No. 18-1856

IN THE

SUPREME COURT OF IOWA

GREGORY BALDWIN,

Plaintiff-Appellant,

v.

CITY OF ESTHERVILLE, IOWA,

Defendant-Appellee.

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

APPELLANT'S BRIEF

JACK BJORNSTAD
JACK BJORNSTAD LAW OFFICE
1700 HILL AVENUE
SPIRIT LAKE, IA 51360
PHONE: 712-332-5225
jack@bjornstad.legaloffice.pro
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of February, 2019, he did serve the Appellant's Final Brief through electronic filing, on the following respective parties:

Douglass L. Phillips
Klass Law Firm, LLP
4280 Sergeant Road, Suite 290
Sioux City, Iowa 51106

Zachary Clausen
Klass Law Firm, LLP
4280 Sergeant Road, Suite 290
Sioux City, Iowa 51106

The undersigned further certifies that on the 21st day of February, 2019, he did e-mail the Appellant's Final Brief to Gregory Baldwin, appellant.

/s/ Jack Bjornstad
Jack Bjornstad, ICIS #AT0000922
Jack Bjornstad Law Office
1700 Hill Avenue
Spirit Lake, IA 51360
ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING

I further certify that on the 21st day of February, 2019, I did electronically file the Appellant's Final Brief.

/s/ Jack Bjornstad
Jack Bjornstad, ICIS #AT0000922
Jack Bjornstad Law Office
1700 Hill Avenue
Spirit Lake, IA 51360
ATTORNEY FOR APPELLANT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case. The questions certified by Judge Bennett concerning this claim for damages invoking article I, sections 1 and 8 are substantial constitutional issues of first impression. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This case concerns certified questions 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. App. 60. For the convenience of the Court, the Appellee provides a brief summary.

On Sunday, November 10, 2013, officers Reineke and Hellickson processed a complaint that Greg Baldwin had been operating a 4-wheeler in a ditch. App. 66-67. Officer Reineke filed a complaint for violation of city ordinance "E321I.10," for operation on a highway. App. 67-68. Officer

Reineke requested an arrest warrant. App. 68. The magistrate issued the warrant. *Id*.

On November 11, 2013, Greg and his wife Lorainne were at their granddaughter's school parking lot for pickup/dropoff. *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. *Id*.

However, the ordinance, "E321I.10," did not exist. App. 67. The arresting officers created ordinance "E321I.10" ex nihilo. *Id*. Greg had violated no law whatsoever. *Id*.; App. 69.

Greg plead not guilty. App. 68. 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. App. 69. 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. *Id*.

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, and that an objectively reasonable officer could reasonably have had arguable probable cause for a violation of ordinance 219-2(2), even though Greg had not actually violated that ordinance, or any other. App. 86. As a result, the officers were entitled to qualified immunity concerning Greg's 4th Amendment and false arrest claims. *Id*.

Greg's article I, section 1 and 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. App. 88.

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. App. 89.

On October 2, 2017, Judge Bennett certified the following question to this 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? On June 29, 2018, the Iowa Supreme Court held that in actions invoking the Iowa Constitution, "to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to conform with the requirements of the law." *Baldwin v. City of Estherville*, 915 N.W. 2d 259, 279 (Iowa 2018).

Judge Bennett again ruled on the parties' cross motion for summary judgment, finding that Greg's article I rights had been violated, and certifying the following questions to the Iowa Supreme Court:

> 1. Can the City assert qualified immunity to a claim for damages for violation of the Iowa Constitution based on its officers' exercise of "all due care"?
>
> 2. If the City can assert such a defense, on the facts presented in this case, does the City have "all due care" qualified immunity to liability for damages for the violation of Baldwin's right to be free from an unreasonable search and seizure under article I of the Iowa Constitution? This question necessarily includes questions about the extent to which reliance on a warrant may satisfy the "all due care" standard and whether the "all due care" analysis considers alternative bases for probable cause or a warrant on which the officers did not rely.
>
> 3. If punitive damages are an available remedy

against an individual defendant for a violation of a plaintiff's rights under the Iowa Constitution, can punitive damages be awarded against a municipality that employed the individual defendant and, if so, under what standard?

4. If punitive damages are available in answer to the previous question, would a reasonable jury be able to find that the applicable standard was met on the facts presented in this case?

5. If an award of attorney's fees would have been available against an individual defendant for a plaintiff who attains some degree of success on a claim of a violation of a plaintiff's rights under the Iowa Constitution, would they be available against a municipality that employed the individual defendant and, if so, under what standard?

6. If the answer to either Question No. 3 or Question No. 5 (or both) is in the affirmative, will retroactive application to the pending case be appropriate?

Opinion and Order Certifying Questions to the Iowa Supreme Court. App. 162-163.

ARGUMENT

I. ERROR PRESERVATION.

This matter is before the Court pursuant to questions of law certified to this Court by the United States District Court for the Northern District of

Iowa, Central Division, in accordance with the provisions of Iowa Code §§ 684A.1 and 684A.2.

