IN THE IOWA SUPREME COURT

No. 18-1280

JOSHUA VENCKUS,

Plaintiff-Appellee,

v.

CITY OF IOWA CITY; ANDREW RICH; JOHNSON COUNTY, IOWA; ANNE LAHEY; NAEDA ELLIOTT; and DANA CHRISTIANSEN,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE CHAD KEPROS, JUDGE

FINAL REPLY BRIEF OF DEFENDANTS-APPELLANTS CITY OF IOWA CITY AND ANDREW RICH

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INTRODUCTION

Venckus has made clear in his brief that, ultimately, this case is an effort to get around prosecutorial immunity, or in the alternative, reverse long-standing law on that immunity. Clearly, his beef is with his prosecutors. Officer Rich and the City were dragged into this fight only to avoid justifiable concerns that his claims against the prosecutors might be quickly dismissed. Venckus's claims against the City defendants are predicated on the erroneous notion that an officer, who has no legal authority to dismiss a charge, for which there is probable cause, after it is filed, can be held liable when prosecutors refuse to dismiss.

If that request is granted, one must ask what claims may follow. Might not the next plaintiff ask to assign liability to those with actual authority to dismiss charges, like judges? What if a criminal defendant files a motion to suppress, or motion to dismiss, and has his motion denied by the trial judge? Would not Venckus's arguments in this case lead naturally to an argument that the trial judge could be liable? Wouldn't that plaintiff argue that the constitutional violations he alleges to have suffered at the hands of the trial judge must have a constitutional damages remedy? Does that outcome serve the long-term interests of the judicial system?

REPLY TO VENCKUS'S STATEMENT OF FACTS

While there are many factual assertions in the Amended Petition which the City defendants dispute, they readily concede that all facts alleged therein must, for purposes of a motion to dismiss, be deemed true and accepted by the Court. However, the following factual recitations contained in Venckus's brief are not contained in his Amended Petition.

- Markley "never implicated [Venckus] in several law enforcement interviews." Statement of Facts/Page 25 of Venckus's Brief.
- Tara Scott "testified that she had no training in transfer." Statement of Facts/Page 26 of Venckus's Brief.
- "rather than the many thousand [sperm] which would be expected to be found during ejaculation." Statement of Facts/Page 26 of Venckus's Brief.
- Damages Venckus suffered include "expulsion from college, a lost career...." Statement of Facts/Page 27 of Venckus's Brief.
- Rich "continued to support and press for a prosecution that no longer had probable cause to support the charges." Page 32 of Venckus's Brief.
- "repeated defamation in the press..." Page 39 of Venckus's Brief.
- Venckus still suffers "through lost education..." Page 41 of Venckus's Brief.
- "public trial (published ...outside the courthouse...)" Page 43 of Venckus's Brief.

ARGUMENT

I. ERROR IS PRESERVED ON THE ISSUE OF WHETHER A CAUSE OF ACTION IS RECOGNIZED IN IOWA AGAINST LAW ENFORCEMENT FOR A "CONTINUED" PROSECUTION.

In arguing that error has not been preserved, Venckus makes no mention of the fact that his own recharacterization of the claim as one unrecognized in Iowa raised the issue, requiring a response by the City and a decision by the district court.

As detailed in the City's initial brief, the parties have been addressing the viability of Venckus's malicious "continued" prosecution claim since he responded to the City's motion to dismiss by stating that his claim against the City and Rich is not based on the initiation of the prosecution by the filing of the criminal charge, but rather, on the continuation of the prosecution notwithstanding the evidence presented by Venckus. (App. p. 44). The district court addressed and decided the issue in both its rulings.

Initially, in "taking the facts in the light most favorable to the Plaintiff", the court acknowledged the Plaintiff's novel "they should have backed down later" theory, (App. p. 68), but rejected it concluding that "Plaintiff may only proceed against the City and Rich on the basis of actions that led up to the finding of probable cause for arrest, but may not claim against him for actions taken in the course of the prosecution itself." (App. p. 70).

In his motion to reconsider, Venckus argued that a viable malicious prosecution claim exists for "continued" prosecution. (App. p. 78). He requested that if "the court believes that Plaintiff cannot make such a claim for malicious prosecution, then the court should dismiss the claim entirely so he can appeal at this time." (App. p. 81). The City joined in the request for dismissal because the claim failed as a matter of law. (App. p. 99). On reconsideration the district court reversed, stating: "Assuming that a malicious prosecution claim may lie in Iowa for actions

taken by police officers after the initiation of the case, the Court will allow the Plaintiff to proceed on its claim of malicious prosecution." (App. p. 105). It is that Order from which the City appeals. Error is preserved.

