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IN THE SEVENTH JUDICIAL DISTRICT COURT
GRAND COUNTY, STATE OF UTAH

JOSEPH PETITO, and NICHOLE SCHMIDT, individually and for and on behalf of GABRIELLE PETITO, deceased, Plaintiffs, v. MOAB CITY POLICE DEPARTMENT, Defendant.	**OPPOSITION TO DEFENDANT MOAB CITY POLICE DEPARTMENT'S MOTION TO DISMISS** Case No. 220700046 Judge Don M. Torgerson **(Hearing Requested)**

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Introduction

Few tragedies compare to the death of a child at the hands of another's malice or negligence. And fewer are the tragedies still that the hands of the law should take hold of and remedy. Yet, Defendant Moab City Police Department ("Moab") would have this Court believe that when a child dies due to the negligence of a city *and* an assault and battery by a third party, the law leaves her parents without judicial redress. This was not the view held by those who settled this state, many of whom lost children and family to religious and political violence sanctioned by government actors; and when they petitioned for legal relief, they were told the courts would not right their wrongs. It stands as no surprise, then, that when they founded this state, they ratified a constitution that protected the "right of action to recover damages for injuries resulting in death." *See* UTAH CONST., Art. XVI, Sec. 5.

In what follows, Plaintiffs Joseph Petito and Nichole Schmidt, individually and on behalf of their deceased daughter, Gabbrielle Petito ("Gabby"), show that the guarantees in article XVI, section 5—the wrongful death clause (or "Section 5")—enshrine the understanding that no one—not even a municipality like Moab—enjoys immunity when negligently causing another's death. To do so, they interpret Section 5 in its historical context, showing that it protects the right of heirs to bring wrongful death claims against municipalities. They also show that *Tiede v. State*, 915 P.2d 500 (Utah 1996), does not apply to this case. It deals with state sovereign immunity, not municipal liability. To the extent it does apply, it ought to be overturned. Doing so will return Utah law to its original understanding and restore to those within this state the protections intended by Utah's founders.

Factual Allegations and Background

1. On or around September 19, 2021, Gabby was murdered by her fiancé, Brian Laundrie. Moab and its officers could have prevented this murder but did not. This case focuses on Moab's negligence and the negligence of its agents, including Chief of Police Bret Edge, Assistant Chief of Police Braydon Palmer, Officer Eric Pratt, and Officer Daniel Robbins. Plaintiffs' Second Amended Complaint ("SAC") sets forth the allegations and claims against Moab. Here, Plaintiffs focus on the allegations most relevant to Moab's Motion to Dismiss ("Motion").

2. During the summer of 2021, Gabby and Brian were traveling the country in a van she had converted into a camper to use in her travels as an aspiring "vanlife" travel influencer. (SAC ¶¶ 20–22). By August 12, 2021, their chosen travel route brought them to Moab, Utah. (*Id.* ¶ 23). During much of that day, Gabby and Brian had been arguing. At a certain point, Brian, without justification, physically and publicly assaulted Gabby outside the Moonflower Community Cooperative. (*See id.* ¶ 25). He also grabbed Gabby's face so forcefully that he cut her cheek and drew blood. (*Id.* ¶ 26). A witness saw Brian "slapping" Gabby and called 911. (*Id.* ¶¶ 27, 28). Another witness later reported seeing Brian hit Gabby with a closed fist, causing her to fall against the side of the van with her back and probably her head. (*Id.* ¶ 29).

3. Officer Pratt was dispatched to the Co-Op to investigate, but he did not activate his body camera or locate and talk to the 911 caller. (*Id.* ¶ 31). Officer Robbins found Gabby and Brian in their van speeding northward out of town and pulled them over. (*Id.* ¶¶ 32, 33). Inside the van, he found Gabby, visibly distraught, sitting in the passenger seat alongside Brian in the driver's seat. Brian was calm and showed no signs of distress. (*Id.* ¶ 34). Officer Robbins separated Gabby and Brian, and then spoke with Gabby, who said she and Brian had been fighting. (*Id.* ¶¶ 36–39).

4. Officer Robbins eventually had Gabby sit in his police car—an action that likely led Gabby to believe she was in trouble with the police. He then joined Officer Pratt and a park ranger—Ryan Kral—as they spoke with Brian. (*Id.* ¶¶ 41–42). Officer Robbins noticed scratches on Brian's face and asked him about them. Brian said he had taken Gabby's phone, locked the van, and told Gabby "to take a breather" and calm down, at which point she tried to take her phone and the van keys from him. Brian then admitted that he responded by pushing Gabby, and while this was happening, Gabby scratched his face. (*Id.* ¶ 43).

5. After this interaction, Officer Pratt went and spoke with Gabby, who was still in Officer Robbins' car. He pointed out multiple scratches on her face and arm and asked her what had happened. (*Id.* ¶ 48). Gabby initially claimed she wasn't sure how she got them, but after Officer Pratt told her about the 911 caller, Gabby proceeded to blame herself, saying that she slapped Brian first because "he kept telling me to shut up," and that he then grabbed her arms so she wouldn't be able to slap him again. (*Id.* ¶¶ 49–51). She then demonstrated how Brian had grabbed and cut her face. (*Id.* ¶ 52).

6. For his part, Officer Pratt failed to ask any questions about or document the cut on Gabby's face or to further investigate Brian's violent conduct. (*Id.* ¶ 53). He also did not consider the asymmetrical seriousness of the force Gabby used on Brian as compared to the force Brian used on Gabby, nor did he otherwise conduct any kind of lethality assessment to evaluate whether Brian violently grabbing Gabby's face was an indicator of a potential for escalating violence in the future. (*Id.* ¶ 56).

7. Instead, Officer Pratt began sympathizing with Brian, asking Gabby leading questions about Brian being "pretty patient" and asking her if she took medication for anxiety. (*See id.* ¶ 58; *see also id.* ¶¶ 59–61). Officer Robbins also began to sympathize with Brian. At one

point, Officer Robbins asked Brian if Gabby takes any medication, to which Brian said, "she's crazy," then laughed and said, "no, I don't think so, none that I know of." (*Id.* ¶ 67).

8. Officer Pratt and Robbins then spoke. Officer Pratt summarized his findings while admitting he had not really questioned Brian. Even so, he had concluded that Gabby was the "primary" aggressor. (*Id.* ¶ 73). This conclusion was the first in a series of errors in applying Utah law and Moab's domestic violence protocols.

9. Under Utah law, a law enforcement officer must identify the "predominant" aggressor in cases of domestic violence. *See* UTAH CODE § 77-36-2.2(1) ("The primary duty of law enforcement officers responding to a domestic violence call is *to protect the victim and enforce the law*." (emphasis added)); *see also id.* § 77-36-2.2(3) ("If a law enforcement officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine who *the predominant aggressor* was." (emphasis added)).

10. In making this identification, an officer "shall consider" the following: (a) any prior complaints of domestic violence; (b) the relative severity of injuries inflicted on each person; (c) the likelihood of future injury to each of the parties; and (d) whether one of the parties acted in self defense." *Id.* § 77-36-2.2(3)(a)–(d). Moreover, in considering the above factors, "[a] law enforcement officer may not threaten, suggest, or otherwise indicate the possible arrest of all parties in order to discourage any party's request for intervention by law enforcement." *Id.* § 77-36-2.2(4).

11. In addition to this statute, Moab had previously committed in 2018 "to faithfully following all essential elements of the Lethality Assessment Protocol-Maryland Model" (the "LAP"), including training, reporting, and faithful implementation of lethality assessment screens when responding to cases of reported domestic violence." (*Id.* ¶ 150). In 2019, it renewed its

commitment to full and faithful implementation of the LAP for a period of three (3) years. (*Id.* ¶ 151).