II. 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).

III. MERITS.

INTRODUCTION

It is a special privilege to be an Iowa lawyer. Iowa has a long and proud tradition of its Courts being pioneers when it has come to protecting the rights of all people. *See In re Ralph*, 1 Morris 1 (Iowa 1839)(refusing to treat human as property and extending equal protection to persons of all races and conditions); *Clark v. Board of Directors*, 24 Iowa 266 (1868)(striking blow to racial segregation); *Coger v. North West. Union Packet Co.*, 37 Iowa 145 (1873)(African-American steamboat passenger entitled to same rights and

privileges as white passengers). As an Iowa lawyer, the undersigned is privileged to practice in a state that has "been at the forefront in recognizing individuals' civil rights." *Varnum v. Brien*, 763 N.W.2d 862, 877fn4 (Iowa 2009). The Iowa Court of Appeals has strongly declared that Iowa's judicial branch "has for over 150 years led the nation in protecting the individual rights of our citizens. We reaffirm that position." *State v. Blanks*, 479 N.W.2d 601, 605 (Iowa App. 1991)(emphasis added). The undersigned is proud to be an Iowa lawyer.

But it is not just the Courts that jealously value Iowans' constitutional rights. Iowans themselves are passionate about their constitutional rights. In nearly 20 years of speaking with prospective jurors in Iowa, there is one area of clear agreement: Iowans truly prize their constitutional rights. And it cuts across all of the lines that "divide." Men and women stand together. Old and young stand together. All races stand together. Rich and poor stand together. The formally educated and non-formally educated stand together. Business people and the unemployed stand together. Second Amendment enthusiasts and Free Speech advocates stand together. People of all religious faiths and creeds stand together. I've not run into a prospective juror in 20 years who did not truly prize their constitutional rights. I've not run into a prospective

juror in 20 years who, at the end of the day, is not proud of our justice system's efforts to protect and preserve our constitutional rights.

This case presents the Court with yet another opportunity to be at the forefront of protecting the individual rights that Iowans so prize. *Baldwin* took Iowa down an independent path from federal *Harlow* qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As Judge Bennett found, "'exercising all due care with conform to the requirements of the law'" imposes a greater burden on defendants than not violating 'clearly established . . . constitutional rights of which a reasonable person would have known.'" App. 128.

This case presents this Court an opportunity to actually apply the "all due care to conform with the requirements of the law" defense to the facts of a live controversy centering on Iowans' prized constitutional rights.

At its most basic level, however, this case presents this Court an opportunity to give expression to every Iowans' true prizing of their constitutional rights. If your article I rights have been violated in Iowa, what can be done about it in our justice system? Just how will every Iowans' prized constitutional rights be protected?

A. EVEN IF THE OFFICER IS ENTITLED TO AN "ALL DUE CARE" DEFENSE, THE CITY DEFENDANT IS NOT.

Baldwin did not address whether a municipal defendant, as opposed to an individual defendant, may assert a qualified immunity defense. In this case, we are dealing with a municipal defendant.

Pursuant to Iowa Code § 670.2, the City is liable for the torts of its officers. Common law immunity is abrogated by § 670.2. As the Iowa Supreme Court has stated:

> Similarly overlooked by the county is the fact . . . 'every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties * * *.' **Any common-law immunity in tort previously accorded governmental subdivisions was eliminated** except for those torts specifically excluded . . . . *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780, 782 (Iowa 1971).

Symmonds v. Chicago, M., St. P. & P.R. Co., 242, 264 N.W.2d 262 (Iowa 1976) (emphasis added). *Baldwin* "all due care to comply with the requirements of the law immunity" is "shaped by the historical Iowa common law as appreciated by our framers." *Baldwin* at ___. The Municipal Tort Claims Act (MTCA) eliminates any common law immunity. If *Baldwin* immunity is

shaped by Iowa common law, the MTCA should make the City liable for the torts of its officers under Iowa Code § 670.2.

Common law cases do not support a municipality enjoying the qualified immunity of its officers. As the United States Supreme Court stated in *Owen*, "in the hundreds of cases from [the common law] era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers." *Owen v. City of Independence*, 445 U.S. 622, 641 (1980). So not only does § 670.2 prohibit the City from asserting an "all due care" common law qualified immunity defense, municipal defendants were not entitled to a "qualified immunity" or similar defense at common law.

Because *Baldwin* immunity is "shaped by the historical Iowa common law as appreciated by our framers," any immunity afforded municipalities should be based on Iowa common law. *Baldwin* at 280. The City points to no such Iowa common law cases.

Concerning whether the City may invoke an "all due care defense," there is no genuine issue of material fact, and Greg Baldwin is entitled to judgment as a matter of law.

B. THE CITY OFFICERS DID NOT EXERCISE "ALL DUE CARE."

"Sloppy study of the laws" should not be immunized as, of all things, "all due care to comply with the requirements of the law," for either the City or its officers. Instead, their actions should be at issue. The officers' failure to do their minimum homework should be actionable when article I rights, which all Iowan's prize, have been violated.

1. Sloppy study of the laws, plain incompetence, and "all due care."

The Iowa Supreme Court held that in actions invoking the Iowa Constitution, "to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to conform with the requirements of the law." *Baldwin* at 279.

Judge Bennett found the mistake of law at issue here "was not a mistake of law that even federal constitutional law would excuse, because it was the result of sloppy study of the laws the officers were duty bound to enforce, and as such, was plainly incompetent. App. 131.

