IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1592

GREGORY BADLWIN,
Plaintiff-Appellee,

vs.

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,

Defendants-Appellants.

CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT
FOR NORTHERN DISTRICT
THE HONORABLE MARK W. BENNETT, JUDGE

AMICUS CURIAE BRIEF IN SUPPORT OF DEFEDANTS-APPELLANTS

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General (jeffrey.thompson@ag.iowa.gov)

JULIA S. KIM
Assistant Attorney General (julia.kim@ag.iowa.gov)
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
ATTORNEYS FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Rules

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(D)

No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

INTEREST OF THE AMICUS CURIAE

The State of Iowa was admitted to the union as the 29th state on December 28, 1846. The State of Iowa has filed numerous amicus curiae briefs in state and federal court on important issues impacting the State of Iowa and its citizens. The State of Iowa, one of the largest employers of government officials in the State, has a significant interest in the outcome of the Court's ruling.

INTRODUCTION

The United States District Court for the Northern District of Iowa 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?

The State of Iowa was granted leave to file an amicus brief.

ARGUMENT

I. ***Godfrey* Decision**

Recently, in *Godfrey v. State*, the Iowa Supreme Court "reaffirmed" that Article I, sections 6 and 9—equal protection clause and due process clause—of the Iowa Constitution were self-executing, thereby, opening the door for the possibility of a *Bivens*-type action for an alleged violation of the equal protection or due process clause of the Iowa Constitution. 898 N.W.2d 844, 870-71 (Iowa 2017). The *Godfrey* Court began its analysis with the "key modern United States Supreme Court precedent on the question of whether provisions of the United States Constitution are self-executing without legislative implementation": *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* at 851. In discussing *Bivens* and its progeny, the *Godfrey* Court concluded that the "different nature of the interests protected weighs in favor of allowing a *Bivens*-type claim to go forward against the defendants." *Id*. at 879. In permitting a *Bivens*-type action, however, the *Godfrey* Court did not elaborate upon the parameters of such an action in Iowa or express any view on the merits or defenses of the due process claims it recognized. *Id*. at 876, 879. Moreover, the *Godfrey* Court expressly

reserved judgment, noting that "to the extent that a *Bivens*-type action might inhibit [government officials from performing their] duties, the doctrine of qualified immunity is the appropriate vehicle to address those concerns. . . [but] [t]he issue of qualified immunity, however, is not before the court today." *Id.* at 879.

II. Open Questions Regarding the Application of a *Bivens*-type-Action in Iowa

While the certified question before the Court indeed remains unanswered by the *Godfrey* decision, the case at hand presents important threshold questions that can otherwise dispose of the case. Consequently, this Court should either address these threshold questions or decline to answer the certified question. The first threshold question is whether, under *Godfrey*, a *Bivens*-type action is available for an alleged violation of Article I, sections 1 and 8 of the Iowa Constitution. Second, in *Godfrey*, the plaintiff alleged Iowa Constitutional violations against the State of Iowa and individually named defendants in their official and personal capacities. The *Godfrey* Court, however, did not identify which defendants in what capacity could be sued under a *Bivens*-type claim. That is, under a federal *Bivens* action, only the individual government official may be sued—not the governmental entity. Therefore, if Iowa adopted

Bivens then the well-settled federal jurisprudence on the scope of a *Bivens* claim should apply to a *Bivens*-type claim in Iowa. In this instant case, a *Bivens*-type claim should not be permitted directly against the City of Estherville, the only defendant against whom plaintiff asserts his Iowa Constitutional claims. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (declining to create a *Bivens* type action directly against the federal agency); *but compare Brown v. State of New York*, 674 N.E.2d 1129, 1133-36 (N.Y. 1996) (permitting constitutional tort claim directly against the state given New York's "broad" waiver of sovereign immunity) *with Corum v. Univ. of N. Carolina Through Bd. of Governors*, 413 S.E.2d 276 (N.C. 1992) (permitting constitutional claim only against state actors in their official capacity). Thus, a court may not need to reach the certified question to decide the present case.[1]

[1] Indeed, even this issue may be premature as the federal district court in the instant case found probable cause for the arrest—meaning there was no constitutional violation in the first instance to conduct a qualified immunity analysis. *Baldwin v. Estherville, Iowa*, 218 F. Supp. 3d 987, 1001 (N.D. Iowa 2016).