12. The LAP has two parts: a lethality screen, and a protocol referral. The lethality screen uses the following 11-question risk assessment:

1. Has your partner ever used a weapon against you or threatened you with a weapon?
2. Has he[1] ever threatened to kill you or your children?
3. Do you think he might try to kill you?
4. Does he have a gun or can he get one easily?
5. Has he ever tried to choke you?
6. Is your partner violently or constantly jealous or does he control most of your daily activities?
7. Have you left him or separated after living together or being married?
8. Is he unemployed?
9. Has your partner ever tried to kill himself?
10. Do you have a child that he knows is not his?
11. Does he follow or spy on you or leave threatening messages?

See Maryland Network Against Domestic Violence, Lethality Assessment Program – Maryland Model 1, 10 (describing protocol for law enforcement), https://mn adv.org/_mnadvWeb/wp-content/uploads/2013/12/LAP-Protocol.pdf [https://perma.cc/UU2 B-6P2L]. An affirmative response to any of the first three questions automatically triggers a "protocol referral," while an affirmative response to at least four of the remaining questions will do so. D. Kelly Weisberg, "Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years," in Hastings Women's Law Journal, vol. 30, no. 2 (2019), p. 224 (citing Messing, et al., POLICE DEPARTMENTS' USE OF THE LETHALITY ASSESSMENT PROGRAM). This protocol referral—the second part of the LAP—connects the victim with victim services. The officer educates the victim of the high risk she faces of ongoing violence. For victims screening as "high danger," (i.e. at an increased risk of homicide), the officer explains that victims with similar responses to the

[1] The protocol uses "he/she." For simplicity, the above simply uses "he."

lethality screen have been killed by their intimate partners. The officer then calls a victim's advocacy organization and tries to get the victim to consult with a representative of that organization. The representative reinforces the officer's statement about the victim's risk and then conducts safety planning for the victim while informing the victim of additional services. *See id.*

13. Federally funded research has confirmed the effectiveness of the LAP.[2] That research compared the outcome of abused women in jurisdictions that used the LAP with those that did not. It found that abused women in an LAP jurisdiction experienced fewer and less severe incidents of re-abuse. *See id.* at 226. This outcome stems from the fact that "women who received the LAP intervention used significantly more protective strategies than those in the control group—both immediately after the incident and at a follow-up time seven months later." *Id.*[3] In addition, research found that jurisdictions implementing the LAP saw "improvement in law enforcement investigations." *Id.* "By requiring officers to assess the level of risk to the victim, the screening effort spurred police to strengthen their collection of evidence." *Id.* This also led to a decrease in the rate of domestic violence homicides. *Id.* (noting that in Maryland, "where all police departments utilize the LAP, domestic violence homicides have fallen by 40 percent since 2007" (citation omitted)).

14. In identifying Gabby as the "primary aggressor," Officer Pratt did not follow Utah law or the LAP. (*See* SAC, ¶¶ 74–75). Moreover, his conduct following this identification actually elevated Gabby's risk of harm. This elevated risk can be seen in Brian and Gabby's different responses to Officer Pratt's erroneous identification. When he told Brian that Gabby was the

[2] *See Messing et al.,* POLICE DEPARTMENTS' USE OF THE LETHALITY ASSESSMENT PROGRAM: A QUASI-EXPERIMENTAL EVALUATION 20–21 (Mar. 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf.
[3] *See also id.* (noting that "[v]ictims' protective actions included: removing or hiding a partner's weapons, obtaining mace or pepper spray, establishing a safety code to alert family/friends of trouble, improving home security, applying for an order of protection, obtaining medical care from a health care practitioner, going somewhere where the partner could not find or see them, and seeking advocacy services.").

primary aggressor and that Brian was "the victim of domestic assault," Brian laughed. (*Id.* ¶ 80). Brian also showed no distress when told of the automatic no-contact order mandated by the legislature. (*See id.* ¶ 81). Gabby, in contrast, began to sob when told the same information, begging for the officers to merely issue a citation for hitting the curb because she did not "want to be separated" from Brian. (*Id.* ¶ 99). Though Gabby showed clear indications of being the victim of abuse, Officer Pratt said he would call his supervisor—Assistant Chief of Police Brayden Palmer—to see if there was a way around applying the law. (*Id.* ¶ 91).

15. While he was making that call, Gabby called her parents. (*Id.* ¶ 92). Gabby's parents demanded that she fly home to get away from Brian, offering to pay for her ride to Salt Lake City and her flight home. But upon learning that the police were involved, Gabby's parents accepted Gabby's assurances that she should continue her trip. In the end, Gabby's parents relied to their detriment on Moab and its officers. But for the officers' failure to investigate and follow Utah law and the LAP, Gabby's parents would have intervened to end the trip and bring Gabby home. (*Id.* ¶ 93).

16. After Officer Pratt concluded his call with his supervisor, he reread the statute. (*Id.* ¶¶ 94–95). He then spoke with Officer Robbins and explained the primary reason why the statute exists: "You know why the domestic assault code is there. It's there to protect people. The reason they don't give us discretion on these things is because too many times women who are at risk want to go back to their abuser, they just want him to stop, and they don't want to be separated, they don't want him charged, they don't want him to go to jail. And then they end up getting worse and worse treatment, and then they end up getting killed." (*Id.* ¶ 96).

17. Despite his clear understanding of the foreseeability of a victim being killed if police did not follow the statute, he proceeded to intentionally manipulate the investigation to find

a loophole to the statute. To do so, he read the Utah criminal assault statute—Utah Code section 75-5-102—as defining an "assault" as "an attempt with unlawful force or violence to do bodily injury to another." (*Id.* ¶¶ 96, 97). This incorrect reading of the law led Officer Pratt to ask Gabby a leading question about "her intention to do [Brian] bodily injury," noting that "[w]hatever she answers to that question will seal her fate." (*Id.* ¶ 99).

18. Specifically, he asked Gabby the following: "Gabby, this is a very, very important question. How you answer this question is going to determine what happens next. But the only person who can answer this question is you. Think very hard before you answer the question. Do not quickly answer it. Think very hard. When you slapped him those times, were you attempting to cause him physical pain or physical impairment? Was that what you were attempting to do to him?" (*Id.* ¶ 101). In response, Gabby answered, "no," exactly as Officer Pratt hoped she would. (*Id.* ¶ 102).

19. In the end, Officer Pratt and Officer Robbins willfully decided not to follow the statute and protect Gabby. (*Id.* ¶¶ 103–05, 117–18, 121–27). In a subsequent review of the officers' handling of their encounter with Brian and Gabby, Captain Brandon Ratcliffe of the Price City Police Department concluded that the officers made several mistakes, including misrepresenting and misapplying Utah law and failing to properly investigate. He concluded that he could not rule out that Gabby's murder might have been prevented if the officers had acted properly. (*Id.* ¶ 138).

20. Officer Pratt's mishandling of the investigation stems from his bias as someone with a history of having abused his police powers and having engaged in domestic violence. (*See id.* ¶¶ 139–47). Moab knew or should have known about this concerning history of pervasive professional and domestic misconduct, and it also knew or should have known that this history made him unfit and unsafe to be a police offer. (*Id.* ¶ 148). But rather than terminating his

employment, Moab has promoted him to detective and assigned him as a school resource officer at all three schools in the Grand County School District. (*Id.* ¶ 149).

