

IN THE SUPREME COURT OF IOWA  
No. 19-1278

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**KRYSTAL WAGNER,**  
Individually and as Administrator of the Estate of Shane Jensen,  
  
Plaintiff-Appellant,

vs.

**STATE OF IOWA and WILLIAM L. SPECE**  
a/k/a BILL L. SPECE,  
  
Defendants-Appellees.

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CERTIFIED QUESTIONS OF LAW from the  
HONORABLE C.J. WILLIAMS  
UNITED STATES DISTRICT COURT for the  
NORTHERN DISTRICT OF IOWA  
Case No. 19-CV-3007-CJW-KEM

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**PLAINTIFF-APPELLANT'S FINAL BRIEF**

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. THE IOWA TORT CLAIMS ACT SHOULD NOT BE APPLIED TO CONSTITUTIONAL TORT CAUSES OF ACTION AGAINST THE STATE**

#### **Cases**

*Adickes v. Kress & Co.*, 398 U.S. 144 (1970)

*Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019) ("*Baldwin III*")

*City of Waukee v. City Dev. Bd.*, 590 N.W.2d 712 (Iowa 1999)

*Comegys v. Vasse*, 26 U.S. 193 (1828)

*Doe v. Koenigs*, 826 N.W.2d 516, 2012 WL 6194351 (Iowa App. 2012)  
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*Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017)

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*Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376 (Iowa 2000)

*Owen v. Independence*, 445 U.S. 622 (1980)

*State v. Osmundson*, 546 N.W.2d 907 (Iowa 1996)

*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

#### **Statutes**

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Iowa Code Ch. 684A

#### **Other Authorities**

1979 *Iowa Op. Atty. Gen.* 314 (Iowa A.G.), WL 21035

3 *Black. Com.* 123

#### **Constitutional Provisions**

Iowa Const. art. I, § 1

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## **II. THE IOWA TORT CLAIMS ACT REMEDIES FOR EXCESSIVE FORCE BY A LAW ENFORCEMENT OFFICER ARE INADEQUATE BASED ON THE UNAVAILABILITY OF PUNITIVE DAMAGES**

### **Cases**

*Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019) ("*Baldwin III*")  
*Carlson v. Green*, 446 U.S. 14 (1980)  
*Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017)  
*Huckle v. Money*, (1763) 95 Eng. Rep. 768 (C.P.)  
*Speed v. Beurl*, 251 N.W.2d 217 (Iowa 1977)  
*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)  
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### **Statutes**

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### **Other Authorities**

Alfred S. Regnery, The Intercollegiate Studies Institute, *The Pillars of Modern American Conservatism* (April 3, 2018)  
James McClellan, *The Constitution from a Conservative Perspective* (1988)

### **III. PLAINTIFF'S CLAIMS UNDER THE IOWA CONSTITUTION SHOULD NOT BE SUBJECT TO THE ADMINISTRATIVE EXHAUSTION REQUIREMENT OF THE IOWA TORT CLAIMS ACT**

#### **Cases**

*Baldwin v. City of Estherville*, 915 N.W.2d 259 (“*Baldwin II*”)

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

*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

#### **Statutes**

Iowa Code § 1A.1

Iowa Code Ch. 669 ("Iowa Tort Claims Act")

Iowa Code Ch. 670 ("Iowa Municipal Tort Claims Act")

Iowa Code Ch. 684A

### **IV. PLAINTIFF SHOULD NOT BE REQUIRED TO BRING IOWA CONSTITUTIONAL CLAIMS EXCLUSIVELY IN IOWA DISTRICT COURT**

#### **Cases**

*Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993)

*Barnes v. Missouri*, 960 F.2d 63 (8th Cir. 1992)

*Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995)

*Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981)

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

*Jacobsen v. DOT*, 450 F.3d 778 (8th Cir. 2006)

*Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir. 1996)

*Kellner v. University of Northern Iowa*, 2014 WL 855831 (N.D. Iowa Mar. 5, 2014)

*Myers v. Richland Cnty.*, 429 F.3d 740 (8th Cir. 2005)

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*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

#### **Statutes**

Iowa Code § 669.4

Iowa Code Ch. 669 ("Iowa Tort Claims Act")



Iowa Code Ch. 670 ("Iowa Municipal Tort Claims Act")  
Iowa Code Ch. 684A

## **ROUTING STATEMENT**

The Iowa Supreme Court should retain this case. The questions certified by U.S. District Judge Williams concerning this claim for damages invoking article I, section 8 of the Iowa Constitution raise substantial issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This appeal is from certified questions of law from the Honorable C.J. Williams, United States District Court for the Northern District of Iowa, in case No. 19-CV-3007-CJW-KEM, Krystal Wagner, Individually and as Administrator of the Estate of Shane Jensen, Plaintiff, versus the State of Iowa and William L. Spece a/k/a Bill L. Spece, Defendants.