Concerning actions the officers could have taken, Judge Bennett had previously ruled that:

> . . . the mistake at issue, here, is the result of "a sloppy study of the laws [the officers were] duty-bound to enforce," *see Hein*, 135 S. Ct. at 539-40, as Baldwin contends. The officers, here, had more authoritative resources available to them than each other or other officers or some Handbook that purportedly summarized the applicable law statewide, but did not purport to interpret the City's Ordinances, to clarify that 321I was a distinct chapter of the Iowa Code from 321. Such resources included access to printed or electronic editions of the IOWA CODE (e.g., from a public website, such as https://www.legis.iowa.gov/law/iowaCode) and recourse to the City Attorney.

App. 80.

Judge Bennett has also found that prior Iowa decisions allowing recovery for violations of the Iowa Constitution "confirm that 'bad faith,' 'malice and lack of probable cause,' and lack of 'reasonable ground' for the conduct in question are factors suggesting that the 'all due care' qualified immunity defense is inapplicable." App. 130.

It really was sloppy. The officers, a police captain, and the police chief read an entire Chapter of the Iowa Code, Chapter 321I, into their ordinances. App. 94. That is like reading Chapter 321J, Iowa's Operating while Intoxicated law, into City Ordinances when it really isn't in there. There is

sloppy, and then there is coming to the conclusion that a sixteen-page Chapter of the Iowa Code, including 37 separate code sections, was right there in the City Ordinances when it was not. *See* Iowa Code Chapter 321I. This Court should hold that sloppy study of the law involving misapplying an entire Chapter of Iowa law does not constitute "all due care to conform to the requirements of the law."

The City's defense also strains credulity. The City claims the officers, the police captain, and the police chief "believed when the City adopted and incorporated Iowa Code Chapter 321, it included Chapters 321A-321M." Defendants' Brief in Support of Motion for Partial Summary Judgment, (Doc 21-3) at 4. Are we really to believe the officers and their supervisors thought they could charge Operating While Intoxicated offenses under the City Ordinances based on an imaginary Chapter E-321J? Even if believed, at this stage of the proceedings on this record, is that a reasonable understanding of the law the officers had the duty to enforce? Can this mistake, mistakenly believing fourteen Chapters of the Iowa Code had been adopted when they had not, be construed as "all due care to conform to the requirements of the law?"

Greg's arrest was more than just unreasonable. The officers and their supervisors reasonably should have known the law they were duty bound to enforce. They simply should have known there was no such ordinance as E321I. So whether the standard is negligence, all due care, or recklessness, under the facts of this case, the officers' arrest of Greg for a violation of an ordinance that did not exist should not be afforded immunity.

The Defendants have admitted to negligence by not knowing, or learning, the law. *See* App. 6-7, 10. Negligence means the failure to use ordinary care, which is the care which a reasonably careful person would use under similar circumstances. *See Bartlett v. Chebuhar*, 479 N.W.2d 321 (Iowa 1992); *Schalk v. Smith*, 277 N.W. 303 (1938). Put another way, negligence is failing to do something a reasonably careful person would do under similar circumstances. *See id*. The Defendants have thus admitted that they have committed a mistake that a reasonably careful person would not make under similar circumstances. Because the Defendants have admitted that a reasonably careful person would know, or learn, the law sought to be enforced, the Defendants have admitted their mistake of law is an unreasonable mistake.

"Sloppy study of the laws" is the antithesis of "all due care to conform with the requirements of the law." A finding that the Officers exercised "all due care" would be incompatible with Judge Bennett's finding that they engaged in "sloppy study of the laws." As Judge Bennett found,

> I have relatively little doubt that such conduct was *not* the result of "all due care to conform to the requirements of the law."
>
> *******
>
> This mistake was one that the Iowa Supreme Court would likely conclude deprived officers of any legal authority for the arrest, *see Hetfield*, 3 Green at 585, and that their failure to discover it was not a matter of good faith that would compensate for the error.

App. 131-132.

The City's "all due care" qualified immunity defense fails.

2. Alternative probable cause and "all due care."

Judge Bennett does ask, however, whether the possible existence of alternative probable cause would afford the City immunity. However, alternative probable cause appears to be incompatible with the "all due care to conform to the requirements of the law" defense. As Judge Bennett points out, the "distinction appears to me to be between *taking reasonable action* to 'conform' to the requirements of the law, under the Iowa 'all due care'

qualified immunity standard, and *avoiding action* one should reasonably know would violate the law under the *Harlow* federal qualified immunity standards." App. 128 (emphasis original).

In this case, that means the officers had to take the action of actually learning the law they were duty bound to enforce. The officers had to do "their minimum homework." Instead, they engaged in "sloppy study of the laws."

The question is not a *Harlow* question: Would reasonably competent officers have avoided arresting Greg because they should reasonably know that the law did not support the arrest? Instead, the question is a *Baldwin* question: Should the officers have done their minimum homework and learned that Chapter E321I did not exist? Similarly, the alternative probable cause question is not now a *Harlow* question: Would a reasonably competent officer have arguable probable cause to arrest under some other law, namely City Ordinance, 219-2(2)? Instead, the question remains a *Baldwin* question: Should the officers have done their minimum homework and learned that Chapter E321I did not exist, have sought more authoritative resources, or have consulted the city attorney?