Standard of Review

Moab seeks dismissal under rule 12(b)(6) of the Utah Rules of Civil Procedure. This rule permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." UTAH R. CIV. P. 12(b)(6). As such, it "reflects Utah's adoption of notice pleading and, thus, relies on rule 8 of the Utah Rules of Civil Procedure." *Mack v. Utah State Dep't of Comm.*, 2009 UT 47, ¶ 17, 221 P.3d 194; *cf.* UTAH R. CIV. P. 8 (requiring a complaint to provide a "short and plain statement of the claim showing that the pleader is entitled to relief"). A complaint does not fail to state a claim under this rule "*unless it appears to a certainty* that the plaintiff would be entitled to no relief *under any state of facts which could be proved* in support of the claim." *Mack*, 2009 UT 47, ¶ 17 (citation omitted) (emphases added); *see also Erickson v. Canyons School Dist.*, 2020 UT App. 91, ¶ 6, 467 P.3d 917 ("Dismissal of a complaint is proper 'only if it is clear from the allegations that the [plaintiff] would not be entitled to relief under the set of facts alleged *or under any facts it could prove to support its claim*.'" (citation omitted) (emphasis in original)). Consequently, courts "accept all facts as true, and indulge all reasonable inferences in favor of the [plaintiff]." *Erickson*, 2020 UT App. 91, ¶ 6 (alteration in original). And "if there is *any doubt* about whether a claim should be dismissed for lack of factual basis, the issue should be resolved *in favor of giving the party an opportunity to present its proof*." *Zisumbo v. Ogden Regional Medical Ctr.*, 2015 UT App. 240, ¶ 9, 360 P.3d 758 (emphases added). Applying this standard and the applicable substantive law, the Court should deny the Motion.

Argument

Plaintiffs assert claims on behalf of Gabby for personal injury under Utah Code section 78B-3-107 and on their own behalf, as heirs, for wrongful death under Utah Code section 78B-3-106. (SAC ¶¶ 186–91). These claims are based on the negligence of Moab's officers and Moab's negligence in hiring, training, and supervising those officers. (*Id.* ¶¶ 155–85). In response, Moab argues that Plaintiffs' claims do not fall within a waiver of immunity as set forth in the Utah Governmental Immunity Act (the "Act"). It then cites *Tiede v. State*, 915 P.2d 500 (Utah 1996) to argue that even if immunity has been waived, the Act's battery exception reinstates immunity. (Mot., pp. 4–7). Lastly, it argues that it was not *the proximate cause* of Gabby's murder. (Mot. pp. 7–11). The Court should reject these arguments.

Under Section 5, Moab is not immune from suit for wrongful death. As such, neither the Act nor the Act's battery exception govern Plaintiffs' claims. *Tiede*, moreover, is not to the contrary. It addresses *state* sovereign immunity, not *municipal* immunity.[4] It thus does not answer the constitutional question before this Court: namely, the constitutionality of applying the Act in a wrongful death case against a municipality. The Court can and should reach that question directly and hold that municipalities do not enjoy immunity from suit in cases of wrongful death. If, however, this Court concludes that *Tiede* governs this case, it ought to be overturned. After all, it has none of the factors giving a precedent special weight as applied to this case. Finally, the Court should reject Moab's proximate-cause argument because it raises an issue of fact beyond the purview of a Rule 12(b)(6) review.

[4] The SAC makes the legal conclusion that *Tiede* applies to this case. After further consideration and research, counsel has reached the contrary conclusion.

I. The Court Can and Should Hold that Applying the Act to this Case Violates Section 5 of the Utah Constitution

a. The Act does not govern Plaintiffs' causes of action, and *Tiede v. State* is not to the contrary

Moab argues that the Act's waiver of immunity for negligent misconduct does not apply to this case because Plaintiffs "expressly assert that their claims and injuries result from intentional misconduct of a non-party"—namely, its officers. (Mot., p. 5 (citing SAC ¶¶ 5, 96, 162)). It also cites *Tiede v. State*, 915 P.2d 500, to invoke immunity under the Act's battery exception. That exception retains immunity for "[a] governmental entity, its officers, and its employees," "if the injury arises out of or in connection with, or results from assault or battery." UTAH CODE § 63G-7-201(4)(b) (cleaned up) (emphasis added).

These arguments misunderstand Plaintiffs' constitutional challenge. As Plaintiffs will show, municipalities were not immune from wrongful death causes of action at the time of statehood. And if they were not immune then, they cannot be immune now. A contrary holding would violate Section 5 by abrogating a wrongful death cause of action that existed when Utah achieved statehood. Thus, Plaintiffs need not show that their claims fall within a *waiver of immunity* under the Act or that the battery exception does not apply.

Tiede is not to the contrary.[5] That case dealt with wrongful death claims against the *State*. This case, in contrast, involves wrongful death claims against a municipality. Unsurprisingly, *Tiede* based its holding on an analysis of state sovereign immunity, not municipal liability.

[5] Moab also cites *Sanders v. Leavitt*, 2001 UT 78, 37 P.3d 1052, a case involving the Department of Child and Family Service's negligence and the subsequent assault, battery, and death of an infant. *Id.* ¶¶ 2–3. It does not address the constitutionality of the battery exception under Section 5. Instead, it cites several cases for the proposition that a governmental entity retains immunity under the battery exception, "regardless of who the tortfeasor is, and even if the assault or battery occurs as the result of the negligence of the state or state agent." *Id.* ¶ 29. None of its cited cases are for wrongful death. *See id.* (collecting cases). Plaintiffs', therefore, focus on the *Tiede*, the font for a constitutional analysis of Section 5 and the battery exception.

Specifically, it cited the 1913 case of *Wilkinson v. State*, 134 P. 626 (Utah 1913), for the proposition that "[s]overeign immunity was a settled feature of the common law when Utah became a state and adopted its constitution." *Tiede,* 915 P.2d at 504.[6] As further support, it looked to an 1898 statute that retained immunity for the State while affording a discretionary process whereby the State could consider and pay claims. *Id.* (discussing 1898 REV. STAT. UTAH § 929). Relying on these authorities, it held that applying the battery exception to reinstate "governmental immunity from wrongful death suits against *the State*" did "not abrogate any previously existing right of action and therefore [did] not violate [Section 5]." *Id.* (emphasis added).

As can be seen, *Tiede* has nothing to say about the constitutionality of the Act in wrongful death cases against a municipality. *See Eldridge v. Johndrow*, 2015 UT 21, ¶ 26, 345 P.3d 553 ("For a case to be stare decisis on a particular point of law, that issue *must have been raised in the action* decided by the court." (quoting 20 Am. Jur. 2d *Courts* §134 (2014) (emphasis added)). This is crucial. After all, very "different lines of [common law] authority [] developed after statehood with respect to *state* and *municipal* immunity." *DeBry v. Noble*, 899 P.2d 428, 440 (Utah 1995) (emphases added). These different lines were reflected in Utah's first statutes, which *presume* a municipality's liability for negligence. *See DeBry*, 899 P.2d at 438 (noting that Utah Revised Statute section 312 (1898) "did not purport to waive sovereign immunity" but "merely established a procedural requirement that a claim for negligence against a city or town had to be presented to a city or town council within a certain time before an action could be maintained").

[6] The term "sovereign" references a "sovereign *state*" as one "vested with independent and supreme authority" in its sphere. *Sovereign, n.,* BLACK'S LAW DICTIONARY (9th ed.). This is the meaning used by the supreme court in *Tiede* and *Wilkinson*, both of which dealt with lawsuits against the State of Utah. *See Tiede*, 915 P.2d at 504 ("In the absence of either express constitutional or statutory authority an action against a *sovereign state* cannot be maintained.") (quoting *Wilkinson*, 134 P. 626, 630 (Utah 1913)).