### **Course of the Proceedings**

Shane Jensen was shot and killed by Bill Spece, a DNR officer using a rifle, on November 11, 2017. (App. 1, 4-5, Complaint ¶¶ 3, 29). Wagner, individually, for loss of consortium, and as Administrator of the Estate of Shane Jensen, for wrongful death, filed a lawsuit against the Defendants on February 13, 2019. (App. 1-14, Complaint). On April 23, 2019, the Defendants filed a Motion to Dismiss which was resisted by the Plaintiffs. The U.S. District Court issued its Memorandum Opinion and Order granting

the motion in part, denying it in part and certifying questions of law to the Iowa Supreme Court on July 29, 2019. (App. 15-46, Opinion and Order). The Certified Questions of Law were filed with the Iowa Supreme Court on August 1, 2019. (App. 43-45, Certified Questions of Law). The Certified Questions of Law were docketed with the Iowa Supreme Court on August 30, 2019.

## **STATEMENT OF THE FACTS**

The following statement of facts are taken from Wagner’s Complaint, which was adopted by the U.S. District Court as “the statement of facts for purposes of the certified questions.” (App. 44, Opinion and Order, p. 30).

Jensen was born on January 23, 1998, and was 19 years old at the time he was shot and killed by Defendant Spece on or about November 11, 2017. (App. 2, Complaint ¶ 8). Jensen suffered from numerous mental health issues including Asperger’s, now known as Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder and Obsessive-Compulsive Disorder. (App. 2, Complaint ¶ 9). Jensen was also suffering from situational depression after breaking up with his girlfriend on or about November 9, 2017. (App. 3, Complaint ¶ 11). Jensen was well known to law enforcement officers in Humboldt, Dakota City and Humboldt County, Iowa. Jensen was used by local law enforcement officers to make controlled purchases of drugs, and alcohol and cigarettes to minors, both wired and unwired. (App. 2, Complaint ¶ 10).

A warrant was issued for Jensen’s arrest on or about Thursday, November 9, 2017, alleging he destroyed some of his ex-girlfriend’s property. (App. 3, Complaint ¶¶ 11-12). Jensen found out about the warrant, but did not want to turn himself in until Sunday evening so he could see a judge and

gain bail on Monday morning. Being in jail was difficult for Jensen because of his mental health conditions. (App. 3, Complaint ¶ 13). On Friday, November 10, 2017, Jensen was staying with a relative in Pocahontas, Iowa, and took possession of a 9mm Smith and Wesson handgun. (App. 3, Complaint ¶ 14).

Jensen was understood to be suicidal. (App. 3, Complaint ¶ 15). Jensen's mother, Krystal Wagner, told Humboldt County Deputy Michael Vinsand that, given Jensen's mental state, she was concerned that if law enforcement approaches Jensen the situation may not end well. (App. 3, Complaint ¶ 16). Wagner also told Vinsand that Jensen had an infatuation with the movie "Straight out of Compton" and that she feared a suicide by cop situation. *Id.* Vinsand assured her that "would not happen" and Wagner replied that "at the end of the day I want everyone to be safe." *Id.*

On Saturday, November 11, 2017, Jensen went to a friend's home in Dakota City, Iowa, and eventually ended up hiding under the deck of that home. (App. 3, Complaint ¶ 17). Humboldt Police Officer Tom Nielson found Jensen and ordered him to come out from under the deck. (App. 3, Complaint ¶ 18). As Jensen emerged, according to Nielson, he pointed a gun at Nielson, but Nielson, aware of Jensen's condition, did not shoot. Rather than fire at Jensen, Nielson retreated to cover. (App. 3, Complaint ¶ 19). Nielson then

observed Jensen backing away from the home and not pointing the gun in his direction. (App. 4, Complaint ¶ 20). Nielson ordered Jensen to submit and no reasonable person in Jensen's position would have understood that they were free to leave without being taken into custody. *Id.* Humboldt County Deputy Sheriffs Kenneth Vorland, Matt Steil and Tim Fisher were also on the scene, understood Jensen's condition, knew that time and patience were their ally and never fired their weapons. (App. 4, Complaint ¶ 21).

Spece, a conservation officer with the DNR, was in Humboldt County on conservation-related business, was asked to assist or volunteered to assist with the search for Jensen and was also made aware of Jensen's condition. (App. 4, Complaint ¶ 22). Spece failed to understand, comprehend and/or execute basic strategies for the de-escalation of situations involving armed and suicidal suspects. *Id.*

Jensen stood in an open area with his gun pointed to his own head. (App. 4, Complaint ¶ 23). While standing in the open area surrounded by five, armed law enforcement officers, Jensen never pointed the gun he was holding in the direction of any of the officers. (App. 4, Complaint ¶ 24). At one point, Jensen fired a single shot into the air straight above his head. (App. 4, Complaint ¶ 25). Jensen was yelling words to the effect that the officers were going to have to kill him. (App. 4, Complaint ¶ 26).

Defendant Spece claimed that Jensen then “brought his hands down and circled around to face Spece and Fisher.” (App. 4, Complaint ¶ 27). Defendant Spece further stated, “that’s when [he] saw the kid’s wrist and muscles flex, so [he] shot him.” (App. 4, Complaint ¶ 28). Spece also described the justification for the shooting as “Jensen then turned around again and eventually pointed the gun in the direction of Spece and Fisher. . . when Jensen lowered the weapon Spece fired one round from his issued rifle, hitting Jensen in the chest and killing him.” (App. 4-5, Complaint ¶ 29). Defendant Spece claimed the justifications set out above justified his use of deadly force. (App. 5, Complaint ¶ 30).