As Judge Bennett notes, "the defense examines whether the officers' exercised 'all due care to conform to the law,' not whether there *happens* to be *some* law, even one the officers did not rely on, that might have provided legal justification for their actions." App. 136. "[T]aking reasonable action to 'conform' to the requirements of the law is the focus. *Id*. at 128. "The focus is on the officers' actions, not on an alternate hypothetical scenario involving actions the officers did not take. With due care as the benchmark, "[p]roof of negligence, i.e., lack of due care" is the important question.

In this case, the officers had to "take reasonable action" to comply with the law." App. 133. They had to do "their minimum homework." *Id*. For the "all due care to conform to the law" defense to apply, the record would have to disclose facts that the officers took action, did their minimum homework by either (1) looking up "E321I.10" in the City Ordinances or (2) considered charges under City Ordinance, 219-2(2). "Their minimum homework" is the action a reasonably careful officer would use under similar circumstances before charging Greg under the imaginary E321I.10. Or, stated differently, charging Greg under the imaginary E321.10 without (1) discovering E321.10 did not exist or (2) considering charges under 219-2(2) or (3) referring to more authoritative resources than a handbook that didn't interpret City

Ordinances, or (4) consulting with the City Attorney, or (5) distinguishing chapters of the Iowa Code, in print or online, is something a reasonably careful officer would not do.

Iowa's "all due care to comport with the requirements of the law" defense is largely based on the work of Professor John Jeffries. *See* John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013). Professor Jeffries sees a "lack of fit between qualified immunity doctrine and the content of certain rights," such as the Fourth Amendment. John C. Jeffries Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 854 (2010). Professor Jeffries writes that:

> Despite the fact that there is nothing conceptually impossible about applying qualified immunity to constitutional claims based on reasonableness, there is a serious practical problem lurking in these cases. Its marker is not the use of 'reasonableness' in the underlying constitutional right, nor indeed any particular form of words. The problem lies, rather, in the architecture of the constitutional right that is defined a higher level of generality; in terms meant to take all relevant considerations into account; and without resort to particularized rules and doctrines that clarify and define the right. For rights having this architecture, an independent role for qualified immunity is hard understand it even harder to justify.
>
> *******

> One might have thought that qualified immunity would simply merge into the merits.

Id. at 860-861.

In this article I, section 8 case, it is also hard to understand the independent role for the "all due care" defense. Article I, section 8, like the 4th Amendment, is defined at a high level of generality. "Reasonableness" is the key. And the "reasonableness" of the seizure here has already taken all relevant considerations into account in the lack of probable cause determination. *See* App. 114–123.

Others have criticized double-counting reasonableness as well:

> When these two standards are both operating, a court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable. The application of this nonsensical series of questions leads to skewed results. Most problematically the two doctrines lead to two levels of protection for a defendant. Additionally, courts must jump through convoluted analytical hoops that result in unclear and needlessly complicated decisions.

Diana Hassel, *Excessive Reasonableness*, 43 Ind. L. Rev. 117, 124-25 (2009).

Is there a good reason for the "fantastic result" of double-counting reasonableness here? *Baldwin* at 300 (J. Appel dissenting). Judge Bennett has

determined Greg was subjected to an unreasonable seizure under article I, section 8. *Id* at 33. Judge Bennett has determined that the officers engaged in a plainly incompetent "sloppy study of the laws." Is there a need, in this case, to nevertheless carve out room for a "reasonably unreasonable" hypothetical-arguable-alternative-probable cause immunity? Jeffries, *What's Wrong with Qualified Immunity* at 860.

Because the seizure was unreasonable under article I, section 8, the "all due care" inquiry should merge into the merits. Merger may not happen in all article I, section 8 cases. Merger will certainly not happen in all article I cases. But in this mistake of law case under article I, section 8, it is the only approach that does not lead to the "fantastic result" of double-counting reasonableness.

If this Court finds *Baldwin* immunity applies, it will be hard to explain to officers or Greg how he was arrested without probable cause on an ordinance that doesn't exist, but the officers used "all due care to comply with the requirements of the law." If *Baldwin* immunity applies, Iowa's departure from *Harlow* would end up looking identical to a *Harlow* result where the question is whether a reasonable officer have had arguable probable cause on another charge.

3. The arrest warrant and "all due care."

Judge Bennett also questions whether the arrest warrant may amount to "all due care to comply with the requirements of the law." Under Federal law, the issuance of a warrant is not dispositive of the issue of qualified immunity. Despite the issuance of an arrest warrant, Officers "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising a reasonable professional judgment." *Id.* at 345-46.

In this case, as Judge Bennett strongly stated,

> The officers' error in reliance on the warrant was exactly the same as their mistake in citing Baldin for a violation of a non-existent ordinance, in the first place: it was the result of a sloppy study of the laws the officers were duty-bound to enforce. Because of that, on an objective basis, I concluded that it was obvious that no reasonably competent officer would

> have concluded that a warrant should issue based on an alleged violation of an ordinance that did not exist. . . . Likewise, had the officers done their minimum homework and informed the neutral magistrate that no such evidence existed, no magistrate could have reasonably issued the warrant based on the then available information in position of the officers.

Under the facts of this case, including the officers' failure to do their minimum homework, no reasonable magistrate could have reasonably issued the warrant.