Thus, *Tiede* does not control the outcome of this case. The Court can, therefore, directly address the constitutionality of the Act as applied to wrongful death claims against municipalities. It should do so and hold that Moab does not enjoy immunity from Plaintiffs' claims.

b. The Act violates Section 5 of the Utah Constitution when applied to wrongful death causes of action against municipalities

If the Act applies here, it violates Section 5. Below, Plaintiffs start with the plain language of Section 5. They then discuss this language in its historical context. That context shows that wrongful death causes of action have long occupied a privilege position in Utah. It also shows that when Section 5 was ratified, municipalities did not enjoy immunity from suit and could be sued for negligent ministerial acts, even when such acts resulted in death. This means that applying the Act here would unconstitutionally abrogate Plaintiffs' wrongful death claim in contravention of Section 5.

i. *Section 5 categorically protects wrongful death causes of action*

To understand "the protections afforded by [Section 5 to] the Utah Constitution," the Court should begin "with a review of the constitutional text." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235. This text "is not to be read as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 523, 71 S. Ct. 857 (1951) (Frankfurter, J., concurring)). Courts should avail themselves of this rich history and look "to the background out of which [the text] arose and its practical application in order to determine the [framers'] intent." *State v. Betensen*, 378 P.2d 669, 669–70 (Utah 1963). This background can be informed by prior caselaw, "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." *Am. Bush*, 2006 UT 40, ¶ 12. "The goal of this analysis is to

discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Id*.

Section 5 reads as follows:

> The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law. UTAH CONST., Art. XVI, Sec. 5.

This language categorically protected wrongful death claims from legislative intrusion. *See Bybee v. Abdulla*, 2008 UT 35, ¶ 17, 189 P.3d 40 ("This provision confers special status on the cause of action for wrongful death.").

Since its enactment, courts have struck down any legislative act that seeks to limit or eliminate a wrongful death claim, "whether in a wholesale or piecemeal fashion." *Malan v. Lewis*, 693 P.2d 661, 667 (Utah 1984). And they have done so without first balancing the government's interests against a claimant's interests. *See Bybee,* 2008 UT 35, ¶ 17 (comparing the absolute protections of Section 5 with the open courts clause and its corresponding balancing test). Simply stated, if a statute abrogates a wrongful death claim, it is unconstitutional.

This fact was understood by the founding generation, who believed it necessary to graft onto Section 5 the phrase, "*except in cases where compensation for injuries resulting in death is provided for by law*," to allow the legislature to subject wrongful death claims to the workers' compensation statutory scheme. *See Henrie v. Rocky Mountain Packing Corp.,* 113 Utah 415, 425 (1948) (stating that "the original Workman's Compensation Act" of 1917 could not make its death benefits "the exclusive remedy" for wrongful death claims, as doing so "would have been a clear violation of" the wrongful death clause "as it then existed," and observing that "[i]n order to remedy this situation, the section was amended by adding thereto the words italicized"). But this amendment has a modest reach: it makes an exception only for wrongful death claims eligible for

benefits under workers' compensation. *See Smith v. United States*, 2015 UT 68, ¶ 17, 356 P.3d 1249 (interpreting the term "compensation" in the wrongful death clause as carrying "the same meaning that it had in the [original] Workmen's Compensation Act").

Thus, all other efforts to eliminate or limit wrongful death claims will undoubtedly violate the plain language of Section 5. *See Bybee*, 2008 UT 35, ¶ 20 (concluding that any legislation purporting to compel arbitration in wrongful death claims would violate the wrongful death clause); *Smith*, 2015 UT 68, ¶ 19 (striking down the damages cap of the Utah Medical Malpractice Act as unconstitutional under Section 5). This reading of Section 5 is reinforced by the available historical evidence, which shows the robust protections accorded wrongful death claims by Utah's founders.

ii. *Utah's history reveals the original intent of Section 5 to create a wrongful death cause of action with categorical protections*

Utah's history illuminates the original meaning of Section 5. It is well known that the State of Utah was founded by converts to the Church of Jesus Christ of Latter-day Saints. Before arriving in the Salt Lake Valley, these converts experienced episodes of religious and political violence. The most intense period of violence erupted in late 1838 in Caldwell County, Missouri, when county militias with the eventual sanction of the State of Missouri forcibly expelled Latter-day Saints from their homes and settlements. A particularly harrowing episode occurred on October 30, 1838, when 18 men, women, and children were massacred at Haun's Mill. *See* Richard L. Bushman, *Joseph Smith, Rough Stone Rolling: A Cultural Biography of Mormonism's Founder* 365–66 (1st ed. 2005).

During and after these events, Latter-day Saints petitioned for relief. *See id.* at 392–94. But they "found the courts and law enforcement agencies unable or unwilling to protect the security of their persons or property against the armed attacks of hostile inhabitants." Orma Linford, "The

Mormons, the Law, and the Territory of Utah," 23 THE AMERICAN JOURNAL OF LEGAL HISTORY, 213, 216 (1979). In short, "[t]he legal system was a passive instrument in the hands of the mob that forced the Saints out of a succession of new settlements in Missouri." *Id.* at 216–17. These events would remain etched on Latter-day Saint cultural memory as they entered the Salt Lake Valley on July 24, 1847.[7]

Soon thereafter, their ecclesiastical leaders began providing "the full complement of governmental functions." *Id.* at 220. In 1849, they created the State of Deseret, a political entity never officially recognized by the United States. They also enacted a criminal code, which was later adopted by the Utah territorial legislature. *See id.* at 220–21. That code contained embedded civil remedies that required persons convicted of certain crimes to "pay all damages sustained, and be fined or imprisoned, or both at the discretion of the court." CRIMINAL LAWS OF THE STATE OF DESERET § 29 (criminalizing assault).

These ordinances did not, however, include a wrongful death statute. If Utah were a common law jurisdiction, this would have left the territory's citizens without a remedy. *See Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033, 1808 (holding that under the common law, "the death of a human being could not be complained of as an injury"); *see also* T.A. Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAND. LAW REV. 605–24 (1960) (discussing the origins and errors of this rule). But Utahans, by their own reconning, did not follow the common

[7] This conflict was caused in substantial part by political considerations. Church members were commanded to gather in Missouri to build Zion. This led non-Latter-day Saints to fear the loss of their political influence over their communities. *See* Bushman, *Joseph Smith, Rough Stone Rolling,* p. 223. These conflicts resulted in the development of a Latter-day Saint *political* theology with sweeping consequences for early Utah history. *See id.* at 226 (noting that "[f]or the first time, government figures in [Joseph Smith's] thought as an active agent"); *see also* Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900*, 261 (1st ed. 1988) ("After [the saints] migrated to the deserts of the Great Basin, the Saints pursued their radical theory of Zion as an alternative to the social experiment of pluralistic America. A critical part of this effort was the establishment and maintenance of their own court system.").

law. *See* Michael W. Homer, *The Judiciary and the Common Law in Utah Territory*, *1850–61*, 21 Dialogue 97, 98 (1988).