Spece “seized” Jensen by inflicting deadly force upon him. (App. 5, Complaint ¶ 31). Spece and the other officers present made it clear that Jensen was not free to leave and would be seized by being placed into handcuffs and taken to jail. *Id.* A video of the shooting shows that Spece was not truthful about claiming Jensen pointed his gun at him and/or Fisher. (App. 5, Complaint ¶ 32). Therefore, Defendant Spece was not justified in his use of deadly force in shooting and killing Jensen. *Id.*

None of the four other armed law enforcement officers in the immediate vicinity at the time fired their weapons at Jensen confirming that Jensen was not pointing his gun at them or any other law enforcement officer at the time

Defendant Spece shot and killed him. (App. 5, Complaint ¶ 33). Certainly, if any of the four other law enforcement officers armed and present perceived Jensen as a threat to themselves, or anyone else, they would not have hesitated to meet that threat by using their service weapons to neutralize Jensen. (App. 5, Complaint ¶ 34).

Defendant Spece, a DNR officer, did not have sufficient training, experience, equipment and or expertise in dealing with suicidal individuals. (App. 5, Complaint ¶ 35). Defendant Spece, a DNR officer, failed to appropriately heed the warning he was given that Jensen was suicidal and may be seeking to commit suicide by cop. (App. 5, Complaint ¶ 36). Defendant Spece failed to follow protocol by not setting up a perimeter in order to contain Jensen which would have allowed Spece to take cover at a safe distance from Jensen. (App. 5, Complaint ¶ 37). Defendant Spece, who was armed with a rifle, failed to follow protocol by not setting up further from Jensen and observing him using optics and/or by not waiting for other law enforcement officers present more familiar with the situation to act. (App. 6, Complaint ¶ 38).

Defendant Spece failed to follow protocol by not preparing and using chemical or other less than lethal force weapons in order to neutralize Jensen, or waiting for other law enforcement officers present to use those tools to



handle the situation without using deadly force. (App. 6, Complaint ¶ 39). Defendant Spece failed to follow protocol by screaming directions at Jensen thereby escalating the encounter rather than trying to calmly negotiate with Jensen in order to de-escalate the situation. (App. 6, Complaint ¶ 40). Defendant Spece failed to follow protocol by not recognizing that time was an ally and there was no need to force the situation to a very tragic end. (App. 6, Complaint ¶ 41). Defendant Spece failed to follow protocol by shooting and killing Jensen even though Jensen did not point his gun at Spece or anyone else. (App. 6, Complaint ¶ 42). Defendant Spece did not act as an objectively reasonable officer would have acted under the circumstances given that he was the only one of the five, armed law enforcement officer present who believed Jensen's conduct warranted the use of deadly force. (App. 6, Complaint ¶ 43).

Defendant Spece has a history of using excessive force particularly by drawing his service weapon to respond to a threat that did not justify the use of deadly force. (App. 6, Complaint ¶ 44). Upon information and belief Defendant Spece was terminated for cause from the one law enforcement job he held prior to being hired by Defendant Iowa as a DNR officer. (App. 6, Complaint ¶ 45). Defendant Iowa failed to properly check Spece's background before hiring him; failed to properly train Spece; failed to

properly monitor and oversee Spece's activities as a law enforcement officer; and/or failed to instruct Spece to avoid getting into situations in which he was neither appropriately trained nor equipped by reason of experience or with the tactical equipment necessary to handle suicidal individuals. (App. 6-7, Complaint ¶ 46).

All the alleged actions of the Defendants were conducted under color of state law. (App. 7, Complaint ¶ 47).

## ARGUMENT

### I. THE IOWA TORT CLAIMS ACT SHOULD NOT BE APPLIED TO CONSTITUTIONAL TORT CAUSES OF ACTION AGAINST THE STATE

**Error Preservation.** This matter is before the Court pursuant to questions of law certified by United States District Judge C.J. Williams of the United States District Court for the Northern District of Iowa, in accordance with the provisions of Iowa Code Chapter 684A.

**Standard of Review.** The standard of review for constitutional claims, such as those at issue in this case, is *de novo*. *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009) (summary judgment); *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017) (“*Godfrey II*”) (motion to dismiss).

Article I of the Iowa Constitution starts with section 1, stating “[a]ll men are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.” Article I of the Iowa Constitution ends with section 25, stating “[t]his enumeration of rights shall not be construed to impair or deny others, retained by the people.” In between those bookend statements of absolute, unassailable and incontrovertible rights of citizens protected by the Iowa Constitution is the particular right at issue in this case, “[t]he right of the

people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated.” Iowa Const. art. I, § 8. It is inconceivable to Wagner that those clear statements of individual rights could somehow be misinterpreted to allow a state government agent show to up in her hometown, use her son for target practice with his rifle and escape liability for violating her son’s rights under the Iowa Constitution.

