IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1856

GREGORY BALDWIN,
Plaintiff-Appellant,

v.

CITY OF ESTHERVILLE, IOWA,
Defendant-Appellee.

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

FINAL AMICUS CURIAE BRIEF of IOWA COMMUNITIES ASSURANCE POOL IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE

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

ICAP members represent many of the stakeholders on the defense side of municipal liability cases. ICAP members ensure the rights of all persons are protected while promoting the safety of all persons. A priority of ICAP members is to use their resources to best meet this wide-reaching goal that is in the interest of all Iowa residents. Thus, ICAP submits this amicus brief in support of the City of Estherville and, more generally, in support of those governmental entities and their employees, who perform their governmental duties to the best of their abilities within the confines of their scarce resources, and who need the protection of qualified immunity from the potential onslaught of unfair and costly litigation.

STATEMENT OF AUTHOR AND CONTRIBUTION— RULE 6.906(4)(d)

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

ARGUMENT

The United States District Court for the Northern District of Iowa has certified six questions to the Iowa Supreme Court pertaining to issues related to state constitutional torts and qualified immunity. ICAP has particular interest and insight as it concerns Questions 1, 2, 3, and 5, and provides argument and authority on those questions hereafter. On Questions 4 and 6, ICAP agrees with and supports the arguments made by Defendant-Appellee, the City of Estherville, and the State of Iowa in its amicus brief.

I. QUESTION 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"?

The first certified question asks this Court to resolve whether the City can assert qualified immunity to a claim for damages for a violation of the Iowa Constitution based on its officers' exercise of "all due care." *Baldwin*

v. City of Estherville, 336 F.Supp.3d 948, 958 (N.D. Iowa 2018). This question necessarily incorporates an inquiry into how a city can violate the Iowa Constitution, and then in turn, whether strict liability is appropriate for municipalities despite the fact the court already found constitutional torts are not strict liability claims. These sub-questions are addressed in turn.

A. Causation for a constitutional tort against a municipality can only be imposed by a custom, policy, or practice, not mere vicarious liability.

According to the last released data from the Governments Division of the U.S. Census Bureau, there were 152,396 full-time employees of state and local government in Iowa.[1] Statistics are not readily available concerning the presumably tens-of-thousands of part-time employees of those governments. Adopting a strict vicarious liability standard would make municipalities, and thus tax-payers, responsible for the acts of thousands of individuals regardless of how isolated the incident is, and regardless of how many policies, procedures, trainings, and customs are in place to prevent constitutional infractions. Such a scheme of vicarious liability is not grounded in relevant legal authorities and is improper. Rather, the Court

[1] Exploring the Intricate Layers of State and Local Governments: Iowa, The Governments Division of the U.S. Census Bureau, issued March, 2011, https://www2.census.gov/govs/pubs/state_snapshot/gov07-ia.pdf (last accessed February 18, 2019).

should adopt the standard that causation for constitutional torts against municipalities must be specifically proven and liability shall only accrue to a municipality by showing the municipality, itself, actually caused damage through its policy, practice, or custom.

Importantly, in recognizing constitutional torts for money damages in the recent decisions of *Godfrey*[2] and *Baldwin*,[3] the Court has consistently described these claims as torts—observing that a constitutional tort is still a tort. An essential element of such a tort claim is causation. *See e.g. Garr v. City of Ottumwa*, 846 N.W.2d 865, 869 (Iowa 2014) (finding insufficient evidence to support causation between a municipality's conduct and the plaintiffs' damages). Enumerating the policy, practice, or custom requirement for causation for municipal torts is not creating new law, but rather, reinforcing existing law that there must be some type of actual action on behalf of a municipality for it to act. The policy, practice, custom standard is a **causation** standard and, in fact, incorporates how municipalities have traditionally been thought to act: through official acts of the city councils. *See* Iowa Code § 364.3(1) ("a city council shall exercise a power only by the passage of a motion, resolution, an amendment, or an

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2 *Godfrey v. State*, 898 N.W.2d 844, 877 (Iowa 2017).