C. UNDER THE UNIQUE FACTS OF THIS CASE, THE CITY SHOULD BE SUBJECT TO PUNITIVE DAMAGES.

The allowance of punitive damages is entirely a matter of the jury's discretion. *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976). Plaintiff's motion for summary judgement is not for the allowance of punitive damages. Plaintiff's motion for summary judgment is solely for a judgment of reckless disregard for Greg Baldwin's article I rights.

Under Iowa Code Chapter 670, claims for punitive damages are not allowed. *See* Iowa Code § 670.4(1)(e). The Iowa Supreme Court has, however, affirmed the award of punitive damages in a case based upon an individual defendant's "wanton and reckless" disregard of the plaintiff's Iowa constitutional rights. *Krehbiel v. Henkle (Krehbiel II)*, 129 N.W. 945 (1911).

And as Justice Appel pointed out,

> Chief Justice Cady's concurring opinion in *Godfrey* provided the deciding vote on the question of whether the lack of a punitive damages remedy in the ICRA prevented the Act from preempting a direct constitutional claim. 898 N.W.2d at 880–81 (Cady, C.J., concurring in part and dissenting in part). Chief Justice Cady concluded that on the facts of the *Godfrey* case, the lack of a punitive damages remedy did not cause the remedies in the ICRA to be inadequate. *Id*. Chief Justice Cady noted that the ICRA provides attorney's fees, a remedy that might compensate for a lack of availability of punitive damages. *Id*. at 881. He acknowledged, however, that "[i]n the appropriate case, a remedy of punitive damages may be necessary to vindicate a plaintiff's constitutional rights." *Id*. But, according to Chief Justice Cady,
>
> 'when the claimed harm is largely monetary in nature and does not involve any infringement of physical security, privacy, bodily integrity, or the right to participate in government, and instead is against the State in its capacity as an employer, punitive damages are not a necessary remedy.' *Id*.
>
> **This search and seizure case, of course, does involve infringement of physical security and bodily integrity. Under Chief Justice Cady's concurring opinion, punitive damages may well be necessary to vindicate the plaintiff's constitutional**

> **rights, just as it was in *Krehbiel*.** *See id*.; *Krehbiel II*, 152 Iowa at 606, 129 N.W. at 945.

Baldwin at 297 (J. Appel dissenting)(emphasis added).

In *Godfrey*, Chief Justice Cady pointed out that:

> The importance of punitive damages was an essential part of the United States Supreme Court's opinion in *Carlson v. Green*, 446 U.S. 14, 22, 100 S. Ct. 1468, 1473 (1980). In *Carlson*, a plaintiff alleged that his due process, equal protection, and protection from cruel and unusual punishment rights were violated because prison officials failed to provide him with proper medical attention while he was in their custody. *Id*. at 16, 100 S. Ct. at 1470. The Court asked whether the Federal Tort Claims Act (FTCA) provided the exclusive remedy for the plaintiff. *Id*. at 18-19, 100 S. Ct. at 1471. But because the FTCA explicitly barred punitive damages, the *Carlson* Court found the FTCA "is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id*. at 22, 100 S. Ct. at 1473. **The Court emphasized, without qualification, that punitive damages are "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights.**" *Id*.

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)(C.J. Cady, concurring)(emphasis added).

In fact, since at least as far back as 1763, exemplary damages have been available for constitutional torts. *Huckle v. Money,* (1763) 95 Eng. Rep. 489 (C.P.). The MTCA should not be construed to eliminate the traditional availability of punitive damages for constitutional torts.

This case involves a municipal defendant, not an individual defendant. Although not entirely foreclosed, punitive damages have not generally been allowed against municipalities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The reasons municipalities are not generally liable for punitive damages are that the usual purposes of the remedy are punishment and deterrence. *See id*. In most cases, a municipality does not respond to either punishment and deterrence. Instead, it is thought that municipalities are better controlled by their superiors and the electorate. *See id*.

This case, however, demonstrates that officers are not always punished or deterred by their superiors or the electorate. This case is more like *Webster v. City of Houston*, 689 F.2d 1120 (5th Cir. 1982), as it concerns punishment and deterrence considerations. In *Webster*, the parents of a 17-year-old boy who had been shot and killed by the Houston police sued the city under § 1983. Apparently, the Houston police had a policy of carrying "throw-downs," weapons placed near unarmed suspects killed by officers.

The seventeen-year-old had been unarmed, and a "throw-down" was placed next to him at the scene.

The Fifth Circuit, on appeal, reversed the award of punitive damages against the city at trial, citing *Fact Concerts* as controlling precedent. In a concurring opinion, however, Judge Goldberg acknowledged that although bound by *Fact Concerts* precedent, its rationale did not apply to the facts of *Webster*. *Id*. at 1236. In short, Judge Goldberg found that the superiors in the police department were unlikely to sanction the officers because their collective policy was to support "throw-downs." *Id*. at 1237. Punitive damages were necessary in *Webster* to deter and punish both the officers and their superiors. *Id*. Further, Judge Goldberg found that the electorate was unlikely to deter or punish the superiors or the officers because without a punitive damages award, the public would never be "nudged out of their blissful ignorance." *Id*.

Concerning the actual rationale behind disallowing punitive damages against a municipality, this case is similar to *Webster*. Here, in making the decision to charge Greg under the non-existent E321I charge, the officers "discussed the matter with the City's police chief and a police captain." *See* App. 94. So it was not just the officers who made the decision to charge a

violation of the non-existent ordinance without checking the ordinance book, Iowa Code, or seeking the counsel of the City Attorney. It was the chief, the police captain, and the officers.