**A. Enforcement of The Civil Rights Established by Article I of the Iowa Constitution Does Not Require Legislative Enactment.**

The whole question presented in *Godfrey II* involved whether Article I, §§ 6 and 9 were self-executing, *i.e.* enforceable without enacting legislation. The concurring majority in *Godfrey II* answered that question in the affirmative. *Godfrey II*, 898 N.W.2d at 880 (C.J. Cady, concurring). A three-person minority of the court answered that question negatively based upon a misreading of Article XII, § 1, of the Iowa Constitution. *Id.* at 882 (Mansfield, dissent). It is inconceivable to Wagner that the framers of the Iowa Constitution spent 39 days from January 19, 1857 through March 5, 1857,<sup>1</sup> drafting the Iowa Constitution, made the preeminent and first section of the Constitution the protection of Iowans’ civil rights, but intended all those rights

<sup>1</sup> <https://www.statelibraryofiowa.org/services/collections/law-library/iaconst.>

to be unenforceable window dressing unless and until the legislature said differently.

It is Wagner's contention that the framers of the Iowa Constitution absolutely anticipated "that someone could simply walk into court with a constitutional provision in hand and file a lawsuit to recover money, including punitive damages," for the violation of that constitutional provision by a state agent. *Id.* at 882. Certainly, the framers of the Iowa Constitution knew that "there is no such thing as right, without legal remedy." *Comegys v. Vasse*, 26 U.S. 193, 210 (1828) (citing 3 *Black. Com.* 123). "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. Independence*, 445 U.S. 622, 651 (1980). As later explained in U.S. Supreme Court decisions, "[h]ow 'uniquely amiss' it would be, therefore, if the government itself – 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' -- were permitted to disavow liability for the injury it has begotten." *Owen*, 445 U.S. at 651, (citing, *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970)).

The framers of the Iowa Constitution did not draft "Article XII - Schedule," the last Article of the Iowa Constitution, even after Article XI titled

“Miscellaneous,” and intend that section on “scheduling” to render the prior eleven articles useless and unenforceable, unless and until the legislature passed enacting legislation. If that is the correct interpretation of Article XII, § 1, then there could never have been a first legislature under the Iowa Constitution because there was no prior legislature to enact Article III. Further, there could never have been a first Governor under the Iowa Constitution, Article IV, because there was no prior Governor to sign into law any enacting legislation. That absurd result is avoided because Articles III and IV of the Iowa Constitution, like Article I, are self-executing.

The Court should embrace, not retract, its recent discussion of this argument in *Godfrey II*:

We think it clear that section 1 of the schedule article cannot swallow up the power of the judicial branch to craft remedies for constitutional violations of article I. The rights established in the Iowa Bill of Rights are not established by legislative grace, but by the people in adopting the constitution. The Iowa Bill of Rights was a big deal to the framers. We divine no desire of the 1857 framers to prevent the Iowa judiciary from performing its traditional role from a schedule article requiring the general assembly to enact necessary laws for the transition to the new constitutional government.

898 N.W.2d at 869.

If legislative action is required to effectuate all provisions of the Iowa Constitution, then the current list of useless and unenforceable provisions in the Iowa Constitution is long and varied. A search of Iowa Constitutional

provisions for which the legislature has not seen fit to pass enacting legislation includes: Article I, § 19 (no debtors' prison); Article III, § 4 (qualifications for members of the house of representatives); Article III, §§ 10 and 13 (the legislature must meet in public and record votes); and Article IV, § 6 (eligibility for office of Governor). Not to mention Article I, § 16, (prohibiting treason), for which there was legislative enactment, see Iowa Code §§ 689.1-13 (1977), but that code section was repealed effective January 1, 1978.

Requiring legislative enactment in order to enforce Iowa Constitutional provisions would, therefore, lead to numerous absurd results. A for-profit prison corporation could convince the legislature to allow debtors prison thereby exponentially increasing its profits and any effort to enforce Article I, § 19 would be futile. The legislature could meet in private and a majority could pass a law allowing debtors' prison without a recorded vote because Article III, §§ 10 and 13 would be unenforceable. A non-resident of the United States could be elected to the Iowa House of Representatives because Article III, § 4 would be inoperative. A thirteen- year old could be elected Governor because Article IV, § 6 was not in effect. These ridiculous election results could occur even though the Iowa Attorney General issued an opinion finding that “[w]hen qualifications for office are defined and fixed in the

constitution, they are not subject to legislative alteration, addition, or modification.” 1979 *Iowa Op. Atty. Gen.* 314 (Iowa A.G.). WL 21035.

Article XII, § 1, states “[t]his Constitution shall be the supreme law of the State, and any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.” It is a violation of the rules of statutory construction to interpret the first sentence of Article XII, § 1, as only encompassing a conflict of law preference for the Constitution over legislative enactments. See *Godfrey II* at 882.

Where “reasonable minds could disagree” over the meaning of the first two phrases of Article XII, § 1, we should look to the “the rules of statutory construction” for the correct interpretation. *City of Waukee v. City Dev. Bd.*, 590 N.W.2d 712, 717 (Iowa 1999). “When construing a statute, we read the language used and give effect to every word.” *State v. Osmundson*, 546 N.W.2d 907, 910 (Iowa 1996). “We apply all relevant doctrines of construction in determining intent.” *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 379-80 (Iowa 2000).