II. THE CITY IS NOT LIABLE FOR DAMAGES BASED ON A CLAIM OF FAILURE TO INVESTIGATE AND IS ENTITLED TO ABSOLUTE IMMUNITY BECAUSE THERE WAS PROBABLE CAUSE TO CHARGE VENCKUS, AND THE CITY'S ROLE THEREAFTER WAS THAT OF AN ORDINARY WITNESS.

In his second argument, Venckus states that the City mischaracterizes his claim of failure to investigate in order to assert absolute immunity, whereas it is Venckus who mischaracterizes how the criminal justice system operates in order to assert liability. It is undisputed that the City had probable cause to file the charge against Venckus, namely his DNA on the victim's cervix. "Plaintiff is not critical of the original arrest as there was arguably probable cause to believe he had committed the crime." (App. p. 77). Venckus argues that the City violated his rights under the Iowa Constitution by subsequently failing to investigate alibi evidence provided by Venckus and dismiss the charges. Missing from Venckus' argument is any legal authority for how the City could dismiss a criminal case after the complaint was filed in light of Iowa R. Crim. P. 2.33(1) that provides only the prosecutor or the court may dismiss a pending criminal prosecution. Iowa Code defines "Prosecution" as "[T]he commencement, *including the filing of a complaint*, and continuance of a criminal proceeding, and pursuit of that proceeding to final

judgment on behalf of the state or other political subdivision." Iowa Code §801.4(13) (emphasis added). Thus, once Officer Rich filed the complaint, "prosecution" had begun, and only the prosecutor or trial judge could have dismissed the charge.

According to Venckus, the City committed a "clear *Brady v. Maryland,* 373 U.S. 83 (1963) violation" in failing to investigate the alibi defense. (Venckus's Brief, p. 34). *Brady* is the seminal case in which the U.S. Supreme Court found that the prosecution's suppression of exculpatory evidence violated the due process clause of the U.S. Constitution. It is not alleged that the City withheld information from Venckus, a requirement for any *Brady* challenge. *Brewer v. State*, 444 N.W.2d 77, 82 (Iowa 1989).

Venckus maintains his failure to investigate claim is supported by the Eighth Circuit, which has recognized a failure to investigate claim in §1983 litigation and cites *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001) and *Akins v. Epperly*, 588 F.3d 1178 (8th Cir. 2009). In both cases, the issue was whether the alleged failure to investigate prior to the arrest of the defendants shocked the conscience, in violation of the Fourth Amendment If there was probable cause for the arrest, there is no substantive due process violation. *Id*. at 1184. *See also*, *Amrine v. Brooks*, 522 F.3d 823, 833 (8th Cir. 2008).

Venckus next alleges that the City has a duty to a defendant after his arrest, but cites no authority. Such an assertion is antithetical to well-established Iowa law that a police officer does not have a special duty to a defendant. *Morris v. Leaf*, 534 N.W.2d 388, 390 (Iowa 1995) ("Iowa courts have consistently held that law enforcement personnel do not owe a particularized duty to protect individuals; rather, they owe a general duty to the public."). *See also*, *Fitzpatrick v. State*, 439 N.W.2d 663, 667 (Iowa 1989) ("In *Hildenbrand*, we reaffirmed our prior holding in *Smith v. State*, 324 N.W.2d 299 (Iowa 1982), that we do not recognize an independent tort for negligent investigation of crime by law enforcement officers.").

Venckus claims that the City had "a duty [that] was triggered to re-evaluate probable cause and dismiss the charges," but once more offers no authority. (Venckus's Brief, p. 36). The City cannot have a legal duty to take an action that the law does not authorize, and the City is not authorized to dismiss a charge after the complaint is filed. Venckus's only retort is that the City had a "duty to bring their concerns to the prosecutor and to do everything within their power to abort the prosecution." (Venckus's Brief, p. 36). That assertion is also without authority and contradicts *Fitzpatrick*.

Venckus continues his argument by circling back to *Brady* and taking the position that the "City had a similar duty [as *Brady*] to review and investigate exculpatory information provided by Venckus," but again cites no authority.

(Venckus's Brief, p. 35). On the contrary, *Brady* and its progeny do not hold that the Fourth Amendment requires law enforcement to investigate exculpatory evidence provided by a defendant. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

> [T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence…that is, to any suppression of so-called "*Brady* material" -- although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Id. at 281.