3 *Baldwin v. City of Estherville*, 915 N.W.2d 259, 281 (Iowa 2018) (hereafter referred to as "*Baldwin I*").

ordinance"); *see also City of Akron v. Akron Westfield Cmty. Sch. Dist.*, 659 N.W.2d 223, 225–26 (Iowa 2003).

As referenced by the Court in *Baldwin I*, Michigan courts have rejected vicarious liability for state constitutional torts. In Michigan, a state agency may be held liable for a violation of the state constitution only if a custom, policy, or policymaker caused a person to be deprived of a constitutional right and the policy or custom at issue was "the moving force" behind the constitutional violation. *Carlton v. Dep't of Corrections*, 215 Mich. App 490, 505; 546 N.W.2d 671 (1996); *see also Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

Under the due care qualified immunity created in *Baldwin I*, officers are incentivized to take care to comply with constitutional requirements and municipalities are incentivized to guarantee their policies, practices, and customs are consistent with constitutional mandates. If an officer acts outside her scope of training and acts without due care, the aggrieved party can turn to that officer for recovery. Only when the officer acts within her training (and thus pursuant to a municipal policy, practice, or custom) and still deprives a party of a constitutional right should liability sound in the municipality.

This Court should reaffirm in that there must be causation for a municipality to be liable, not merely responsibility for the singular acts of thousands of employees.

B. Even if the Court Does Not Apply the Policy, Practice, or Custom Standard, Municipalities May Still Assert Due Care Qualified Immunity

Even if the Court declines to apply the policy, practice, or custom standard and rather applies vicarious causation/liability, the Court implicitly decided in *Baldwin I* a municipality can assert the affirmative defense of due care qualified immunity. This implicit holding should now be made explicit to avoid any further confusion, and the portion of the certified question asking whether qualified immunity is available to a municipality must be answered in the affirmative.

In his Petition in Count I (article I, § 8 of the Iowa Constitution) and Count III (article I, § 1 of the Iowa Constitution), Baldwin alleges the City, through its officers, acting within the scope of their employment, violated his rights. At no point were the individual defendants ever sued for violations of the Iowa Constitution. Thus, when this Court concluded in *Baldwin I* that the defendant can assert the affirmative defense of all due care qualified immunity, by virtue of the claims and parties involved, the Court already concluded a municipality (the only defendant in *Baldwin I*)

can assert the affirmative defense. *Baldwin I*, 915 N.W.2d at 265. This holding has already been implemented by the Iowa Court of Appeals in analyzing the application of due care qualified immunity to a government entity defendant. *Lennett v. State*, No. 17-2019, 2018 WL 6120049 at *3 (Iowa Ct. App. Nov. 21, 2018) (affirming the denial of a motion to dismiss filed by the State because an affirmative defense cannot be raised during a motion to dismiss, but finding "qualified immunity is available as an affirmative defense to constitutional torts").

Here, Plaintiff relies upon Iowa Code section 670.2(1) for the proposition that municipalities are **automatically**, and **without defense**, liable for the torts of their employees. The cherry-picking of Section 670.2(1) as a waiver of due care qualified immunity, while ignoring the other provisions of Chapter 670 limiting municipal liability and providing other immunities, is inappropriate. Even assuming Iowa Code section 670.2 applies to constitutional torts, there is no language in *Godfrey*, *Baldwin I*, or the Iowa Code preventing municipalities from asserting due care qualified immunity on behalf of their officers of employees. The thrust of *Godfrey* and *Baldwin I* is that these Constitutional money damages claims, though dormant for decades, have always existed and the parties must therefore look to the existing common law for guidance. However, due care qualified