In *Doe v. Koenigs*, 826 N.W.2d 516, 2012 WL 6194351 (Iowa App. 2012) (unpublished), the Iowa Court of Appeals was faced with interpreting a statute that, like the first sentence of Article XII, § 1, included two



independent clauses separated by a comma. *Id.* at \*5-6. The *Koenigs* court held,

Under the rules of grammar, an independent clause is one that contains a subject and a predicate and makes sense standing alone; that is, it expresses a complete thought. *Hamilton v. Werner Co.*, 268 F. Supp. 2d 1085, 1088 (S.D. Iowa 2003). The clause after the comma here is an independent clause, expressing the complete thought that "any person . . . proven to have disseminated . . . child abuse information in violation of this chapter . . . shall be liable for actual damages and exemplary damages for each violation." Accordingly, the plain, unambiguous language of Iowa Code section 235A.20 states that "any person" can be held liable for "damages."

*Id.* at \*5-6. The rules of grammar dictate that “whether or not you put a comma before "and" depends on how you’re using "and.” When “a coordinating conjunction is used to connect two independent clauses, a comma is always used. For example: ‘I hit my brother with a stick, and he cried.’ On the other hand, when a coordinating conjunction is used to connect a dependent clause, a comma is never used. For example: ‘The boy ran to his room and cried.’”<sup>2</sup>

Article XII, § 1, contains a comma after the first phrase before the coordinating conjunction “and.” The two phrases of the first sentence of Article XII, § 1, are independent, could stand alone and should be interpreted that way. Article XII, § 1, could read, without changing its meaning, “This

<sup>2</sup> <https://english.stackexchange.com/questions/30516/should-i-use-a-comma-before-and-or-or/>

Constitution shall be the supreme law of the State. Any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.” The *Godfrey II* minority incorrectly interpreted Article XII, as “stand[ing] for [only] two propositions. First, in the event of a conflict between a law and the constitution, the constitution wins. Second, the constitution is implemented through laws passed by the general assembly.” Article XII, § 1, actually stands for three propositions. First, the Constitution is the supreme law of the State. Second, any law inconsistent with the Constitution is void. Third, the legislature must pass any laws necessary to effectuate the Constitution. It is an incorrect reading of Article XII, § 1, to interpret the first sentence to only mean the Constitution takes precedent over other laws if in conflict.

It is also incorrect to read the second sentence of Article XII, § 1, as permissive, *i.e.*, the legislature “may” pass laws necessary to carry the Constitution into effect. The founders mandated that the legislature “shall pass all laws necessary to carry this Constitution into effect.” Article XII, § 1, second sentence. As the Iowa Supreme Court has consistently held,

Sometimes courts are justified in interpreting the word 'shall' as 'may,' but, when used in a statute directing that a public body do certain acts, it is manifest that the word is to be construed as mandatory and not permissive. \* \* \* The uniform rule seems to be that the word 'shall,' when addressed to public officials, is mandatory and excludes the idea of discretion.

*Hansen v. Henderson*, 56 N.W.2d 59, 67 (1952). Justice Mansfield alluded to, but understated, this interpretation of Article XII, § 1, in his dissent in *Godfrey II*. 898 N.W.2d at 893 (“At best, article XII, section 1 might be read as requiring the general assembly to enact a damages remedy for constitutional violations.”).

Under either scenario set out above, by the very language of the protections set out, or through inaction of the legislature, the protections set out in Article I of the Iowa Constitution are self-executing and it is up to this Court to identify the parameters of how those rights will be enforced through private rights of action.

**B. The Iowa Tort Claims Act Should Not Be Applied to Direct Constitutional Claims Against the State.**

Wagner anticipates the State will argue that direct constitutional claims against the State of Iowa are subject to the Iowa Tort Claims Act (“ITCA”). While this Court has decided direct constitutional claims brought against municipalities are limited by the Iowa Municipal Tort Claims Act (“IMTCA”), the Court should reject the State’s invitation to empower the Iowa legislature with unquestionable authority to narrow the protection of the Iowa Constitution.

Unlike the IMTCA, the ITCA does not define the actions covered by the law to include the “denial or impairment of any right under any constitutional provision.” *Compare* Iowa Code § 670.1(4) (defining “tort”) with Iowa Code § 669.2(3) (defining “claim”). Accordingly, the holding in *Baldwin v. City of Estherville*, 929 N.W.2d 691, 697 (Iowa 2019) (“*Baldwin III*”), which applies the IMTCA to constitutional torts against municipalities, is inapplicable in this direct constitutional action against the State of Iowa. Subjecting direct constitutional claims to legislative limitation would undermine individual rights. “If we held that a statute might preempt an otherwise valid constitutional action, this would in effect grant ordinary legislation the power to cabin constitutional rights. The Iowa Constitution would no longer be the supreme law of the state.” *Godfrey II*, 898 N.W.2d at 875.