In fact, they formally codified their rejection of the common law in 1854, when their territorial legislature enacted a statute that prohibited the citing of precedent in court. *See* 1854 COMP. UTAH LAWS, 16, § 1 ("[N]o report, decision, or doings of any Court shall be read, argued, cited, or adopted as precedent in any other trial."). In the years that followed, the legislature enacted other statutes to reinforce this prohibition. *See* 1882 COMP. UTAH LAWS 73, § 1 (requiring the rules of equity to prevail over the common law when there is a conflict); 1884 COMP. UTAH LAWS 154, § 3 (mandating that the code of civil procedure be liberally construed to preempt the common law).[8]

In keeping with the foregoing statutes, church leaders counselled Latter-day Saints to avoid the law courts. They also created ecclesiastical courts with "exclusive jurisdiction" as fora for adjudicating civil disputes. Wain Sutton, ed., UTAH: A CENTENNIAL HISTORY, Vol. 2, 570–71 (1949); *see also* Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900*, 261 (1st ed. 1988) (noting that "[a] critical part" of building a political Kingdom of God "was the establishment and maintenance of their own court system").[9]

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[8] These statutes were partially aimed at preventing federal prosecutors and judges from relying on the common law to prosecute polygamists. *See* BLACKSTONE 1:423–24 (describing the act of marriage while already having a living husband or wife as a felony under the common law). But they also addressed the problem of transplanting foreign law into Utah soil. Zerubbabel Snow—the Associate Justice of the Utah Territorial Supreme Court from 1850 to 1854—expressed this point well to a group of law students when he said that Latter-day Saints had "a right to make such laws as suited [their] own Convenience Notions and circumstances" and should do so "without any regard to the Common Law of England or the laws which any of the states had adopted." Dan Vogel (ed.), *The Willford Woodruff Journals* (Signature Books: 2023), Vol. 4, pp 85–86.

[9] One historian has identified bishopric courts "as the most important of the tribunals in Mormon theocracy." Wain Sutton, ed., UTAH: A CENTENNIAL HISTORY, Vol. 2, 570 (1949). "To these tribunals were brought all the minor difficulties of the Saints to be adjudicated." *Id.* This system also included courts of appeals. And "[a]fter the establishment of the civil government in Salt Lake, Brigham Young and his

These courts heard tort disputes and awarded compensatory remedies in cases ranging from assault and battery to negligence. *See* Firmage and Mangrum, *Zion in the Courts*, 354–70; *see also id.* at 369 ("Church courts generally punished members who willfully misbehaved in ways that caused unintentional injuries.").[10] And since these courts had "exclusive jurisdiction," it stands to reason that they would have also heard wrongful death cases.

The desire to protect wrongful death claims for everyone in the territory—not merely those appearing in ecclesiastical courts—caused the territorial legislature to enact a wrongful death statute in response to an 1873 territorial district court case. That year, Henry Thomas sued Union Pacific Railroad Company for $30,000 in damages "alleged to have been sustained by him in the loss of his minor son, Joseph Thomas, who was killed by a collision of the defendant's cars."[11] Union Pacific moved to dismiss the case, apparently invoking the common-law rule that a cause of action expires upon the death of a decedent. *See Thomas v. Union Pac. R.R.*, 1 Utah 232, 232 (Terr. Utah 1875). The trial court agreed and granted the motion. Mr. Thomas appealed.

His appeal was pending before the Utah Territorial Supreme Court when the territorial legislature enacted section 1216—the predecessor to Section 5—and section 1241—a corresponding rule of civil procedure. Those enactments read as follows:

> Section 1216. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*: That whenever the death of a person shall be caused by wrongful

associates urged the Saints to bring their difficulties before the church tribunals rather than before the civil courts for adjustment. *Id.* at 570–71. In fact, church leader gave "exclusive jurisdiction" to ecclesiastical courts in civil cases. *See* Firmage and Mangrum, *Zion in the Courts*, 264. "Church members who violated the exclusive jurisdiction rule by suing their brethren in civil courts were guilty of 'unChristianlike conduct' and subject to being disfellowshipped." *Id.*

[10] Firmage and Mangrum discuss several tort cases involving willful misconduct. For example, in 1849, a boy was run over by two horses who were being improperly run in the street. A Salt Lake bishop ordered the horse owners to pay "the injured boy $5 plus any other medical fees necessary as a result of the injury." *Id.* at 369. In an 1894 case, a bishop's court awarded a claimant damages "when a defective seat caused her to fall out of [a common carrier's] mail wagon en route from Paris to Montpelier, Idaho." *Id.* at 369–70.

[11] *See* Salt Lake Herald-Republican (*newspaper*), October 19, 1873, accessed on June 12, 2024, athttps://newspapers.lib.utah.edu/details?id=11573391&q=%22Henry+Thomas%22&sort=date_tdt+asc%2Cparent_i+asc%2Cpage_i+asc.

> act, neglect or default, and the act, neglect or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.[12]
>
> Section 1241. An action shall not abate by the death, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, or disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In the case of any other transfer or interest, the action may be continued in the name of the original party, or the court may allow the person whom the transfer is made to be substituted in the action. After verdict shall have been rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

See 1876 COMP. LAWS UTAH § 1216 (Particular Wrongs) and *id.* § 1241 (Civil Practice Act). In sum, section 1216 secured a wrongful death cause of action while section 1241 instructed courts how to proceed in cases where a party dies.

The passage of these sections was timely. One year later, the territorial supreme court issued its decision in the case of *Thomas v. Union Pacific Railroad*. It declared the common law as "prevailing" in the territory and affirmed dismissal of Mr. Thomas' case under the common-law rule that "the death of a person caused by another does not give rise to a cause of action in any one." *Thomas*, 1 Utah at 234. This case and the legislature's response to it reveals Utahans' commitment to guarantee the existence of a wrongful death cause of action.

[12] Latter-day Saint memory of Missouri likely played a role here. At least 11 of the legislators voting on these statutes were among those who were forcibly driven from Missouri. For example, Jesse N. Smith (a member of the Territorial Council), his brother Silas Sanford Smith (a member of the House of Representatives) and his family were driven from Missouri in the winter of 1839. In the days following their expulsion, their six-year-old brother, John Aiken Smith, died of exposure. Similarly, Wilard G. Smith and his parents settled at Haun's Mill. During the massacre, Willard's father and brother were murdered. Another one of his brothers, Alma Smith, was severely injured. Finally, Abraham Owen Smoot, father of future Senator Reed Smoot, was taken prisoner in 1838 alongside Joseph and Hyrum Smith.

That commitment held firm during subsequent years. In 1884,[13] the legislature amended the Civil Practice Act to *expand* the protections afforded by section 1216 by eliminating a cap on damages. *Cf.* 1876 COMP. LAWS UTAH § 1217 (Particular Wrongs) (limiting wrongful death damages to "the sum of ten thousand dollars") *with* 1888 COMP. LAWS UTAH § 3179 (Civil Practice Act) (permitting wrongful death damages to "be given as under all circumstances of the case may be just"). This statute was accompanied by a related statute that called for "statutory enactments" to be "liberally construed to preempt the common law." *Smith,* 2015 UT 68, ¶ 10, n.20 (citing 1884 UTAH LAWS 154–55). With these statutes, the legislature reinforced its rejection of the common law and its dedication to the right of action for wrongful death.

Yet, controversy remained as to precisely *what claims* these statutes protected, and in 1890, a dispute arose over section 1216 and the phrase, "if death had not ensued." *See Mason v. Union Pac. R.R.*, 24 P. 796, 797 (Terr. Utah 1890); *see also id.* ("While this law makes it the duty of the court to continue actions that survive in the name of the representative of the deceased party, it does not indicate those that do survive."). The territorial supreme court read this phrase expansively and held that "immediately upon [a decedent's] death, a *new cause of action arises* in [] favor [of the heirs]." *Id.* at 797 (emphasis added). So read, the heirs could recover compensation for their own damages, not solely the damages suffered by the decedent. *Id.* ("It gives the heirs a right of action to renumerate their loss, in consequence of death occasioned by the same act."). A dissenting opinion construed the phrase narrowly, limiting "[t]he cause of action" to the action that had "been vested in plaintiff during his life-time," thereby leaving the heirs without remedy for their own damages. *Id.* at 798 (Anderson, J., dissenting).

[13] By this time, the statute had been renumbered. *See* 1888 COMP. LAWS UTAH § 2961.