immunity was recognized in *Baldwin I*, and thus, the abrogation of common law immunities that occurred through Section 670.2 could not abrogate the newly created due care qualified immunity. *Baldwin v. City of Estherville*, 333 F. Supp. 3d 817, 831 (N.D. Iowa 2018) ("Thus, any prior abrogation of common-law immunities is inapplicable to the Iowa Supreme Court's subsequent adoption of a qualified immunity defense to newly-recognized Iowa constitutional claims."). Moreover, the Court in *Baldwin I* did not reject **all** of the Chapter 670 (and Chapter 669) immunities. Rather, the Court found "**some** of those [immunities] are unsuitable for constitutional torts" and others were simply not ripe for resolution; stating "potential applicability of provisions in chapters 669 and 670 other than sections 669.14 and 670.4 [are] not address[ed] today." *Baldwin I*, 915 N.W.2d at 280-81 (emphasis added). One relevant provision in Section 670 immunizes municipalities from claims "based upon an act or omission of an officer or employee of the municipality, **exercising due care**." Iowa Code § 670.4(1)(c) (emphasis added). Thus, applying 670.2 to create liability necessarily implicates other provisions in the chapter, including Section 670.4(1)(c), which allows for "due care" immunity for municipalities.

The assertion municipalities should be strictly liable for such torts has already been rejected by the Court. *Baldwin I*, 915 N.W.2d at 275.

"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." *Id.* at 278–79. A framework that precludes a municipality from asserting due care qualified immunity when its employees can assert it would be arbitrary, unfair, and puzzling. How could it be possible, in a scenario in which both the municipality and the employee are sued, the employee would have due care immunity because her actions comported with due care, and yet the municipality would not be allowed to assert the defense and would be strictly liable? Such an application of due care qualified immunity would wholly subsume the doctrine because no party would ever sue the individual—instead only the strictly liable municipality would be targeted.

This vicarious immunity not only is logical, unlike the strict liability proposed, it has well-founded legal support. First, this Court has found defenses personal to agents, such as immunities, will not ordinarily extend to bar claims against the principal unless the rationale for immunity also applies to the principal. *Hook v. Trevino*, 839 N.W.2d 434, 441 (Iowa 2013). The Court in *Hook* determined the purpose of volunteer immunity under the Iowa Tort Claims Act (to encourage people to volunteer to the state) does not support applying the immunity to the State. *Id.* at 445. Here,

as discussed below, the rationale for applying due care qualified immunity to municipalities as well as its employees are identical.

Instructive to the present matter, Minnesota courts have long adopted what they term as vicarious official immunity. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 561, 663–64 (Minn. 2004). In general, when a public official is found to be immune from suit on a particular issue, his government employer will enjoy vicarious official immunity from a suit arising from the employee's conduct. *Id.* Vicarious official immunity is usually applied "where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Id.* at 664. The Minnesota Supreme Court held: "This court applies vicarious official immunity when failure to grant it would focus 'stifling attention' on an official's performance 'to the serious detriment of that performance.'" *Id.* at 663 (quoting *Olson v. Ramsey County*, 509 N.W.2d 368, 372 (Minn. 1993)). To fail to grant immunity to the governmental entity would create a disincentive for the entity to use its experience and knowledge to create protocols and policies in the future with respect to its operation in a certain area, such as policing and other duties

owed to the general public. *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 508 (Minn. 2006).

As discussed below, this reasoning is further supported by the policy reasons of due care qualified immunity. The municipalities are entitled to assert the due care qualified immunity defense and the first certified question should be answered in the affirmative.

II. Question 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?

In the event this Court answers the first certified question in a manner that it becomes necessary to reach Question 2, the Court must answer the question mindful of the purpose of qualified immunity and, therefore, provide a test for qualified immunity effectuating that purpose.

While the test for qualified immunity may vary between state law and federal law and from state-to-state, the underlying intent and purpose of qualified immunity is uniform. From a broad perspective, the intent and purpose of qualified immunity is to separate insubstantial cases from substantial cases at an early juncture in the legal proceedings so that

insubstantial cases can be swiftly disposed of and substantial cases can proceed with appropriate attention and resources. *Dickerson v. Mertz*, 547 N.W.2d 208, 214–15 (Iowa 1996); *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). This purpose is justified in the context of lawsuits against government officials, and particularly in lawsuits against law enforcement, for a number of reasons.