III. This Court Should Adopt Qualified Immunity

Should this Court decide to answer the certified question, this Court should adopt qualified immunity analogous to the qualified immunity available in federal *Bivens* actions.

A. *Bivens* and Recognition of Qualified Immunity

The U.S. Supreme Court first recognized a cause of action for violation of the U.S. Constitution against federal government officials in *Bivens*. In *Bivens*, the plaintiff alleged that federal agents, under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations without a warrant and that unreasonable force was employed in making the arrest. 403 U.S. at 389. The *Bivens* Court recognized this implied cause of action because there was no other equally effective remedy to protect the plaintiff's rights under the Fourth Amendment of the United States Constitution. *See* 403 U.S. at 396-97. Thereafter, the U.S. Supreme Court consistently stated that the purpose of *Bivens* is to deter the individual officer.[2] *See, e.g., Carlson v. Green*, 446 U.S. 14, 21 (1980) ("Because

[2] One of the reasons the U.S. Supreme Court recognized a cause of action against individual officials was "*because* a direct action against the Government was not available." *Meyer*, 510 U.S. at 485 (emphasis in original) (citing *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)).

the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States"); *Meyer*, 510 U.S. at 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*." (emphasis in original)).

Along with creating a *Bivens* action, the U.S. Supreme Court then recognized that the "same type of qualified good faith immunity available to state officers in § 1983 actions was also available to federal officers made defendants in *Bivens*-type actions for violations of federal constitutional rights" correctly "finding no appreciable difference between state officers subject to § 1983 and federal officers subject to *Bivens* actions." *Moresi v. State Through Dep't of Wildlife & Fisheries*, 567 So. 2d 1081, 1094 (La. 1990) (citing *Butz v. Economou*, 438 U.S. 478 (1978)). The *Butz* Court reiterated that "qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations" because qualified immunity balances 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" while recognizing "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." 438 U.S. at 506-07.

B. Applying Qualified Immunity to State Constitutional Violations

States have generally recognized qualified immunity for violation of its state constitution. *See, e.g.*, *Moresi*, 567 So. 2d at 1094 (recognizing qualified immunity for state officers or persons acting under color of state law for damages caused by a violation of the Louisiana Constitution); *Stevens v. Stearns*, 833 A.2d 835, 842 (Vt. 2003) (stating it would be illogical to adjust standards for qualified immunity given the public policy considerations); *Graham v. Cawthorn*, 427 S.W.3d 34, 45 (Ark. 2013) (applying qualified immunity for violation of the Arkansas Constitution); *Benjamin v. Washington State Bar Ass'n*, 138 Wash. 2d 506, 527-28, 980 P.2d 742, 753 (Wash. 1999) (discussing without distinction qualified immunity for violation of Washington Constitution); *W. Virginia Bd. of Educ. v. Marple*, 783 S.E.2d 75 (W. Va. 2015) (applying qualified immunity to West Virginia Constitutional violation).

"Although most state courts which have considered the issue have followed the federal law of qualified immunity, not all have done

so."[3] *Dorwart v. Caraway*, 58 P.3d 128, 139 (Mont. 2002). To the extent that certain states declined to recognize qualified immunity for violation of its state constitution, such cases are distinguishable. For example, in *Dorwart*, one of the issues before the Montana Supreme Court was whether qualified immunity analogous to federal qualified immunity under section 1983 should be recognized for a violation of the Montana Constitution. *Id.* at 138. The *Dorwart* Court began its analysis with the "historical basis for federal immunity" which it found "compelling," stating:

> In *Mitchell*, 445 U.S. at 538, 100 S.Ct. at 1351, the Supreme Court stated that:
>
> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." In the absence of clear congressional consent, then, "there is no jurisdiction in the Court of Claims more than in any

[3] The primary case cited in *Dorwart* for not extending qualified immunity, *Clea v. City Council of Baltimore*, 541 A.2d 1303, 1314 (Md. 1988), is no longer applicable. *See Lee v. Cline*, 863 A.2d 297, 310 (Md. 2004) (holding "the immunity under the Maryland Tort Claims Act, if otherwise applicable, encompasses constitutional torts and intentional torts").

> other court to entertain suits against the United States." [Citations omitted.]
>
> The Supreme Court has also explained the difference between qualified immunity and a defense to a claim on the merits as well as the deeply rooted common law traditions for immunity at a federal level in *Richardson*. . . . In *Richardson*, 521 U.S. at 403, 117 S.Ct. at 2103, the Court explained that "a distinction exists between an 'immunity from suit' and other kinds of legal defenses.... [A] legal defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." It concluded that while immunity for a government employee is deeply rooted in the common law there is no comparable tradition of immunity applicable to privately employed prison guards.