Like in *Webster*, in this case it is very unlikely that the officers' superiors will sanction the officers for their sloppy study of the law and plainly incompetent practices. The superiors are just as culpabale, just as in *Webster*. Punitive damages are necessary in this case to deter and punish both the officers and their superiors.

Further, like in *Webster*, in this case it is very unlikely that the electorate will ever punish the superiors or the officers because without a punitive damages award, the public will never be "nudged out of their blissful ignorance." *Webster* at 1237. The city electorate should know their police chief, police captain, and officers make arrests on non-existent ordinances, think 14 Chapters of the Iowa Code are in the City Ordinance book when they are really not, and have been branded by a Federal Judge as engaging in "sloppy study of the laws."

Given the historical and vital role punitive damages have played in constitutional tort litigation, and the unique facts of this case, punitive damages should be allowed against the City. This Court, unlike the *Webster*

court, is of course not bound by *Fact Concerts* in this article I case. As the Iowa Supreme Court has recognized, "[i]n interpreting article I, section 8, we may look to federal caselaw, the caselaw of other states, the dissenting opinions of state and federal courts, and to secondary materials for their persuasive power." *State v. Coleman,* 890 N.W.2d 290 (2017) citing *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014).

While punitive damages may not be allowed against municipalities in all future cases, in this case the important interests of punishment and deterrence should apply to both the supervisors and the officers. Punitive damages should be allowed against the City.

D. OFFICERS REINEKE AND HELLICKSON ACTED WITH RECKLESS DISREGARD TO GREG BALDWIN'S INVIOLABLE RIGHT TO BE FREE FROM UNREASONABLE SEIZURES.

Should the Court determine that punitive damages against a municipality are appropriate, the punitive damages analysis in this case begins with Iowa Code section 668A.1(1)(a). In order to be awarded punitive damages, a plaintiff must prove by a preponderance of clear, convincing, and satisfactory evidence that the defendant's conduct constituted a willful and wanton disregard for the rights of another. *See* Iowa Code § 668A.1(1)(a); *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153,

156 (Iowa 1993). Willful and wanton conduct is shown "when an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007).

Punitive damages are also deemed appropriate when a tort is committed with either actual or legal malice. *Jones v. Lake Park Care Ctr., Inc.*, 569 N.W.2d 369, 378 (Iowa 1997). "Actual malice may be shown by such things as personal spite, hatred, or ill-will and legal malice may be shown by wrongful conduct committed with a willful or **reckless disregard for the rights of another**." *Cawthorn*, 743 N.W.2d at 529 (emphasis added).

> The distinction among such categories as "negligence," "reckless or callous indifference," and "intentional" conduct can be elusive. According to general tort principles, however, a central distinction among these categories involves the actor's degree of certainty that negative consequences will result from his act or omission. If a person acts either with the desire to cause the harm or with the belief that the harm is certain to result, the action is labeled "intentional." If the actor has no such desire or belief, but acts unreasonably in light of the risks, his

> behavior is labeled "negligent." Between the poles of "intent" and "negligence" lies the gray area of "reckless indifference." *See* W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts Sec. 31, at 169-70 (5th ed.1984). In the present context, involving concerns about the abuse of power, we find it most appropriate to view "reckless or callous indifference" not as a heightened degree of negligence (akin to "gross negligence"), but rather as a lesser form of intent. An intentional violation of a person's constitutional rights occurs if the official desires to cause such a violation or believes that his conduct is certain to result in such a violation. A recklessly or callously indifferent violation occurs, in contrast, if the official believes (**or reasonably should believe**) that his conduct is very likely (but not certain) to result in such a violation. *See* Restatement (Second) of Torts Sec. 500, comment f (1977) (comparing intentional misconduct and recklessness). Cf. *Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir.1978) (approving the view, in the context of a securities fraud case, that "reckless conduct 'comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence' ") (quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir.1977)).

Germany v. Vance, 868 F.2d 9, 18 n. 10 (1st Cir. 1988)(emphasis added).

An award of punitive damages does not require that the defendant have an actual malicious intent. Nor does a trier of fact have to find that the

defendant manifested personal animosity to the plaintiff. Punitive damages may be awarded for reckless disregard for the rights of another.

"[O]fficers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable." *U.S. v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005). The officers' and supervisors' sloppy study of the law, failure to refer to more authoritative resources than a handbook that didn't interpret City Ordinances, failure to consult with the City Attorney, and failure to distinguish chapters of the Iowa Code, in print or online, amounts to reckless disregard for Greg's constitutional rights. The officers and their supervisors, but for their sloppy study of law, reasonably should have believed that an arrest for a violation of "Chapter E321I" would result in a violation of Greg's article I rights.

Concerning whether the officers and their supervisors acted with reckless disregard for Greg's constitutional right to be free from unreasonable seizure and right to liberty, there is no genuine issue of material fact, and Greg is entitled to judgment as a matter of law.

E. GREG BALDWIN IS ENTITLED TO ATTORNEY FEES.

1. Prevailing Party and Catalyst.

It is important to note at the outset that the right to be free from unreasonable search and seizure is the same ancient right, whether memorialized in the 4th Amendment or article 1, section 8.