As an initial matter, to suggest the category of cases involving public officials, and law enforcement in particular, as defendants is just like all other types of tort cases and does not require special considerations such as qualified immunity is naïve. Decisions and actions of governmental officials are almost certain to be viewed positively by some and negatively by others because, while our system of government is democratic, rarely—if ever—does unanimity coalesce around governmental decisions and actions. Examining the duties of law enforcement reveals more starkly this condition. Seldom do individuals suspected of lawbreaking admit and acknowledge misdeeds, particularly during their initial interactions with law enforcement officers. Moreover, the information available to law enforcement when they encounter suspects is likely incomplete. Yet, it is the duty and obligation of law enforcement and the expectation of the public-at-large that officers will take action and not recoil from the need to make difficult decisions under

tense circumstances. Therefore, simply by virtue of doing their jobs, law enforcement officers, and the municipalities that employ them, are much more likely to be hailed into court for specious litigation than a member of the general public.

An average citizen who does not work in the capacity of a public servant is not placed into such adversarial encounters in his or her day-to-day business and is not faced with such a high level of scrutiny. Thus, to suggest ordinary rules of tort law are equally appropriate in the context governmental officials—and for law enforcement in particular—ignores the reality of working in such fields and of government entities presiding over and providing services to the public.

The concerns associated with legal actions against law enforcement and the intent and purpose of qualified immunity to inoculate against such problems have been roundly recognized by the both the Iowa Supreme Court and the United States Supreme Court. For example, the Iowa Supreme Court, in accord with federal case law, has described the intent and purpose of qualified immunity as it relates to governmental officials is to avoid the "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Leydens v. City of Des Moines*, 484 N.W.2d 594, 596 (Iowa

1992) (quoting *Anderson*, 483 U.S. at 638). Stated otherwise, "[a]s recognized at common law, public officers require [qualified immunity] protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Hlubek v. Pelecky*, 701 N.W.2d 93, 98 (Iowa 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). Or as described by Judge Gorsuch—now Justice Gorsuch—during his tenure on the U.S. Court of Appeals for the Tenth Circuit:

> The qualified immunity doctrine … is intended to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages arising from their conduct effectuating their sworn obligation to intervene in aid of public safety, often on a moment's notice with little opportunity for reflection and based on incomplete information.

Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (J. Gorsuch, concurring in part, dissenting in part).

In the present case, where Plaintiff seeks to hold the municipality vicariously liable for actions of individual law enforcement officers, the intent and purpose of qualified immunity to avoid needless and inefficient allocation of limited governmental resources to legal defense is of particular import. "The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). Application of qualified immunity, in appropriate circumstances, should avoid discovery

whenever possible because "inquiries of this kind can be peculiarly disruptive to effective government." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The Supreme Court has repeatedly recognized the burdens of discovery and trial as key to the necessity of qualified immunity. Litigation "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft*, 556 U.S. at 685.

In affirming that qualified immunity applies to constitutional torts in *Baldwin I*, this Court necessarily recognized the validity of the reasoning in favor of the defense. Thus, the next inquiry is into how to effectuate the intent and purpose of the doctrine in light of the Court's declination of the federal approach. Ultimately, the purpose of qualified immunity is lost if it cannot be applied early in the case to determine whether the matter is substantial enough to proceed. Qualified immunity is "an **entitlement not to stand trial** or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Dickerson*, 547 N.W.2d at 215 (emphasis added). "Because qualified immunity is an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks and citation omitted)).

And as the Iowa Supreme Court has previously recognized on a multiple of occasions, "[q]ualified immunity is a question of law for the court and the issue may be decided by summary judgment." *Nelson v. Lindaman*, 867 N.W.2d 1, 7-8 (Iowa 2015) (quoting *Dickerson*, 547 N.W.2d at 215). Therefore, as this Court has stated: "The test is properly applied at the summary judgment stage; no discovery should be allowed until the threshold immunity question is resolved." *Torner v. Reagen*, 437 N.W.2d 553, 554-55 (Iowa 1989).