The underlying rationale for the Court's decision in *Brady* is that the defendant was denied a fair trial. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. The City did not similarly deny Venckus a fair trial or treat him unfairly. It charged Venckus with rape based on a number of factors, most notably his DNA being found on the victim's cervix. Venckus admits the City had probable cause, and after that point, the City cannot dismiss the charge or control the prosecution in any manner. Venckus does not allege that Rich or any City employee lied or withheld evidence. Finally, Venckus was acquitted and thus not prejudiced. *Livers v. Schenck*, 700 F.3d 340, 359 (8th Cir. 2012) ("[T]here was no Brady violation because [they] were not

convicted. *See Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed.2d 286 (1999) ...."*).*

Venckus ends his argument with a mischaracterization of *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) in an effort to rebut the City's position that Rich is an ordinary witness after the charge is filed and thus entitled to absolute immunity. The sole issue in *Baldwin* was this certified question: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution?" *Baldwin*, 915 N.W.2d 259, 260 (Iowa 2018). Venckus attempts to defeat the City's argument for a functional approach to Rich's role by claiming *Baldwin* rejects *Minor v. State*, 919 N.W.2d 383 (Iowa 2012), a case cited by the City to support a functional approach. Not only was the functional approach in determining the role of a party for purposes of determining immunity not rejected by *Baldwin*, the word "functional" does not appear in *Baldwin*. Furthermore, the only discussion of *Minor* in *Baldwin* is when the Court discusses why all immunities should not vanish just because claims are brought under the Iowa Constitution. *Baldwin*, 915 N.W. 2d at 277. Finally, the Iowa Supreme Court has not restricted the functional approach to §1983 litigation. The City in its brief and *Minor* both cite *Beck v. Phillips*, 685 N.W.2d 637 (Iowa 2004), a case of common law torts in which the Court applied the functional approach to determine whether a prosecutor under the facts at bar was immune.

In sum, the Iowa Constitution should not be interpreted to allow a municipality to be liable for damages based on a claim of failure to investigate an alibi defense provided by a defendant facing charges for which there is probable cause.

III. VENCKUS'S COMMON LAW AND *GODFREY* CLAIMS ARE TIME-BARRED.

A. The City Lost All Control of the Prosecution Following the Filing of the Charge.

In determining when the clock must start ticking for purposes of statutes of limitation, one must consider for what acts the City defendants can be held responsible. In his brief, Venckus accuses Officer Rich of a "repeated refusal to dismiss the criminal charges against him." (Venckus's Brief, p. 39). However, he immediately follows up that allegation with the following:

> The arrest may have been reasonable based on the information that the City had at the time, but as more and more information was provided to the City as outlined in paragraphs 36-59 it should have been clear that it had charged the wrong person and should have stopped causing harm to Venckus. The City chose to continue to press the charges despite repeated and ongoing requests that the charges be dismissed, and in doing so caused continuing harm to Venckus (Venckus's Brief, p. 39).

Of course, what Venckus refuses to acknowledge, as outlined in Section II. above, is that only the prosecutor and the trial court can dismiss the charges once they have been filed. Iowa R. Crim. P. 2.33(1), Iowa Code §801.4(12), and

§801.4(13). Given that Officer Rich, as a matter of law, had no control over the prosecution following the filing of the criminal complaint, any statute of limitations regarding his actions or inactions must have commenced no later than the arrest of the Plaintiff.

B. "Wrongful loss or injury".

While Venckus alleges that the City mischaracterizes his Amended Petition, and attempts to recharacterize his allegations as a failure to investigate, Venckus is bound to the allegations he *actually* made in his Amended Petition, and the allegations he now advances are contradicted, or simply not contained, in his Amended Petition.

Venckus filed suit on March 15th, 2018, more than four years after his January 24th, 2014 arrest. Ironically, he attempts to bring his suit within the two-year statute of limitations for claims under the Iowa Municipal Tort Claims Act by asserting that the arrest was not "wrongful" at the time, and that the injury was not suffered until the charge became wrongful. In order for Venckus's original petition to be compliant with the two-year statute of limitations for IMTCA claims, the charge could not have become "wrongful" until after March 15th, 2016, more than *two years* after his arrest. (Venckus's Brief, pp. 38-40).