It can be no accident, then, that the drafters of Section 5 omitted the phrase, "if death had not ensued."[14] Nor can it be an accident that when Utah achieved statehood in 1896, its newly formed legislature included the wrongful death *rule* from the Civil Practice Act but *not* section 1216. This reads as a deliberate acknowledgement that Section 5 incorporated the protections of section 1216 into Utah's constitution. *See Bybee*, 2008 UT 35, ¶ 18 (explaining that "[t]he wrongful death cause of action entered Utah territorial law in 1874 and was *incorporated* into the Utah Constitution when Utah entered the union"); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 683 (Utah 1985) (noting that the territorial era wrongful death statute "was then included in the Utah Constitution at statehood").

This history shows that the wrongful death cause of action "was of such importance at the time of statehood given the general uncertainty of the law, at least in other states, that the framers of the Utah Constitution *provided for a judicial remedy*" in Section 5 of the Utah Constitution. *Jones v. Carvell*, 641 P.2d 105, 107 (Utah 1982). Therefore, the drafters of Section 5 and those who voted it into existence, *vested* a wrongful death cause of action held by heirs and conferred upon it *categorical* protections. Moreover, at the time they enacted Section 5, municipalities were not immune and could be sued for negligent ministerial acts, including those resulting in death.

iii. *When Section 5 was enacted, municipalities could be sued for negligence*

When Section 5 was enacted, municipalities were not immune from suit for their negligent ministerial acts. To understand the caselaw, a word must be said about the peculiar nature of municipalities. Courts have examined the differences between sovereign states and municipalities.

[14] Interestingly, this omission has set Utah apart from other jurisdictions, which use this phrase to provide more modest protections for wrongful death claims. *See Riggs v. Georgia-Pacific LLC*, 2015 UT 17, ¶ 12, 345 P.3d 1219 (discussing statutes and caselaw from foreign jurisdictions containing the phrase "if death had not ensued" and holding that the omission of this phrase from Utah's wrongful death statute signifies the legislature's intention to permit the heirs to sue for wrongful death, even when a decedent obtains a remedy from the defendant on the underlying claim before his or her death).

The former reign supreme in their respective jurisdictions; the latter do not. And because they lack sovereignty, they cannot be said to be immune under the common law doctrine of sovereign immunity, based as it is on the precept that "the sovereign can do no wrong." *DeBry*, 899 P.2d at 440.

Given these differences, early Utah caselaw developed "two different lines of authority" "with respect to state and municipal immunity." *See id*. Initially, Utah law "was liberal in allowing actions against governmental agencies." *Id.* But in 1913, the Utah Supreme Court *created* blanket immunity for the State and declared that no tort suit could proceed against the State absent statutory authorization. *See Wilkinson*, 134 P. 626, 626.

Tellingly, the Court never made a similar pronouncement for municipalities. Nor could it have easily done so. For by 1913, the Court had repeatedly employed "a discretionary/ministerial test to determine the liability of cities for negligent acts." *DeBry*, 899 P.2d at 436. Under this test, "municipalities were held liable in negligence for breach of a duty of care in carrying out 'ministerial' responsibilities, whether those responsibilities were imposed by statute or undertaken pursuant to a power granted by a city's charter." *Id.* Liability could attach, moreover, even if there was "*no statute expressly giving the action* against the defendant city for the recovery of damages." *Levy v. Salt Lake City*, 1 P. 160, 164 (Terr. Utah 1881).

This test, of course, turns on the distinction between "discretionary" and "ministerial." In *Kiesel v. Ogden City*, the territorial supreme court explained that distinction in context of damage to land from a backed-up sewage pipe:

> The general rule is that a private action cannot be maintained for an injury for mere failure to construct a sewer, or for injuries from inadequate sewers built according to plans made by competent persons, and adopted by such officers in good faith. But if injury results from a wrong mode of carrying such plans into execution, or if they are unskillfully or improperly executed, or if the sewer when built is found to be defective

> or inadequate, and injury results from a neglect to remedy such defects or inadequacy, when discovered, an action will lie.

30 P. 758 (Terr. Utah 1892), *overturned by Cobia v. Roy City*, 366 P.2d 986 (Utah 1961). Put differently, a municipality cannot be sued for failing to create a plan or for the adequacy of a plan, once created, but it can be sued for the negligent implementation of a plan.

Unsurprisingly, the territorial and state supreme courts have held municipalities liable for a range of ministerial activities. *See Levy v. Salt Lake City*, 16 P. 598 (Terr. Utah 1887) (ditch construction); *Yearance v. Salt Lake City*, 24 P. 254 (Terr. Utah 1890) (street obstruction); *Thomas v. Springville City*, 35 P. 503 (Terr. Utah 1893) (bridge maintenance); *Naylor v. Salt Lake City*, 35 P. 509 (Terr. Utah 1893) (street obstruction); *Scoville v. Salt Lake City*, 39 P. 481 (Terr. Utah 1895) (slip-and-fall); *Scott v. Provo City*, 45 P. 1005 (Terr. Utah 1895) (street maintenance); *Jordan v. Mt. Pleasant*, 49 P. 746 (Terr. Utah 1897) (flooding-barrier construction); *MacKay v. Salt Lake City*, 81 P. 81 (Utah 1905) (bridge maintenance); *Jones v. Ogden City*, 89 P. 1006 (Utah 1907) (street obstruction); *Brown v. Salt Lake City*, 93 P. 570 (Utah 1908) (water-system maintenance); *see also DeBry*, 899 P.2d at 436 (grouping these cases under the discretionary/ministerial test).[15]

[15] The case of *Royce v. Salt Lake City*, 49 P. 290 (Utah 1897) is not to the contrary. In that case, a prisoner was injured after the chief of police unlawfully imprisoned him and forced him to work in a city quarry. *Id.* at 291–92. Relying on principles from corporate law, the Utah Supreme Court held that the city was not *vicariously liable* for the chief of police's unlawful acts, which were *ultra vires*. *Id.* at 292. It also said, in dicta, that laws for the public benefit cannot be a basis for vicarious liability because officers enforcing those laws are not acting as "servants of the corporation." *Id.* But this assertion was relied upon in only one subsequent opinion. *See Everill v. Swan*, 55 P. 68 (Utah 1898) (relying on this language in deciding whether a state statute precluded a city from terminating the employment of police officers without good cause). Moreover, the case has nothing to say about municipal *immunity*, speaking only to the vicarious liability of municipality. Tellingly, when the Utah Supreme Court in *DeBry*, 889 P.2d at 436–38, surveyed the law of municipal immunity at the time of statehood, it wholly omitted *Royce* from its account. It also bears mentioning that *Royce* did not deal with a wrongful death claim or a claim of *direct liability* against the city for negligent hiring, training, and supervision. It thus provides no guidance on the interplay between Section 5 and municipal liability, nor illuminate a municipality's liability for its own negligence. In sum, then, *Royce* fails every test for precedent and was not closely followed in the years after it was decided.

Consistent with this precedent, no case from this period endorses the concept of municipal immunity.[16] Instead, they all speak in terms of municipal *liability*. *See Jenkins v. Jordan Valley Water Conservancy Dist.*, 2012 UT App 204, ¶ 26, 283 P.3d 1009, *overturned on other grounds by Cope v. Utah Valley State College*, 2014 UT 53, 342, P.3d 243 (discussing the difference between governmental immunity and liability). Accordingly, they do not extend immunity when injury arises from the negligence of a city *and* the assault or battery of a third party. *Cf.* UTAH CODE § 63G-7-201(4)(b) (the battery exception). This nuance would not enter judicial opinions until passage of the Utah Governmental Immunity Act in 1965. *See* UTAH CODE § 63-30-10(2) (1965) (the predecessor to the battery exception); *see also Connell v. Tooele City*, 572 P.2d 697, 698 (Utah 1977) (applying the false arrest exception, which appears alongside the battery exception) and *Maddocks v. Salt Lake City Corp.*, 740 P.2d 1337, 1340 (Utah 1987) (applying the false arrest and battery exceptions).