The ITCA contains a laundry list of exemptions that disallow liability being imposed on the State and its agents for wrongful conduct, including “any claim arising in respect to the assessment or collection of any tax or fee; any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; and any claim by an inmate.” *See* Iowa Code §§ 669.14(2), (4), (6). Any and all of those exemptions, given an

applicable factual scenario, could run directly contrary to a civil right protected by Article I of the Iowa Constitution. What if the sitting Treasurer of the State of Iowa taxed political supporters at a lower rate so they could contribute to his campaign? Section 669.14(2) would negate any recovery sought under Article I, § 6 of the Iowa Constitution (laws shall have a uniform operation). What if state prison guards tortured an inmate? If the protections afforded Iowans under Article I of their constitution are only enforceable if approved by the legislature, then Section 669.14(6) could make compensation for violations of Article I, § 17 (“cruel and unusual punishment shall not be inflicted”), unavailable.

Of course, we do not have to speculate about a factual scenario under which strict application of Section 669.14(4) (claims alleging false arrest and assault and battery are exempted), could negate liability for the State and its agent for violation of Article I, § 8. That is the factual scenario of this case. The ITCA should not be applied to negate Wagner’s claim under the unreasonable search and seizure section of the Iowa Constitution, thereby allowing a state agent to show up at an attempted suicide with his rifle and use the victim as target practice without being held accountable under the Iowa Constitution.

## **II. THE IOWA TORT CLAIMS ACT REMEDIES FOR EXCESSIVE FORCE BY A LAW ENFORCEMENT OFFICER**

## **ARE INADEQUATE BASED ON THE UNAVAILABILITY OF PUNITIVE DAMAGES**

**Error Preservation.** This matter is before the Court pursuant to questions of law certified by United States District Judge C.J. Williams of the United States District Court for the Northern District of Iowa, in accordance with the provisions of Iowa Code Chapter 684A.

**Standard of Review.** The standard of review for constitutional claims, such as those at issue in this case, is *de novo*. *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009) (summary judgment); *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017) (motion to dismiss).

### **A. Punitive Damages Are Not Available Under The ITCA.**

Punitive damages are not allowed against the State of Iowa under the ITCA. Iowa Code § 669.4(2) (“[T]he state shall not be liable for interest prior to judgment or for punitive damages.”). *Baldwin III* applied the IMTCA to constitutional based tort claims against local governments and their agents and held punitive damages are unavailable against a municipality based on the IMTCA’s prohibition on punitive damages. *Baldwin III*, 929 N.W.2d at 698. *Godfrey II*, on the other hand, clearly determined that punitive damages may be available “in the appropriate case . . . to vindicate a plaintiff’s constitutional rights. 898 N.W.2d at 881 (Cady, C.J., concurring in part and dissenting in part).

## **B. Punitive Damages Must Be Available to Vindicate Constitutional Rights.**

Let's be clear at the outset that what the state government agent allegedly did in this case is as outrageous conduct as can be hypothesized – showing up with a rifle while a distraught citizen is contemplating suicide and using that Iowan as target practice. Full compensatory and punitive damages must be available to remedy that wrong assuming Wagner proves her allegations. As the U.S. Supreme Court held in *Carlson v. Green*, 446 U.S. 14, 21-22 (1980), “[p]unitive damages are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. . . . Thus, [the] FTCA [punitive damages unavailable] is that much less effective than a Bivens action [punitive damages available] as a deterrent to unconstitutional acts.”

The majority noted in *Godfrey II*, that the “notion that unconstitutional actions by government officials could lead to compensatory and exemplary damages was well established in English common law.” 898 N.W.2d at 866 (citing *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.), and *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (C.P.). The *Godfrey II* majority also wrote, “when a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an

individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future. 898 N.W.2d at 877.

“Always” and “never” are the enemy of facts and reason. If the legislature passed a statute mandating that punitive damages must always be awarded to prevailing plaintiffs in constitutional tort cases such a provision would be broadly recognized as unconstitutional and rightfully so. On the other hand, the legislature has passed a statute finding punitive damages are never available against the State and that provision has gone essentially unchallenged. See Iowa Code § 669.4(2) and *Speed v. Beurle*, 251 N.W.2d 217, 219-20 (Iowa 1977) (Plaintiff failed to preserve for review a claim that a barring punitive damages violated equal protection under the ITCA). Liability and damages in any case ought to be decided on the merits of the case, *i.e.* the facts of the case and reasoned argument based upon those facts. Justice is not served whenever a legislature or court make broad assertions of law applicable to all cases without regard to the particularized facts and reasoned argument involved in each individual case. The prevailing opinions in *Godfrey II* recognized that punitive damages ought to be available for the right kind of case under the Iowa Constitution. *Godfrey II*, 898 N.W.2d at 881 (Cady, C.J., concurring in part and dissenting in part).



Chief Justice Cady explained the importance of allowing a full measure of damages, including punitive damages, for “infringement of physical security, privacy, bodily integrity, or the right to participate in government. . . .” *Id.* “A basic premise of our constitutional system is that popular whim may not override the individual rights guaranteed by the Constitution . . . Under the Iowa Constitution, a constitutional right may not be altered by ordinary legislation. . . .” *Id.* at 875.