This is particularly notable in that Venckus's criminal defense counsel began, on August 20th, 2015, posting to the Google Drive "all of the evidence" allegedly

disproving the State's charges against Venckus, and immediately shared it with prosecutors. (App. p. 38). But if any such evidence showed that the charge was "wrongful" before March 15th, 2016, then the statute of limitations would have run prior to Venckus filing suit. Consequently, Venckus must take the position that in the nearly seven months between when his criminal defense counsel began posting "all the evidence" of his innocence to the Google Drive (August 20th, 2015), and the date before which his suit could not survive a statute of limitations challenge (March 15th, 2016), his criminal defense attorney was posting material that *did not* suggest he was wrongfully charged. That is inconsistent with the allegations of his Amended Petition, which must be accepted as true. (App. p. 38).

It is likely for this reason that Venckus argues, in his brief, that this is a "question of fact for the jury to decide". (Venckus's Brief, p. 39). One cannot simultaneously argue (as Venckus now does) that his criminal defense attorney was sharing evidence of his innocence on August 20th, 2015, and yet the prosecution was not wrongful until sometime conveniently after March 15th, 2016. Contortions in legal pleadings are not rare, but Venckus's position on this front is self-contradictory and legally impossible.

C. Common Law Claims.

In describing the elements of malicious prosecution, Venckus claims that his "last relevant injury occurs right before trial." (Venckus's Brief, p. 41). Venckus,

however, does not explain what that injury is, either in his Amended Petition, or his brief.

Likewise, in describing abuse of process, he states that "the act of continuing the charges and bringing them to trial to avoid a potential lawsuit, as alleged in the Amended Petition, does not occur and therefore the injury from that does not occur until the element of the claim is established." (Venckus's Brief, p. 42). But again, the last "legal process" Officer Rich engaged in was the filing of his charge against Venckus on January 24, 2014. (App. p. 37). Beyond that date, Rich had no control over the "prosecution" and cannot be held accountable for decisions made in the case.

Regarding his allegation of defamation against the City, Venckus "claims that the continual allegation that he was a rapist was defamatory and such claim was continually made by the City up to the trial date." (Venckus's Brief, p. 42). The Amended Petition contains no allegation that the City published any such statements, other than the criminal complaint. (App. p. 37). Venckus also acknowledged that the County Attorney's Office conducted the prosecution after that point. "The prosecution was conducted by the Johnson County Attorney's Office through the three employees, Ms. Lahey, Ms. Elliott and Mr. Christiansen." (App. p. 38).

Venckus attempts to rectify this fatal flaw by asserting, in his brief, that there were "numerous additional defamatory statements (whether oral or in writing),

including court filings, court hearings, and a public trial (published within and outside the courthouse) ..." [1] (Venckus's Brief, pp. 42-43). Again, because court filings, after charges have been filed, would be by the County Attorney's Office, not by the City, and because any testimony in hearings and trial would be protected by absolute witness immunity[2], Venckus essentially asks this Court to ignore the fact that the filings and testimony are already available and knowable, but somehow the issue of "what was said, when it was said" is a jury issue. (Venckus's Brief, p. 43). Quoting the very case that Venckus cites in his brief, "We agree with the court of appeals that whether a claim in a civil case is barred by the statute of limitations should be determined by the factfinder, *unless the issue is so clear it can be resolved as a matter of law." Shams v. Hassan*, 905 N.W.2d 158, 163 (Iowa 2017) (emphasis added). Given the absence of these allegations in the Amended Petition, the lack of City authorship of any post-arrest filings, and the immunity granted witnesses for their testimony, there can be no jury issue for defamation, and that cause of action must be dismissed.

Finally, Venckus argues that different statutes of limitation for state and municipal employees cannot coexist. "If we accept the contention made by the City,

[1] Said allegations are not found in his Amended Petition, and thus should not be accepted by this Court.
[2] *See Rehberg v. Paulk*, 566 U.S. 356 (2012), *Minor*, 819 N.W.2d at 394, and *Briscoe v. Lahue*, 460 U.S. 325, 343 (1983).

we either end up with different statutes for different defendants, or less protection for suits against State employees than for Municipal employees. The position advanced by the City is untenable." (Venckus's Brief, p. 44). Federal courts currently rely on state statutes of limitation, which vary from state-to-state, to govern the statute of limitations for *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) and §1983 actions. *Sanchez v. United States*, 49 F.3d 1329 (8th Cir. 1995). Because not all 50 states have the same statutes of limitation, this means that a case could be brought in one state, while an identically-timed claim in a neighboring state with a different statute of limitation would be dismissed. Processes are different as well. For example, claims filed against the State must go through the State Appeal Board. Iowa Code §669.3.