Id. at 139-40. The *Dorwart* Court, however, concluded that Montana would not recognize qualified immunity for violation of its state constitution because the Montana Constitution *specifically prohibited* governmental immunities unless specifically provided by law. *Id.* at 140 (citing Montana Constitution Art. II, § 18: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-third vote of each house of the legislature."). The Iowa Constitution, however, has no similar language to warrant denial of qualified immunity.

C. **Public Policy for Qualified Immunity**

The public policy for recognizing qualified immunity is sound. Qualified immunity serves to "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992); *Minor v. State of Iowa et al.*, 819 N.W.2d 383, 400 (Iowa 2012) ("Qualified immunity 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.'" (quoting *Pearson v. Callahan*, 555 U.S 223, 231 (2009)).

"The justification for this limited official immunity was succinctly stated by Chief Justice Burger:

> [O]ne 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."

Moresi, 567 So. 2d at 1093 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974)).

The Iowa Supreme Court acknowledged that "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." *Leydens v. City of Des Moines*, 484 N.W.2d 594, 596 (Iowa 1992) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). The same special policy concerns are applicable to government officials regardless of whether federal or Iowa Constitution claims are at issue. Indeed, "[t]he pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials." *Butz*, 438 U.S. at 500. The constitutional injuries and the rationale for qualified immunity should not change because it is an Iowa Constitutional injury. *See id.* at 500-01 ("We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a

federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation."); *Wyatt*, 504 U.S. at 167 (stating that "special policy concerns" dictated the recognition of "qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suit from entering public service").

The recognition of qualified immunity for violation of the Iowa Constitution will not dilute any afforded constitutional rights. Indeed, the availability of qualified immunity does not stand for the proposition that a government official will be entitled to qualified immunity. Rather, to determine whether an official is entitled to qualified immunity, a court must consider: (1) "whether the facts alleged by the plaintiff 'make out a violation of a constitutional right'" and (2) "whether that right was 'clearly established' at the time of defendant's alleged misconduct." *Minor*, 819 N.W.2d at 400 (quoting *Pearson*, 555 U.S. at 232, 236).

However, if qualified immunity is not recognized for violations of the Iowa Constitution, the notion of qualified immunity for state

government officials will be eviscerated, as anyone dissatisfied with a government decision will have unfettered recourse under the Iowa Constitution. *See Minor*, 819 N.W.2d at 400 (stating that qualified immunity protects government officials from suit when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal citation and quotation omitted)). Without qualified immunity, all state government officials will be exposed to liability and subject to litigation just for performing their duties. Indeed, if qualified immunity is not recognized, government officials working on contentious cases, such as social workers, judges, and the like, will be chilled in their ability to perform their duties. The protections and balancing of public policy goals offered under qualified immunity should be available to government officials regardless of whether the constitutional injury is federal or state in nature.

Accordingly, this Court should hold that qualified immunity is available to government officials for violation of the Iowa Constitution.

CONCLUSION

For the reasons set forth above, qualified immunity should be available for violation of the Iowa Constitution.

REQUEST FOR ORAL SUBMISSION

State of Iowa hereby requests oral argument upon submission of this case.

Respectfully submitted,

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ Jeffrey S. Thompson___
JEFFREY S. THOMPSON
Solicitor General
jeffrey.thompson@ag.iowa.gov

/s/ Julia Kim_____
JULIA KIM
Assistant Attorney General
julia.kim@ag.iowa.gov
IOWA ATTORNEY GENERAL'S OFFICE
Hoover Building, 2nd Floor
Des Moines, IA 50319
Ph: (515) 281-5166
Fax: (515) 281-4209

ATTORNEYS FOR AMICUS CURIAE

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)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2, 604** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: December 15, 2017

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ Jeffrey S. Thompson___
JEFFREY S. THOMPSON
Solicitor General
jeffrey.thompson@ag.iowa.gov

/s/ Julia Kim_____
JULIA KIM
Assistant Attorney General
julia.kim@ag.iowa.gov
IOWA ATTORNEY GENERAL'S OFFICE
Hoover Building, 2nd Floor
Des Moines, IA 50319
Ph: (515) 281-5166
Fax: (515) 281-4209