In order for qualified immunity to be applied at the summary judgment stage—such that the purpose of providing immunity from both liability and suit is met—the "all due care" standard must be objective, as only an objective standard will enable the presiding court to decide immunity questions as a matter of law. An objective test for qualified immunity is consistent with Iowa precedent equating "all due care" with objective reasonableness. As far back as the 1920s the Iowa Supreme Court recognized "all due care" is akin reasonable care, which is an objective test: "All 'due care' is reasonable care, and, conversely, 'reasonable care' is due care." *Kubli v. First Nat. Bank*, 186 N.W. 421, 425 (Iowa 1922); *see Garvis v. Scholten*, 492 N.W.2d 402, 404 (Iowa 1992) (holding reasonableness is an objective standard). Moreover, to the extent "good faith" is a companion

consideration for qualified immunity, this Court described the standard as "**objective** good faith." *Baldwin I*, 915 N.W.2d at 279 (emphasis added).

Turning more specifically to the appropriate test for qualified immunity, consideration of objective criteria from a range of authorities is warranted. First, while this Court has rejected wholesale adoption of the federal test and standards set out in *Harlow* and its progeny, the Court found fault only in that the test "gives *undue* weight to one factor: how clear the underlying constitutional law was"—otherwise referred to as the "clearly established" prong of the federal test. *Id.* at 279 (emphasis added). The remedy to the problem identified by the Court is to give **proper** weight to this factor as part of the qualified immunity analysis, but not give it excessive weight. Thus, the Court ought to incorporate the "clearly established" factor into the objective test for qualified immunity and consider it along with other objective factors.

As to objective good faith, which was recognized in *Baldwin I* as part of the calculus for qualified immunity, the case law regarding objective good faith in Iowa is limited but indicates it 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). Notably, case law explaining the other side of the coin, objective bad faith, is more robust. Objective bad

faith is present when no reasonable basis exists to support a decision. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). More specifically, a decision is not objectively in bad faith, or conversely is made in good faith, as long as it is "fairly debatable either on a matter of fact or law." *Id.* A decision is "'fairly debatable' when it is open to dispute on any logical basis." *Id.* Ultimately, "[b]ad faith requires more than a showing of inadvertence or honest mistake of judgment." *Henke v. Iowa Home Mut. Cas. Co.*, 97 N.W.2d 168, 173 (Iowa 1959).

Related to objective good faith, yet different in some respects, is the concept of mistake of fact and mistake of law. United States Supreme Court decisions on this consideration are illuminating. For example, in determining whether a seizure involving the arrest of a person believed to be operating a motor vehicle in violation of the law concerning brake lights was violative of the Fourth Amendment, the Supreme Court recently made clear the Fourth Amendment tolerates objectively reasonable mistakes of either fact or law. *Heien v. North Carolina*, 135 S. Ct. 530, 533 (2014). In so holding, the Court traced back over two centuries of case law and found consistent support for the principle, even noting some of the cases were more akin to modern qualified immunity. *Id.* at 537 (citing *United States v. Riddle*, 5 Cranch 311, 3 L.Ed. 110 (1809) (involving standard "much like a

modern-day finding of qualified immunity") (collecting additional cases). The Court reasoned: "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Id.* While it is recognized that the Iowa Supreme Court has rejected mistake of law in the context of the exclusionary rule, the standard for allowance of tort damages "does not need to be congruent with the constitutional violation." *Baldwin I*, 915-N.W.2d at 278. "[S]ome gap between constitutional rights and the damages remedy is a good thing. It is not a problem to be solved, but an asset to be preserved." John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 246 (2013). Thus, in cases like the present one seeking tort damages, the gap between constitutional violation and monetary tort remedy is appropriately sustained and, therefore, mistake of fact **or law** is an appropriate factor to use when formulating this jurisdiction's test for qualified immunity. Another factor that enlightens as to whether a government official has acted with objective due care and good faith is whether appropriate procedures have been followed in the run up to the allegedly tortious action. In short, when the law requires certain procedural safeguards be followed prior to intrusion on the constitutional rights of an individual, the failure to comply

with such requirements is likely indicative of an absence of objective due care and good faith. Conversely, where such procedures have been adhered to, this fact must be considered strong evidence—perhaps even dispositive evidence—the actor operated with due care and in good faith. Particular to the present case, the law enforcement officers followed appropriate investigative procedures by obtaining and evaluating the factual evidence, they then considered legal resources that were readily at their disposal, and thereafter followed appropriate legal procedures to obtain a warrant. At that point, the magistrate reviewed the warrant application and approved and issued the warrant. Conformity with such procedures is of great import because:

> Even assuming a search warrant should not have been issued, police officers who requested and executed it are immune from suit except in "rare" instances. Presentation to a superior officer and prosecutor, and approval by a judicial officer before the warrant is issued, "demonstrates that any error was not obvious." … [W]here the search or seizure is executed pursuant to a warrant, the fact that a neutral magistrate issued the warrant "is the clearest indication that the officers acted in an objectively reasonable manner." The warrant confers a "shield of immunity" lost only in "rare" circumstances, even for mistakenly issued warrants.