Similarly, the notice of claim statute from this period does not purport to *waive* municipal immunity. *DeBry*, 899 P.2d at 438 (discussing UTAH REV. STAT. § 312 (1898) and noting that it did not waive immunity but "merely established a procedural requirement"). Moreover, this statute did not apply to wrongful death cases. *See Brown*, 93 P. 570 (rejecting city's argument for dismissal where a decedent's mother had failed to comply with Utah Revised Statute section 312 and holding that the mother's wrongful death claim did not come within the terms of the statute).

[16] Municipal *immunity* is first mentioned in *Alder v. Salt Lake City*, 231 P. 1102 (Utah 1924) (noting "a well-recognized exception to the general rule of [municipal] *immunity* in cases involving the maintenance and care of public streets" (emphasis added)). Interestingly, *Alder* cites section 816 of the 1917 Compiled Laws of Utah as support. This section is the successor to the statute discussed in *Brown,* 93 P. 570. Tellingly, *Alder* was decided 11 years after the Utah Supreme Court declared blanket *immunity* for the State of Utah. *See Wilkinson*, 134 P. 626, *superseded by statutes as stated in Madsen v. Borthick*, 658 P.2d 627 (Utah 1983).

Taken together, these authorities demonstrate that municipalities simply were not immune from suit for negligent ministerial acts. This in turn supports the conclusion that heirs could sue a municipality for wrongful death.[17] The Court should, therefore, hold that municipalities were not immune from suit in cases of wrongful death. It should also hold the Act to be unconstitutional in this case.

iv. *The Act would unconstitutionally violate Section 5 if applied to Plaintiffs' wrongful death claim*

If the Act applies to extend immunity to Moab, it will unconstitutionally abrogate a cause of action available when Section 5 was enacted. For, as shown above, municipalities could be sued for ministerial acts of negligence that resulted in death when Utah enacted Section 5. Thus, the Act, as applied to wrongful death cases against municipalities, operates to wholly eliminate a wrongful death cause of action that existed when Utah achieved statehood.

That result clearly violates the plain language of Section 5. As the Utah Supreme Court has said, Section 5 prevents "the abolition of the right of action for wrongful death, 'whether in a wholesale or piecemeal fashion.'" *See Berry v.*, 717 P.2d at 684 (citing *Malan v. Lewis*, 693 P.2d 661 (Utah 1984)). Where this is so, the Court should reject Moab's invitation to apply the Act to this case and hold that doing so would violate Section 5. *See id.* at 483 ("The right protected by Article XVI, section 5 is not subject to the same kind of balancing analysis required by [the open

[17] *See, e.g., Brown v. Salt Lake City*, 93 P. 570 (Utah 1908) (wrongful death from negligent maintenance of water system) and *Sullivan v. Salt Lake City*, 44 P. 1039 (Utah 1896) (wrongful death of city employee from negligent operation of gravel pit). There are also many wrongful death cases published in newspapers from this time. For example, in 1900, parents sued Ogden City for the wrongful death of their two daughters, who died after a bank of sand in a city-owned sand pit gave way and buried them. *See* *https://newspapers.lib.utah.edu/details?id=11117595&page=10&q=suit+for+damages+death&sort=rel&year_start=1856&year_end=1901*, last accessed on July 9, 2024. Similarly, in 1901, parents sued Salt Lake City for the death of their 15-month-old son, who died of drowning in a open city ditch. *See* *https://newspapers.lib.utah.edu/details?id=13387128&page=10&q=suit+for+damages+death&sort=rel&year_start=1856&year_end=1901*, last accessed on July 9, 2024.

courts clause].”). But if the Court determines that *Tiede* controls the outcome of this case, it should further find that *Tiede* lacks the indicia of persuasive precedent.

II. If *Tiede v. State* Applies Here, It Ought to be Overturned Because It Rests on Weak Authority and Reasoning and Is Not Firmly Established in Utah Law as applied to Municipalities

If *Tiede v. State* is binding precedent, it should be limited or overturned.[18] To be sure, stare decisis “is a cornerstone of Anglo-American jurisprudence” because it “is crucial to the predictability of the law and the fairness of adjudication.” *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). As such, courts “do not overrule [their] precedents ‘lightly.’” *Eldridge v. Johndrow*, 2015 UT 21, ¶ 21, 345 P.3d 553 (quoting *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986) (plurality opinion)). But the “presumption against overruling precedent is not equally strong in all cases.” *Id.* ¶ 22 (citation omitted); *see also Francis v. Southern Pac. R.R.,* 333 U.S. 445, 471, 68 S. Ct. 611 (1948) (Black, J., dissenting) (“When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it.”).

To decide whether to limit or overturn precedent, Utah courts consider “two broad factors that distinguish between weighty precedents and less weighty ones.” *Eldridge*, 2015 UT 21, ¶ 21. The first factor investigates “the persuasiveness of the authority and reasoning on which the precedent was originally based.” *Id.* The second factor assesses “how firmly the precedent has become established in the law since it was handed down.” *Id.* Neither of these factors support giving *Tiede* special weight as to wrongful death suits against municipalities.

[18] Though this Court is bound to follow *Tiede* if it applies—which it does not—Plaintiffs still brief these arguments to preserve them for appeal. *See State v. Holgate*, 2000 UT 74, ¶ 11, 10.P.3d 346 (noting that the preservation requirement “applies to every claim, including constitutional questions”); *see also Neese v. Utah Bd. Of Pardons & Parole*, 2017 UT 89, ¶ 59, 416 P.3d 663 (“We’re an adversarial court that ought not upend our precedents absent argument from the parties that they be overturned.”).

a. *Tiede* cites no authority and gives no reasoning applicable to municipal liability

Tiede should be afforded no deference as it cites no authority and gives no reasoning relating to municipal liability. *See State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (overturning precedent that was established "with little analysis and without reference to authority"). As discussed in **Section I** above, *Tiede* relied on *Wilkinson v. State*, 134 P. 626 (Utah 1913), which did not concern the immunity of a municipality from a wrongful death suit arising out of a battery, and section 929 of the 1898 Revised Statutes of Utah, a statute having nothing to do with municipal liability.

In addition to these authorities, *Tiede* cited *State v. District Court*, 78 P.2d 502 (Utah 1937), *overruled on other grounds by Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990), and *Campbell Building Co. v. State Road Commission*, 70 P.2d 857 (Utah 1937). In *State*, the supreme court held the state road commission, as an agency of the state, immune from a lawsuit that sought to enjoin the commission from building a viaduct. *Id.* at 389 ("Being an unincorporated agency of the State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or has waived its immunity." (citing *Wilkinson v. State*, 134 P. 626 and *Campbell Building Co. v. State Road Comm.*, 70 P.2d 857 (Utah 1937)). Similarly, in *Campbell*, the supreme court concluded that a contractor could not sue the state road commission for damages in tort where the state had only waived immunity for suits arising out of a written contract. *See* 70 P.2d at 866. None of these cases even mention, let alone discuss, municipal immunity.

