyd v. Borough of Stone Harbor*, 432 A.2d 572, 583 (N.J. Super. Ct. Ch. Div. 1981); Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 Penn St. L. Rev. 877, 887–88 (2011) (citing *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006) (finding qualified immunity governing Section 1983 actions similarly applies to claim against government official alleged to have

violated Article I, Section 9 of the Indiana Constitution); *Moersi v. State*, 567 So.2d 1081, 1093 (La. 1990) ("The same factors that compelled the United States Supreme Court to recognize qualified good faith immunity under Section 1983 requires us to recognize a similar immunity for them under any action arising from the state constitution.")).

The Vermont Supreme Court reasoned similarly. Relying on *Butz v. Economou*, it concluded officials exercising discretion are entitled to qualified immunity in "suits for damages arising from *unconstitutional action*" but the United States Supreme Court did not suggest the standard for qualified immunity be adjusted according to what constitutional right was allegedly violated. *Stevens v. Stearns*, 833 A.2d 835, 842 (Vt. 2003) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978) (emphasis original to *Stevens*)). Finding it would be "illogical" for the Court to adjust the qualified immunity standard based on what constitutional right was violated because the purpose of qualified immunity is the need to protect officials exercising discretion, and the related public interest in encouraging the vigorous exercise of official authority, is the same regardless of the source of the constitutional right. *Id.* "Thus, even where a state court has concluded that an individual is entitled to recover money damages for injuries resulting from the violation of a state constitutional right to be free from unreasonable

searches, the test for qualified immunity is the same: it remains the same "under any action arising from the state constitution." *Id.* (quoting *Moersi*, 567 So.2d at 1093.

Plaintiff argues the immunities in Section 1983 cases are inapplicable because Section 1983 is a statute and the Iowa Constitution is not. However, Plaintiff fails to acknowledge that the same type of qualified immunity available to state officers in Section 1983 actions is also available to officers made defendants in *Bivens*-type actions for violation of federal *constitutional* rights. *Butz*, 438 U.S. at 506–07. The Court has held:

> We consider here, as we did in *Scheuer* the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established limits will not unduly interfere with the exercise of official judgment.

Id.; *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (holding the Attorney General, who had allegedly had formulated a policy of using the federal material-witness statute pre-textually to detain individuals who were suspected of supporting terrorism but for whom evidence was insufficient to charge the individual with a crime, was entitled to qualified immunity in *Bivens* actions alleging a Fourth Amendment violation by the arrestee).

There is no reason to stray from an application of qualified immunity for claims made under the Iowa Constitution and federal *Bivens* and Section 1983 cases can be used as helpful guidance.

CONCLUSION

For the reasons set forth above, this Court should either decline to answer the certified question or find that qualified immunity is available for civil claims seeking monetary damages under the Iowa Constitution.

Respectfully submitted,

/s/ Thomas M. Boes
Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Tel: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

CERTIFICATE OF COMPLIANCE

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

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/s/ Thomas M. Boes
Thomas M. Boes AT0001048

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Amicus Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 20th day of December, 2017.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048

Douglas L Phillips
Klass Law Firm, LLP
4280 Sergeant Road, Suite 290
Sioux City, IA 51106
ATTORNEYS FOR DEFENDANTS-APPELLANTS

Jack Bjornstad
Jack Bjornstad Law Office
1017 Highway 71
PO Box 408
Okoboji, IA 51355
ATTORNEYS FOR PLAINTIFF-APPELLEE

Joel E. Fenton
541 31st Street, Suite C
Des Moines, IA 50312
ATTORNEYS FOR AMICUS CURIAE -
IOWA ASSOCIATION OF JUSTICE

Jeffrey S. Thompson
Julia Kim
Iowa Attorney General's Office
Hoover Building, 2nd Floor
Des Moines, IA 50319
ATTORNEYS FOR AMICUS CURIAE –
STATE OF IOWA

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that no costs for printing the foregoing Brief were incurred.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048