The Iowa Supreme Court has also approved circumstances in which state and municipal officers may be treated differently:

> The defendants also assert that if section 669.14(4) does not bar certain claims against local law enforcement officers, then absurd results could occur. For example, as noted by the district court, when state troopers and county sheriff's deputies are working side by side in a joint law enforcement operation, the former would be exempt from liability under section 669.14(4) while the latter could potentially be sued.
>
> We are mindful of this concern, but caution that the defendants' view of the law also could lead to some unwieldy outcomes. [….] Iowa law contains no mechanism for resolving these disputes, which suggests the legislature didn't anticipate them.

Thomas v. Gavin, 838 N.W.2d 518, 526 (Iowa 2013).

The difference between the IMTCA's "statute of creation" and the accrual language of the ITCA has existed for years, during which the courts have weighed in repeatedly. This is a distinction the legislature made in dictating the circumstances in which sovereign immunity would be waived. If the legislature did not intend differences between them, they could have, and would have, amended them. They have not.

IV. THERE IS NO NEED FOR THIS COURT TO GRANT VENCKUS AN ADDITIONAL DAMAGES REMEDY UNDER THE IOWA CONSTITUTION BECAUSE THE IOWA MUNICIPAL TORT CLAIMS ACT PROVIDES AN ADEQUATE STATUTORY REMEDY TO ADDRESS HIS CLAIMS.

In his brief, Venckus misreads the holding in *Baldwin*. *Baldwin* is a case about qualified immunity, not the adequacy of statutory remedies. The *Baldwin* court was asked: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution?" *Baldwin*, 915 N.W.2d at 260. The Supreme Court answered: "A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity on an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution." *Id.* Indeed, the *Baldwin* Court specifically stated that this was the only issue it was deciding, declaring:

> We leave open a number of other issues. These include the possibility that constitutional claims other than unlawful search and seizure may have a higher mens rea requirement, such as intent, embedded within the constitutional provision itself. In other words, it may take more than negligence just to violate the Iowa Constitution. They also include the possibility that common law absolute immunities, such as judicial immunity or quasi-judicial immunity, could apply to state constitutional claims. And they include the potential applicability of provisions in chapters 669 and 670 other than sections 669.14 and 670.4. We do not address those issues today.

Id. at 281.

Venckus asserts, "If this Court were to use the IMTCA or ITCA to preempt constitutional tort claims, the legislature could create further roadblocks." (Venckus's Brief, p. 49). But *Baldwin* was about strict liability vs. qualified immunity, not whether direct constitutional claims are necessary in the face of remedies allowed under the IMTCA and ITCA.

> Moreover, strict damages liability for any constitutional wrong would lead to untenable results. On this point, it is worth analyzing a few of the cases where we found state and local officials were entitled to various immunities when claims had been brought against them under the United States Constitution through 42 U.S.C. §1983. Should all those immunities vanish just because claims are also brought under the Iowa Constitution?

Id. at 277.

Venckus, in his brief, asks the question, "What good are remedies if you are precluded by immunity from asserting a claim?" (Venckus's Brief, p. 50). While Venckus may not like the answer, the *Baldwin* court cited case after case in which the answer was clear – immunities are appropriate for some constitutional claims.

> In *Minor v. State*, the plaintiff asserted that two employees of the Iowa Department of Human Services had improperly caused her child to be removed from her care and failed to protect that child once placed in foster care, in violation of her Fourth and Fourteenth Amendment rights. 819 N.W.2d 383, 392 (Iowa 2012). There, *we determined that the employees were entitled to qualified immunity. Id.* at 400-04.
>
> In *Teague v. Mosley*, the plaintiff sued three of the five members of a county board of supervisors, alleging they had violated his constitutional rights by not providing a safe environment at the jail. 552 N.W.2d 646, 647 (Iowa 1996). *We adopted a rule of absolute immunity for supervisors acting in a legislative capacity*. *Id.* at 649.
>
> In *Dickerson v. Mertz*, the plaintiff sued after having been issued citations for hunting without a valid license and later for "taking deer by auto," and subsequently having been acquitted of both charges. 547 N.W.2d 208, 210-11 (1996). *We determined that the defendant officers of the Department of Natural Resources were entitled to qualified immunity from federal constitutional claims* because the "plaintiff ha[d] not shown a factual issue concerning the unreasonableness of defendants' actions based on the existing law." *Id.* at 215-16.
>
> We believe the government officials in these cases would be reluctant to fully perform their jobs if they could be found strictly liable for actions that happened to violate someone's constitutional rights. There is a danger of over-deterrence.