Armstrong v. Asselin, 734 F.3d 984, 991-92 (9th Cir. 2013). Thus, as is the case here, procedural regularity must be considered as a strong, and perhaps dispositive, factor in determining whether qualified immunity applies.

Alternative bases for probable cause is another appropriate factor to be utilized in the qualified immunity analysis. At the outset, this Court has previously held the government "is *not* limited to the reason stated by the investigating officer in determining whether either probable cause or reasonable suspicion existed for the stop." *State v. Tyler*, 830 N.W.2d 288, 295 (Iowa 2013). Next, looking to the nature of constitutional torts, this Court made clear in *Baldwin I* that: "Constitutional torts are torts" and, therefore, are to be "assimilated to the most similar common law tort." *Baldwin I*, 915 N.W.2d at 276, 281. The common law tort most similar to Plaintiff's constitutional tort claim in this instance is false arrest. Damages are, of course, an essential element of a tort claim for false arrest. *See* Iowa Civil Jury Instruction 2800.1. Importantly, until a potentially tortious action "produces injury to claimant's interest by way of loss or damage, no cause of action accrues." *Wolfswinkel v. Gesink*, 180 N.W.2d 452, 456 (Iowa 1970). It follows that if there exists an alternative basis for probable cause to arrest, then an arrestee has suffered no loss or damage and accrued no cause of action. On this reasoning, existence of an alternative basis for probable cause is properly considered in this case and similar cases because if an appropriate alternative basis exists the claimant will have suffered no

damages and no tort cause of action will lie. Therefore, alternative probable cause should be incorporated into the analysis of qualified immunity.

III. Question 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?

The Court should answer this question in the negative for three reasons. First, the history of Iowa law regarding municipal liability shows municipalities have always been immune from punitive damages under Iowa law. Second, the purposes underlying the award of punitive damages cannot be applied to municipalities. Finally, punishing municipalities by awarding punitive damages against them is against the public interest, and would result in significant harm to innocent residents. Accordingly, finding otherwise would constitute a drastic departure from settled Iowa precedent, and would pose a significant threat to municipalities and their residents.

A. Municipalities Have Always Been Immune from Punitive Damages.

At the outset, Judge Bennett's certified question can be answered by looking to the history of Iowa law regarding municipal immunity. Iowa courts have long recognized due to sovereign immunity, municipalities have enjoyed total immunity from all suits, which includes claims for punitive

damages. *See Godfrey*, 847 N.W.2d at 582. The total common law immunity remained in effect until 1968, when the Iowa legislature enacted the Municipal Tort Claims Act ("MTCA"). Under the MTCA, the municipality's immunity protections were rolled back somewhat, allowing for certain claims to be brought against it. *See* 1967 Iowa Acts ch. 405 (codified at Iowa Code ch. 613A (1971), current version at Iowa Code ch. 670). This legislation was not intended to completely undo the municipality's traditional immunity; rather, it intended to only allow for claims to be brought in some limited situations. *See id*.

Following the enactment of the MTCA, this Court was faced with the issue of whether, under the new legal landscape, punitive damages could be awarded against the municipality in *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978). In *Young*, the Court concluded such damages were permitted, finding the Iowa legislature intended to remove all common law liability from tort claims except for those listed in Iowa Code section 613A.4 (currently codified in Iowa Code section 670.4). 262 N.W.2d at 622. As punitive damages were not expressly prohibited under the statute, the Court concluded such damages were permissible to award against municipalities. *See id*.