"Victory in a civil rights suit is typically a practical, rather than a strictly legal matter." *Aubin v. Fudala*, 782 F.2d 287 (1st Cir. 1986). Regardless of the outcome of the pending motions or trial, Greg has already achieved some of the benefit sought from his civil rights suit, namely, Iowa adopting an "all due care" affirmative defense rather than the Federal *Harlow* qualified immunity defense and a determination that his article I rights were violated. Even establishing that the "all due care" defense is (1) an affirmative defense and (2) that the defendant must plead and prove the defense is a development in the law that achieved some of the benefit of the suit. Thus, § 1988 allows attorney's fees as a prevailing party. *See Exeter-West Greenwich Regional School District v. Pontarelli*, 788 F.2d 47 (1st Cir. 1986).

This is not a situation where a typical pendant state-law claim, such as false arrest, has reached a favorable disposition after dismissal of a plaintiff's § 1983 claims. By contrast, Greg's claims for violation of his right to be free from unreasonable search and seizure, the same ancient right under the 4th amendment or article 1, section 8, have already achieved significant benefit

sought from the civil rights suit. By successfully seeking and obtaining a departure from federal qualified immunity, establishing that the defense is an affirmative defense, establishing that the defendant must plead and prove the defense, and establishing that his article I rights were violated, Greg is a prevailing party because his litigation was a catalyst to change the law in Iowa. *See id*.

2. ITCA Attorney's fees.

Attorney's fees are awarded in a § 1983 case to a prevailing party under § 1988. Attorney's fees are also awarded in actions brought pursuant to Iowa Code Chapter 669, the Iowa Tort Claims Act (ITCA), including Iowa constitutional torts. Under the ITCA, attorney fees are statutory. But the statute must be read very closely:

> 669.15 Attorney fees and expenses — penalty.
>
> **The court rendering a judgment for a claimant under this chapter** or the attorney general, making an award under section 669.3 or 669.9, **shall, as a part of the judgment or award, determine and allow reasonable attorney fees and expenses.** The attorney fees and expenses shall be paid out of but not in addition to the amount of judgment or award recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of

> that allowed under this section, if recovery be had, shall be guilty of a serious misdemeanor.

Iowa Code § 669.15 (emphasis added).

This code section makes it incumbent on the Court, when it renders judgment for a plaintiff, to determine and allow attorney's fees "**as a part of the judgment**." So the "parts" of the judgment are the damages to the claimant, the attorney fees, the expenses, etc. Then, after the whole judgment has been rendered, when it comes for the judgment to be paid by the State, attorney's fees and expenses are paid out directly "to the attorneys" by the State and the rest of the judgment is paid to the claimant.

The language in the second sentence of the statute about attorney fees being paid "out of but not in addition to the amount of judgment" **does not mean** that the Court determines damages, then subtracts the fees out of the damages judgment. That would be directly contrary to the first sentence of the statute, which makes it clear that fees are but a "part of the judgement" rendered by the Court.

3. ICRA Attorney's Fees.

Under Iowa Code Chapter 216, the ICRA, "[t]he reason a successful civil rights litigant is entitled to attorney fees 'is to ensure that private

citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts.' "*Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990) (quoting *Ayala v. Ctr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)). There is no reason to distinguish the article I rights to be free from discrimination protected under the ICRA from the article I rights in an Iowa constitutional tort action. The same standards for awarding attorneys fees should apply, including the lodestar method of determining reasonable fees and the same prevailing party test.

4. Equal Protection.

If attorney's fees are awarded for constitutional torts under § 1983 and § 1988, and are awarded under the ITCA, and are awarded under the Iowa Civil Rights Act (ICRA), it would leave an inexplicable gaping hole not to allow attorney's fees for municipal officers' violations of Iowa constitutional rights to a prevailing party.

Any bar of attorney's fees just because Greg is the victim of a governmental tort concerning article I, sections 1 and 8, while the victims of governmental torts under the Iowa Civil Rights Act suffer no such bar would be arbitrary. *See* Iowa Const. article I, § 6. Similarly, any bar of attorney's fees just because Greg is a victim of an Iowa constitutional tort, while the victims

of federal constitutional torts suffer no such bar under 42 U.S.C. § 1983 actions which invoke 42 U.S.C. § 1988, would be arbitrary. *See Id*.

Applying the rational basis test, the question is whether the classification or distinction drawn by barring attorney's fees for article I claims is reasonably related to some legitimate state interest. The party attacking the classification has the heavy burden of proving the action unconstitutional, and must negate every reasonable basis upon which the action may be sustained. *Miller v. Boone County Hosp*., 394 N.W.2d 776 (Iowa 1986).

There are not many potential legitimate state interests for distinguishing between victims of Iowa constitutional torts and federal constitutional torts or ICRA claims. Protecting the public treasury and not wanting to chill the ardor of municipal employees are two possibilities. Both of those potential state interests, however, are negated by the current state of Iowa law, for two reasons.

First, "[l]ocal governments 'rarely budget for claims but carry liability insurance as the statutes permit....' *Id* at 779. "The legislature clearly contemplated local governments would purchase liability insurance to protect themselves." *Id*. citing Iowa Code § 670.7. Liability insurance both

protects the public treasury by making planning and budgeting easier, but also makes sure individual officers are not over-deterred in the performance of their duties.