Id. (emphasis added).

Indeed, the *Baldwin* Court specifically rejected the argument being made here by Venckus:

> Thus, the right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself. Such an approach is not consistent with Iowa precedent or Restatement section 874A, and would result in too little play in the joints. Logically, the threshold of proof to *stop* an unconstitutional course of conduct ought to be less than the proof required to *recover damages* for it. Indeed, if a right of recovery for a constitutional tort existed whenever a constitutional violation occurred, it stands to reason that such

> recovery could not be subject to other limits, such as a statute of limitations.

Id. at 277-78 (Citations omitted. Emphasis in original).

The remedies available to Venckus through the IMTCA common law claims are adequate. Under the IMTCA, "Tort" includes "any right under any constitutional provision . . . ." Iowa Code §670.2(1). In *Godfrey v. State of Iowa*, 898 N.W.2d 844 (Iowa 2017), the Iowa Civil Rights Act was found to be an adequate remedy despite the unavailability of punitive damages. *Id.* at 881. Under the IMTCA, punitive damages are available against the individual governmental officers and employees who Venckus claims violated his rights. Iowa Code §670.8. The U.S. Supreme Court emphasized, without qualification, that punitive damages are "'especially appropriate to redress the violation by a Government official of a citizen's constitutional rights'." *Godfrey at* 881 (Cady, C.J., concurring in part and dissenting in part) (quoting *Carlson v. Green*, 446 U.S. 14, 22, 100 S. Ct. 1468, 1473, 64 L. Ed. 2d 15 (1980). Furthermore, Iowa Code §670.8 makes clear that municipalities can purchase insurance to cover punitive damages assessed against their officers and employees, increasing the likelihood that victims of constitutional violations will recover those damages. Iowa Code §670.8.

CONCLUSION

The United States Supreme Court in *Rehberg* warned against allowing participants in the judicial process to be exposed to liability. "Were it otherwise, a

criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves." *Rehberg,* 566 U.S. at 369. (internal citations and quotations omitted). This both predicts the nature of Venckus's present attempts to mischaracterize Officer Rich's involvement in the criminal case, and warns of the danger in allowing Venckus to do so.

The ruling Venckus seeks would lend itself to severe results. Any acquitted defendant would have the right to claim that the case should not have been taken to trial, arguing that liability must be determined by a fact-finder, exposing every law enforcement officer to the "harassment and intimidation associated with litigation." *Minor* at 394. And if that were the case, there would be no reason to limit liability to the police officer, a concern recognized by the *Baldwin* Court: "And there would be no reason for anyone – including judges – to get special treatment. For example, in this particular case, the magistrate who issued the arrest warrant for Baldwin would be subject to a damages suit as well." *Baldwin*, at 278.

Moreover, it is easy to imagine that the threat of such claims could and would be wielded as a cudgel, particularly by wealthy or powerful criminal defendants, to coerce dismissals by prosecutors, lest they face liability themselves, or potentially create liability for the officers who charged the defendant, or who "defamed" the criminal defendant by testifying.

To be clear, this is not a case in which it is alleged that evidence was withheld or manufactured by Officer Rich, or that he committed perjury or lied at any point in the prosecution. Instead, this is simply a case of the officer and prosecutors not believing a criminal defendant's alibi defense. The fact that the jury was not convinced of guilt beyond all reasonable doubt does not mean the allegations against the defendant were "proven to be untrue." (Venckus's Brief, p. 42). Venckus had a criminal trial, and was acquitted. The system worked.[3]

For all the reasons cited in the City's original brief, and this reply brief, the City defendants ask that this Court dismiss the Amended Petition in its entirety.

[3] In the City's original brief, the City defendants raised the issue of the potential for attorney fees. *See* City's Brief, p. 71, footnote 7. Venckus did not address the matter in his brief. In light of federal case law in *Bivens* cases, and this Court's holding in *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 844-45 (Iowa 2009), the City asks that if this case is not dismissed, this Court rule that attorney fees are not available in *Godfrey* constitutional damages claims, a conclusion reached by the trial court in its original order. (App. p. 65).

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing Final Reply Brief of Defendants-Appellants with the Clerk of the Iowa Supreme Court by using the EDMS system.

I also certify that participants in this appeal are registered EDMS users and service of the foregoing Final Reply Brief of Defendants-Appellants on counsel for Plaintiff-Appellee was accomplished by the EDMS system.

/s/ Eric R. Goers
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