Under our system of government there is no more cherished principle than to protect individual liberties against government oppression. One author for the Heritage Foundation wrote as follows:

The Bill of Rights had a twofold purpose. The first and most obvious was to protect each individual from encroachments upon his liberty by the federal government. . . . The Bill of Rights. . . . rested on the assumption that personal freedom was far too important a matter to entrust to a central government and that individual liberty would best be protected at the local level, where the citizens had a greater say in public affairs and public officials were near at hand and were likely to share the same values and beliefs or cultural background. . . . In the final analysis, it is incumbent upon us to understand that [among our struggles] is to limit the powers of those who govern us and hold them accountable for their actions.

James McClellan, *The Constitution from a Conservative Perspective* (1988)

(retrieved from [http://thf\\_media.s3.amazonaws.com/1988/pdf/hl157.pdf](http://thf_media.s3.amazonaws.com/1988/pdf/hl157.pdf)).

Another conservative commentator put it this way: “the first pillar of conservatism is liberty, or freedom. Conservatives believe that individuals

possess the right to life, liberty, and property, and freedom from the restrictions of arbitrary force. . . Above all, it means freedom from oppression by government. Alfred S. Regnery, The Intercollegiate Studies Institute, *The Pillars of Modern American Conservatism* (April 3, 2018). In order to enforce these principles, we must not only compensate individuals whose rights have been trampled by government agents, but also, where circumstances warrant, punish the government when it violates those rights.

The language from *Godfrey II* is instructive:

The question of whether a statutory remedy might be adequate so as to avoid the need for a direct constitutional claim has nothing to do with legislative intent. It has everything to do with a judicial determination of whether the court should not allow a direct constitutional claim for damages to proceed because the court believes an established statutory remedy is sufficient to vindicate the constitutional interests of the people expressed in the civil liberties provisions of state constitutions.

*Godfrey II*, 898 N.W.2d at 873. The availability of punitive damages is a necessary component in the enforcement of civil rights. The threat of punitive damages will cause government officials to think long and hard before violating the civil rights of a citizen of the State of Iowa. Removing the threat of punitive damages in all cases, regardless of the facts, will correspondingly reduce the incentive for government agents to honor the civil rights of Iowa citizens.

This case involves the most permanent, the most invasive, the most damaging conduct imaginable in our system of government: the taking of a life under the color of law. It is not for this Court to determine whether the conduct by the Defendants in this case was right or wrong—that is for the jury to decide—but, at this stage, viewing all the allegations as true, in a light most favorable to the Plaintiffs, and accepting all reasonable inferences in favor of the Plaintiffs, the Court should find that the deliberate taking of a man’s life by an agent of the State is the type of wrong for which punitive damages should be available under the Iowa Constitution. Limiting the available remedies to those under the Iowa Tort Claims Act would erroneously conclude that the legislature—not this court—determines the scope and availability of relief under the Iowa Constitution.

**III. PLAINTIFF’S CLAIMS UNDER THE IOWA CONSTITUTION SHOULD NOT BE SUBJECT TO THE ADMINISTRATIVE EXHAUSTION REQUIREMENT OF THE IOWA TORT CLAIMS ACT**

**Error Preservation.** This matter is before the Court pursuant to questions of law certified by United States District Judge C.J. Williams of the United States District Court for the Northern District of Iowa, in accordance with the provisions of Iowa Code Chapter 684A.

**Standard of Review.** The standard of review for constitutional claims, such as those at issue in this case, is *de novo*. *Varnum v. Brien*, 763

N.W.2d 862, 874 (Iowa 2009) (summary judgment); *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017) (motion to dismiss).

In *Baldwin II*, the Iowa Supreme Court explained its holding in *Godfrey II*. “[W]e held that the State of Iowa and state officials acting in their official capacities could be *sued directly* for violating” the Iowa Constitution “where state law does not provide an adequate compensatory damage remedy.” *Baldwin v. City of Estherville*, 915 N.W.2d 259, 265 (“*Baldwin II*”) (emphasis added). In *Godfrey II*, the Iowa Supreme Court acknowledged the risk of allowing the Iowa legislature to define the terms upon which the State could be held accountable for constitutional violations: “We cannot imagine the founders intended to allow government wrongdoers to set their own terms of accountability through legislative action or inaction.” 898 N.W.2d at 866. The question before the court in *Godfrey II* was not whether an alleged violation of the constitution could stand as a tort under the ITCA, but “whether *courts* have the power to provide an appropriate remedy for constitutional wrongs.” *Id.* (emphasis added). The direct constitutional claims recognized in *Godfrey II*, then, are not claims recognized and allowed by the legislature like claims pursued under the ITCA—they are claims recognized by the Iowa courts to hold the government accountable to its constitutional obligations and limitations.

Neither *Godfrey II* nor *Baldwin II* relied on the ITCA or the IMTCA to recognize direct claims under the Iowa Constitution. In addition, for all the reasons set out above, the exhaustion of administrative remedies requirement of the ITCA does not apply to claims made under the Iowa Constitution. By act of the First Iowa General Assembly, the Seal of the great State of Iowa was adopted with the distinctly libertarian motto: “Our liberties we prize, and our rights we will maintain.” See Iowa Code § 1A.1, adopted February 25, 1847. The State of Iowa exists to preserve the freedom of its citizens. The goal of Article I of the Iowa Constitution is to protect individual freedom from government oppression. The legislature may neither limit, nor set up procedural roadblocks, to keep citizens from being able assert claims against the State government and its agents for violations of rights guaranteed by Article I of the Iowa Constitution. In fact, the legislature has just the opposite obligation – to make certain that the rights set out in the Iowa Constitution are effectively enforced.