Shortly after the Court's decision in *Young*, the Iowa legislature responded by amending Iowa Code section 613A.4 to expressly include "any claim for punitive damages" thus, reinstating the municipality's common law immunity from punitive damages. *See Parks v. City of Marshalltown*, 440 N.W.2d 377, 379 (Iowa 1989); Iowa Code § 670.4(5). By taking this action, the Iowa legislature made clear it never intended to remove the municipality's historical immunity when it enacted the MTCA. Rather, the legislature intended for municipalities to retain the long-standing immunity. This Court later recognized the legislature's true intent in passing the MTCA, stating:

> A strong argument can be made that our *Young* and *City of Cedar Rapids* holdings were flawed. It is axiomatic that punitive damages are not awarded because a plaintiff deserves them, that their only purpose is "to punish the defendant and to deter the offending party and like-minded individuals from committing similar acts." In enacting section 613A.4(5) the legislature expressed obvious disagreement that either of these purposes could be appropriately served by exacting "smart money" from the taxpayers.

Parks, 440 N.W.2d at 379 (internal citations omitted).

As such, despite the passage of the MTCA in 1968, Iowa municipalities have never shed their immunity from punitive damages.

Turning to the newly-recognized constitutional torts, immunity logically applies. This is because this Court recognized "[c]onstitutional

torts are torts" and, therefore, concluded constitutional tort claims are to be "assimilated to the most similar common law tort." *Baldwin I*, 915 N.W.2d at 276, 281. Because constitutional torts are to be assimilated to their common law counterparts, it follows that common law immunities, and statutory preservation of such immunities, must also apply to constitutional torts. *See id.*

B. The Purposes for Issuing Punitive Damages Does Not Apply to Municipalities.

This Court stated clearly there are two general purposes underlying an award punitive damages: (1) to punish the party responsible for the wrongdoing; and (2) to deter the bad act from occurring in the future. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 867 (Iowa 1994). If the underlying purposes will not be advanced by awarding punitive damages, punitive damages cannot to be awarded.

For example, in *In re Estate of Vajgrt*, the Court was faced with the issue of whether a party may recover punitive damages from a tortfeasor's estate. 801 N.W.2d 570, 573 (Iowa 2011). Plaintiff brought suit within the statute of limitations, but after the tortfeasor had died. *Id.* The plaintiff was awarded compensatory damages, but the trial court refused to award punitive damages. On appeal, this Court affirmed the denial of punitive damages. *Id.* at 574. In reaching its decision, this Court continued to follow past

precedent that punitive damages cannot be maintained against a person's estate as doing so would not advance the dual purposes of punitive damages. *Id*. at 575.

Likewise, these two underlying purposes are inapplicable to municipalities, making punitive damages unavailable. The United States Supreme Court provided a detailed reasoning to this issue in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). While this Court is not bound by *Fact Concerts*, the reasoning provided by the United States Supreme Court applies with equal force in this case. First, in regards to punishment, municipalities are incapable of having malice that properly gives rise to punishment. In *Fact Concerts*, after citing several opinions stating the same, the Court held:

> A municipality however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

453 U.S. at 267.

This is a necessary prerequisite to awarding punitive damages, as it is the bad actor that is to be punished. The only way in which a municipality can engage in malicious actions is through its officials. Thus, according to the Court, the proper party to seek such damages from is the government official who engaged in the wrongful act—not the municipality. *Id*.

Second, awarding punitive damages to municipalities does not advance the goal of deterrence. In *Fact Concerts*, the Court soundly rejected the argument that awarding punitive damages would do so, and provided several reasons as to why not. The Court stated:

> It is far from unclear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality.

Id. at 268.

This makes intuitive sense, as the offending official is far more likely to change his behavior when he is directly responsible for punitive damages than when the official's municipality bears the burden of paying the damages. *See id*. at 269.

Finally, while an argument may be made that assessing punitive damages against municipalities would advance the deterrence goal as it would encourage municipalities to take corrective actions, either through discharge or some other recourse, the Supreme Court recognized these corrective actions are just as likely to be taken where punitive damages are not awarded:

> There also is no reason to suppose that corrective action…will not occur unless punitive damages are awarded against the municipality….The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Id. (internal quotations removed).