Second, the MTCA's indemnification scheme itself negates the potential state interests in maintaining the distinction. Iowa Code § 670.2 makes the municipality subject to the liability of its officers. Coupled with Iowa Code § 670.7, there is no threat of overdeterrence if officers and municipalities were subjected to attorney's fees for article I violations. They would be deterred in not much more degree than they already are facing parallel § 1983 claims or for actions to vindicate article I rights to be free from discrimination under the ICRA.

5. Private Attorney General Doctrine.

Plaintiff further and relatedly requests attorney fees and costs under the private attorney general doctrine. The Iowa Supreme Court recently cited with approval the private attorney general doctrine in support of its judgment in *Lee v. State*:

> The "private attorney general" rationale for attorney fee awards implicitly acknowledges the availability of attorney fees is often "crucial to the practical ability to bring suit." Conceptualizing attorney fee

> awards as "ancillary" to prospective relief in the sense that they serve "as a means of achieving future compliance with federal law."

Lee v. State, 874 N.W.2d 631, 642 (Iowa 2016) (internal citations omitted).

Other states have recognized the doctrine in awarding attorney's fees, particularly in actions to enforce state constitutional rights. In *Deras v. Myers* the Oregon Supreme Court awarded plaintiff fees because his victory benefitted "all members of the public" by enforcing "the interest of the public in the preservation of the individual liberties guaranteed against governmental infringement of the constitution." *Deras v. Myers*, 535 P.2d 541 (Or. 1975). The state of Washington acknowledges both the private attorney general doctrine and the protection of constitutional principles as equitable doctrines supporting fee awards. *Pub. Utlity Dist. No. 1 v. Kottsick*, 545 P.2d 1 (Wash. 1976). *See also Hickel v. Southeast Conference*, 868 P.2d 919, 923 (Alaska 1994)(awarding fees to plaintiffs challenging a redistricting plan constitutional grounds); *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984) (awarding fees where plaintiffs challenged legislature's reapportionment scheme on state constitutional grounds and noting solo law firm engaged in litigation with Attorney General's Office).

In this case, Greg seeks to enforce the interest of the public in the preservation of the individual liberties guaranteed under the Iowa Bill of Rights. Just as in § 1983 claims and ICRA claims, attorney's fees are crucial to Greg's ability to bring suit against the City and its officers. For the above reasons, the Court should award attorney's fees.

F. Punitive Damages and Attorney's Fees are just Categories of Damages, and Would not be "Retroactive."

Punitive damages as a category or damages for violations of article I rights have been the law in Iowa for over 100 years. In 1911 the Iowa Supreme Court affirmed the award of punitive damages in a case based upon the defendant's "wanton and reckless" disregard of the plaintiff's Iowa constitutional rights. *Krehbiel v. Henkle (Krehbiel II)*, 129 N.W. 945 (1911). Punitive damages are a settled matter of law concerning actions based on article I rights, and their imposition would not be "retroactive." In fact, since at least as far back as 1763, exemplary damages have been available for constitutional torts. *Huckle v. Money, (1763)* 95 Eng. Rep. 489 (C.P.).

Whether the requested damages are compensatory damages, punitive damages, or attorney's fees as damages, "retroactivity" is not an issue. The *Krehbiel* Court did not withhold the requested punitive damages as

"retroactive." The Plaintiff requested the damages. The Court awarded the damages. In *Godfrey*, the Iowa Supreme Court allowed a damages remedy for a violation of article I, section 9. The Court did not make the relief prospective only. Similarly, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court did not make damages against federal agents prospective only.

CONCLUSION

Iowans truly prize their article I rights. "Sloppy study of the laws" should not be immunized as, of all things, "all due care to comply with the requirements of the law," for either the City or its officers. Instead, the officers' actions should be at issue. The officers' failure to do their minimum homework should be actionable when Greg's article I rights, which all Iowan's prize, have been violated. As part of the remedy in a case involving supervisors, the historical and vital remedy of punitive damages should be allowed. Likewise, attorney's fees, which are crucial for citizens to mount article I challenges against powerful municipalities, should be allowed. These relief requested above will help to ensure that Iowa's Courts' long and proud tradition of being pioneers when it comes to protecting the rights of all people takes one more step forward.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Respectfully submitted,

/s/ Jack Bjornstad

Jack Bjornstad
Jack Bjornstad Law Office
1700 Hill Avenue
Spirit Lake, IA 51360
Phone: 712-332-5225; Fax: 712-332-8138
E-mail: jack@bjornstad.legaloffice.pro
Attorney for Plaintiff-Appellant

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/s/ Jack Bjornstad
Jack Bjornstad, ICIS #AT0000922
Jack Bjornstad Law Office
1700 Hill Avenue
Spirit Lake, IA 51360
ATTORNEY FOR APPELLANT

ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the necessary copies of the foregoing Appellant's Final Brief is $0.00, due to the cost savings of using the Iowa Appellate Court's Electronic Filing system.

/s/ Jack Bjornstad
Jack Bjornstad, ICIS #AT0000922
Jack Bjornstad Law Office
1700 Hill Avenue
Spirit Lake, IA 51360
ATTORNEY FOR APPELLANT