#### **IV. PLAINTIFF SHOULD NOT BE REQUIRED TO BRING IOWA CONSTITUTIONAL CLAIMS EXCLUSIVELY IN IOWA DISTRICT COURT**

**Error Preservation.** This matter is before the Court pursuant to questions of law certified by United States District Judge C.J. Williams of

the United States District Court for the Northern District of Iowa, in accordance with the provisions of Iowa Code Chapter 684A.

**Standard of Review.** The standard of review for constitutional claims, such as those at issue in this case, is *de novo*. *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009) (summary judgment); *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017) (motion to dismiss).

For all the reasons set out above in Section III above, the ITCA should not be applied to Iowa Constitutional claims. It is noted that “[s]upplemental jurisdiction over state law claims is appropriate ‘whenever the federal-law claims and state-law claims in the case derive from a common nucleus of operative facts and are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding.’” *Kellner v. University of Northern Iowa*, 2014 WL 855831 at \*3 (N.D. Iowa Mar. 5, 2014) (quoting *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1067 (8th Cir. 1996)) (alteration omitted). “Claims arise from a common nucleus of operative fact when they are ‘factually interdependent.’” *Id.* (quoting *Myers v. Richland Cnty.*, 429 F.3d 740, 748 (8th Cir. 2005)). Wagner’s claims under the Iowa Constitution are factually interdependent with her claims pending in federal court under federal law. However, that does not end the analysis

because the State of Iowa has asserted Eleventh Amendment immunity with regard to Wagner's Iowa based claims pending in federal court.

Wagner recognizes that “[w]hen a state is directly sued in federal court, it must be dismissed from litigation upon its assertion of Eleventh Amendment immunity unless one of two well-established exceptions exists.” *Barnes v. Missouri*, 960 F.2d 63, 64 (8th Cir. 1992). Those two exceptions are "congressional abrogation" and "state waiver." *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619 (8th Cir. 1995). Wagner concedes that Congressional abrogation is not applicable to this case. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

With regard to the waiver question, "as a general matter, only unmistakable and explicit waiver of Eleventh Amendment immunity" by the state will suffice. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990); *Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993) ("While Eleventh Amendment immunity can be waived, such waiver must be unequivocally expressed."). Wagner recognizes that Iowa has not generally waived Eleventh Amendment immunity for cases brought in federal court by consenting to be sued in state court. *See Iowa Code* § 669.4.

"A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts." *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981); *see also Jacobsen v. DOT*, 450 F.3d 778, 779-80 (8th Cir. 2006). Therefore, absent a waiver, Wagner concedes that Iowa Constitutional claims must be brought in Iowa Courts.

The State of Iowa may want to be careful what it asks for – it just might get it. If the Defendants have their way then Plaintiffs should be allowed to bring two separate lawsuits covering the exact same factual occurrence and get two bites at the apple to procure a recovery. One in State Court under state law, and one in Federal Court under federal law. That duplication and inefficiency may well be forced upon us based upon the State of Iowa's assertion of Eleventh Amendment immunity in this case.

The only other alternatives would be for the Defendants in this case to drop their claim of Eleventh Amendment Immunity, or for the Iowa Supreme Court to assert its inherent authority under the Iowa Constitution to determine the process by which Iowa Constitutional claims will be decided and expressly waive Eleventh Amendment immunity. Thus, federal courts would have supplemental jurisdiction over Iowa Constitutional claims when joined with a federal claim sharing a common nucleus of operative facts. *See Godfrey II*,



898 N.W.2d at 869 (“We think it clear that Section 1 of [Article XII] cannot swallow up the power of the judicial branch to craft remedies for Constitutional violations of Article I.”). Wagner hereby requests that this court make that determination.

## **CONCLUSION**

For all the reasons set out above, the certified questions of law should be answered as follows:

1. No, the ITCA does not apply to plaintiff's constitutional tort causes of action;
2. Yes, the available remedy under the Iowa Tort Claims Act for excessive force by a law enforcement officer is inadequate based on the unavailability of punitive damages;
3. No, Plaintiff's claims under the Iowa Constitution are not subject to the administrative exhaustion requirement in Iowa Code Section 669.5(1); and
4. Iowa Code Section 669.4 does not apply to Iowa Constitutional claims. Federal courts have supplemental jurisdiction over Iowa Constitutional claims when joined with a federal claim sharing a common nucleus of operative facts because the State of Iowa has consented to such jurisdiction for reasons of judicial efficiency.

## **REQUEST FOR ORAL SUBMISSION**

Plaintiff-Appellant respectfully requests submission of this case with oral argument.

**ATTORNEY’S COST CERTIFICATE**

I, Nathan Borland, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant’s Final Brief because the appeal is being filed exclusively in the Appellate Courts’ EDMS system.

Certified by: */s/ Nathan Borland*

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**CERTIFICATE OF SERVICE AND FILING**

I, Nathan Borland, certify that on November 14, 2019, I electronically filed the foregoing Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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