This too makes logical sense. If a government has a bad actor in its ranks that poses a threat to public safety or to the legitimacy of the government itself, the municipality will not sit idly by. Rather, the municipality will take action to correct the problem. *See id*. However, in the event the municipality does not do so, there is recourse: the voters. In such a case, the voters will be able to install new officials into office and cure the issues themselves. Voters and government officials alike are overwhelmingly motivated to do what is right for their communities. As such, there is no reason to doubt their capability to take the necessary steps to prevent a bad actor from engaging in bad acts in the future. This motivation will always exist, and does not depend upon the municipality being assessed punitive damages to be acted upon.

C. Awarding Punitive Damages Against Municipalities is Against the Public Interest

Awarding punitive damages against a municipality would not only punish the municipality itself, it would also directly punish the innocent residents of the municipality. In *Fact Concerts*, the Court warned awarding such damages against a municipality could potentially threaten the

municipality's financial integrity. *Id*. at 270. Due to this, the Court recognized:

> Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267.

Awarding punitive damages would be counterproductive. Rather than provide the necessary punishment and deterrence to prevent future bad acts from occurring, the damages would instead cause the injured party's neighbors to pay higher taxes and/or receive fewer municipal benefits. The municipality's ability to provide necessary services to its citizens could be significantly impaired.

This Court has previously held punitive damages should not be awarded when the damages would cause injury to innocent bystanders. For example, in *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639 (Iowa 1979), this Court refused to award punitive damages against a corporation. The Court observed such damages would fall upon the policyholders of the corporation, a group who was innocent of any wrongdoing. *Rowen*, 282 N.W.2d at 662. Punishing the innocent does not advance the purposes of punitive damages:

> As already stated, punitive damages serve two main purposes to punish and to deter. We see no legitimate purpose to be served in penalizing one group of innocent policyholders and rewarding another for equally culpable conduct. In this equity case, we find that to be singularly inequitable. We find, too, an assessment of punitive damages against Iowa Mutual would not serve the purposes such damages are designed to serve.

Id.

Here, the same logic applies. The citizens of the municipality are not in control of its daily operations. In many cases, the citizens may be entirely unaware an official engaged in any wrongdoing. It would be wholly inappropriate for these innocent individuals to be punished in the form of higher taxes and/or reduced services.

IV. Question 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?

The opinion rendered in *Baldwin I* instructs that the parameters of qualified immunity should be determined by reference to "historical Iowa common law." That being the case, this Court should similarly look to historical Iowa common law concerning the ability to recover attorney's fees. Historically, Iowa common law has steadfastly followed the American rule, pursuant to which attorney's fees are only recoverable in a tort action if authorized by statute or contract. *See Miller v. Rohling*, 720 N.W.2d 562,

572 (Iowa 2006). Adherence to this rule was recognized by the Iowa General Assembly during its Eighth Session in 1860, whereby the legislature adopted as law that: "[N]o attorney's fee, or part thereof, shall in any case be taxed as costs against the losing party, anything in the code of civil practice to the contrary notwithstanding." 1860 Iowa Acts, p. 34; *see also Blake v. Blake*, 13 Iowa 40, 42 (1862). The Iowa Supreme Court recently affirmed the state of the in law 2017. *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 474 (Iowa 2017). In the present case, there is undisputedly no contract or statute that provides for recovery of attorney's fees by the prevailing party. Therefore, no basis exists in law for an award of attorney's fees in the present case or in any action premised upon a constitutional tort.

CONCLUSION

For the reasons set forth above, this Court should hold: (1) municipalities cannot be held vicariously liable for constitutional torts committed by employees; (2) in the alternative, if vicarious liability is recognized in this instance, municipalities may properly assert the affirmative defense of qualified immunity; (3) the standard for application of due care qualified immunity consists solely of objective considerations and can be properly resolved by the court as matter of law; (4) punitive damages cannot be awarded on constitutional tort claims made against municipalities;

and (5) attorney's fees cannot be awarded to a prevailing party in a constitutional tort claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(l) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 6,943 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l) or

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Amicus Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon all counsel of record by EDMS on the 20th day of February, 2019.

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