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 REPLY BRIEF

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ARGUMENT

A. THE OFFICERS FACTUAL BAD FAITH OVERRIDES ANY PURPORTED LACK OF CLARITY IN THE LAW.

Explaining "all due care to conform to the requirements of the law" immunity, the Iowa Supreme Court stated:

> *Harlow* examines objective reasonableness; thus, in some ways it resembles an immunity for officials who act with due care. However, it is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally, we think of due care or objective good faith as more nuanced and reflecting several considerations. *See*, *eg.*, *Hetfield* , 3 Greene at 585. **Factual good faith** may compensate for a legal error, and **factual bad faith** may override some lack of clarity in the law.

Baldwin v. City of Estherville, 915 N.W.2d 259, 279 (Iowa 2018).

This is a case where factual bad faith overrides some lack of clarity in the law. To be more precise, this is a case where the facts indicate the officers and their superiors based an arrest on their outlandish and erroneous belief that fourteen Chapters of the Iowa Code had been adopted by reference into the city ordinances.

The City argues for just what the Iowa Supreme Court rejected, namely focus on how clear the underlying constitutional law was. The City argues

that alternate arguable (not actual) probable cause establishes the good faith of the officers. But that is not what the Iowa Supreme Court explained. "Factual good faith" must presumably be tied to the facts. If good faith is divorced from the facts of the case, the result is *Harlow* immunity.

Because factual bad faith is the inquiry, the facts should be examined closely. The facts in this case show the officers and their superiors were completely unreasonable in their charging decision, for a multitude of reasons. They mistakenly read fourteen Chapters of the Iowa Code into the city ordinances. Completely unreasonable. They charged an imaginary offense, violation of E321I.10 for ATV Operation on Highway. Completely unreasonable. They ignored the plain language of city ordinance E-321.1, which does not list Chapter 321I as an incorporated chapter:

> (Code of Iowa, 1999, Chapter 321)
> **E-321.1 OFFENSES.** All sections of the state statutory law, rules of the road, Chapter 321 of the Code of Iowa, the offense of which constitutes a simple misdemeanor, are hereby adopted and incorporated by this reference the same as if set forth in full herein into the Code of Ordinances of the City of Estherville, Iowa, and the violation of such applicable state statutory laws of the road shall be a violation of this chapter if the offense occurs within the territorial city limits of the City of Estherville.

Completely unreasonable. They ignored Iowa Code § 321I.10(3), which specifically provides that "Cities may designate streets . . . which may be used for operation of . . . all-terrain vehicles." Completely unreasonable. They charged Greg with "operation on the highway" while ignoring city ordinance 219-2, which specifically allows operation on the city streets:

> **219-2 PLACE OF OPERATION.** ATV/UTVs may be operated upon the streets of the City of Estherville, Iowa, except as prohibited in Subsection 1 of this section, by persons possessing a valid Iowa Driver's License.

Completely unreasonable. The arrest warrant that did issue at the officer's request was for violation of an imaginary code section, E321.10. Completely unreasonable. Measured by the actual facts, this is an egregious case of "factual bad faith."

This fact bears repeating. Greg was arrested for "operation on the highway" while officers ignored a specific ordinance which states "ATV/UTV's may be operated on the streets." As a matter of factual bad faith, Greg's arrest for a violation of E321I.10 is beyond defense.

Good faith is measured by whether conduct was reasonable under the circumstances. *See O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660, 662

(Iowa 1993). Bad faith is established when no reasonable basis exists to support a decision. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). Under the facts of this case, Greg's arrest for a violation of an ordinance that did not exist is not supported by any reasonable factual basis. The officers' factual bad faith, demonstrated by the unreasonableness of their actions and mistakes, overrides any purported lack of clarity in the law.

B. THE MTCA MAKES THE CITY LIABLE FOR THE CONSTITUTIONAL TORTS OF ITS EMPLOYEES.

Not all Article I actions need to be brought pursuant to the MTCA. But in this case, Iowa Code § 670.1(4) specifically provides that an actionable tort includes the "impairment of any right under any constitutional provision." And § 670.2 makes "every municipality subject to liability for its torts and those of its officers and employees."

The City wants to draw the line at *Monell* liability. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). But in this case, that is something this Court does not have to decide. The MTCA makes the City liable for the constitutional torts of its employees. Whether the actions of supervisors or officers are examined, under the MTCA the City is subject to liability.

C. ARTICLE I CLAIMS, WHICH SHOULD BE DECIDED BY IOWA COURTS, WILL END UP IN THE FEDERAL COURTS IF THE ONLY WAY ATTORNEY'S FEES ARE AVAILABLE IS BY INCLUDING A PARALLEL § 1983 CLAIM.

Plaintiffs in article I cases will seek attorney's fees. In many cases, no lawyer can bring the claim unless fees under U.S.C § 1988 incentivize them to go forward. So article I claims will be brought in conjunction with parallel claims under U.S.C. § 1983 to take advantage of § 1988 attorney's fees.

Those article I claims will end up in Federal Court. Either plaintiff's attorneys will file in Federal Court or, like in this case, Defendants will routinely seek removal of article I claims filed in conjunction with parallel § 1983 claims to Federal Court. Either way, the article I claims are going to end up in Federal Court if the only way attorney's fees are available is by including a parallel § 1983 claim.

That is a bad idea. Iowa Courts should decide article I claims, not Federal Judges. Article I has been construed to provide more protection than the federal Bill of Rights. It makes little sense to litigate the constitutional protections that afford the most protection, article I claims, in Federal Court. The same is true of Iowa's "all due care to comport to the requirements of the law" immunity. Iowa's unique defense should be developed in Iowa courts.

Article I jurisprudence would benefit from moving through the Iowa District Courts, Iowa Court of Appeals, and eventually to the Iowa Supreme Court if necessary. But until attorney's fees are available in Iowa for violations of the exact same ancient rights protected under both the Federal and State constitutions, it is the Federal Courts that will get the cases.

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, as demonstrated by the facts of the case, 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. The 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,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This reply brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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

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