Neither did *Tiede*. One reviews its language in vain for any reasoning pertaining to a municipality's immunity in a wrongful death case. Without any relevant reasoning or authority, *Tiede* ought to be afforded no special weight as precedent in this arena. This conclusion is reinforced by constitutional considerations.

b. *Tiede* is not firmly established precedent in the arena of municipal immunity

In assessing whether *Tiede* has become firmly established precedent, the Court considers "the extent to which people's reliance on [it] would create injustice or hardship if it were overturned." *Eldridge*, 2015 UT 21, ¶ 35. Thus, "[e]ven if earlier precedent was wrongfully decided, the court will not overrule the precedent where . . . it has remained standing for a significant period and *many have relied on it*." *Id.* (emphasis in original) (citing 20 AM. JUR. 2D Courts § 132 (2014)). In making this assessment, courts also consider "how well [the precedent] has worked in practice" and "whether the precedent has become inconsistent with other principles of law." *Id.* ¶ 40. Under these considerations, *Tiede* is not firmly established precedent on the question of municipal immunity.

It says nothing of municipal liability. Thus, courts and parties could not *reasonably* rely on its analysis to extend the Act's battery exception to municipalities. By implication, nothing can be said about how well it has worked in practice when applied to municipal defendants. Unsurprisingly, since *Tiede* was decided in 1996, not a single reported judicial decision has applied it to extend immunity to a municipality in a wrongful death case. *See, e.g., Smith v. United States*, 2015 UT 68, 356 P.3d 1249 (referencing *Tiede* in deciding the constitutionality of the medical malpractice damage cap); *Riggs v. Georgia-Pacific LLC*, 2015 UT 17, ¶ 9, n.7, 345 P.3d 1219 (citing *Tiede* for the proposition that "the scope of protection afforded by the wrongful death provision [of the Utah Constitution] is limited to the rights of action that existed at the time the provision was adopted" (citation omitted)); *Wagner v. Utah Department of Human Servs.*, 2005 UT 54, ¶ 11, 122 P.3d 599 (citing *Tiede* for the proposition that "[t]his court has previously held in governmental immunity cases that the State is immunized against a negligence action if the

action arises out of an assault or battery" (citation omitted)); *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 36, 116 P.3d 295, *disavowed on other grounds by Smith v. United States,* 2015 UT 68 (citing *Tiede* for the proposition that the governmental immunity act "does not abrogate any previously existing right of action and therefore does not violate article XVI, section 5"); *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶ 15, 53 P.3d 473, *disavowed on other grounds by Smith v. United States,* 2015 UT 68 (same); *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 163–64 (Utah 1996) (citing *Tiede* as support for applying the battery exception in a non-wrongful death case). Simply put, *Tiede* "has not been necessary to the outcome of [any wrongful death] cases" against municipalities. *Eldridge*, 2015 UT 21, ¶ 36. On balance, then, these considerations show that "the public has [not likely] relied on [*Tiede*] in any substantial way" in this area of law. *Id.* Thus, to the extent *Tiede* applies to wrongful death cases against municipalities, it ought to be limited.

III. Proximate Causation Raises a Fact Question Not Capable of Resolution on a Rule 12(b)(6) Motion to Dismiss

Moab asks this Court to dismiss Plaintiffs' complaint under principles of proximate causation. (Mot., pp. 7–11). In making this argument, Moab discusses several out-of-jurisdiction cases where courts dismissed claims against police officers for lack of proximate cause. (*Id.*). Tellingly, these cases deals with motions for summary judgment, not motions to dismiss. *See Alexander v. Town of Vernon*, 823 A.2d 748 (Conn. Ct. App. 2007) (addressing city's motion for summary judgment based on lack of proximate cause); *Nichols v. Nichols*, 556 So. 2d 876 (La. Ct. App. 1990) (same); *Mack v. Monroe*, 595 So. 2d 353 (La. Ct. App. 1992) (same); *Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir. 1997) (same).[19]

[19] Moab also cites the Cohabitant Abuse Procedures Act—the statute cited in Plaintiffs' SAC—as *precluding* civil claims. (*See* Motion, p. 7 (citing UTAH CODE § 77-36-8)). But the section it cites merely precludes "[a] *peace officer*" from being "held liable" in a civil action. *See* UTAH CODE § 77-36-8 (emphasis added). Plaintiffs are not seeking to hold Moab's officers liable. They are instead using the Cohabitant Abuse Procedures Act as evidence of the standard of care and the multiple failures of Moab's officers. *See*

This is important. Summary judgment requires courts to look beyond the pleadings for evidence showing a genuine dispute of material fact. *See* UTAH R. CIV. P. 56(a) ("The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."); *Salo v. Tyler*, 2018 UT 7, ¶ 25, 417 P.3d 581 (requiring a nonmoving party that bears the burden of persuasion at trial to "set forth specific facts showing that there is a genuine issue for trial" (citing *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600)); *Dee v. Johnson*, 2012 UT App 237, ¶ 4, 286 P.3d 22 (noting that on summary judgment "'[i]t is only when the facts are undisputed and but one reasonable conclusion can be drawn therefrom' that proximate cause because a question of law" (citation omitted)).

Not so with a rule 12(b)(6) motion to dismiss. That rule requires courts to "accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to the plaintiff." *State v. Apotex Corp.*, 2012 UT 36, ¶ 3, 282 P.3d 66. Dismissal under this standard is proper "only if it is clear from the allegations that the [plaintiff] would not be entitled to relief under the set of facts alleged *or under any facts it could prove to support its claim*.'" *Erickson v. Canyons School Dist.*, 2020 UT App. 91, ¶ 6, 467 P.3d 917 (citation omitted) (emphasis in original). Moreover, "any doubt about whether a claim should be dismissed for lack of factual basis," "should be resolved in favor of giving the party an opportunity to present its proof." *Zisumbo v. Ogden Regional Medical Ctr.*, 2015 UT App. 240, ¶ 9, 360 P.3d 758 (emphases added).

Child v. Gonda, 972 P.2d 425, 432 (Utah 1998) (concluding that the violation of a statute may be considered "as evidence of negligence"). In addition, Plaintiffs claims do not rest solely on that statute but also rely more broadly on the standard of reasonable care owed to Gabby in tort, and the LAP—the domestic violence protocol adopted by Moab.

Here, Plaintiffs have alleged sufficient facts in support of their claim that Moab proximately caused Gabby's death. They have alleged their reliance on Moab and its officers when Gabby and Brian were stopped, stating that they would have intervened to end the trip and bring Gabby home but for the officers' investigation. (*See* **Factual Allegations**, above, ¶ 15). They have further set forth Officer Pratt's own words on the subject of proximate cause:

> You know why the domestic assault code is there. It's there to protect people. The reason they don't give us discretion on these things is because too many times women who are at risk want to go back to their abuser, they just want him to stop, and they don't want to be separated, they don't want him charged, they don't want him to go to jail. And then they end up getting worse and worse treatment, and then they end up getting killed.

(*Id.* ¶ 16). These words reflect Officer Pratt's clear understanding of the foreseeability of a victim being killed if police did not follow Utah law.

It also supports the critical importance of utilizing Moab's lethality assessment protocol—the LAP. In 2018, Moab committed "to faithfully following all essential elements" of the LAP. (*Id.* ¶ 11). In 2019, it renewed its commitment to full and faithful implementation of the LAP for a period of three years. (*Id.*). Officer Pratt should have received training on the LAP as an officer for Moab. His foresight of violence to Gabby—uttered in connection with Utah's domestic assault code—were no doubt consistent with the empirical studies associated with the LAP. (*See id.* ¶ 13).

Federally funded research on the LAP has confirmed its effectiveness at reducing the severity and frequency of re-victimization following an LAP intervention. (*Id.*). This reduction in severity, unsurprisingly, included a reduction in the homicide rate. (*Id.*) These positive findings were explained by two things: first, the LAP's role in educating women of the risks to their lives and the actions they can take to protect themselves; and (2) the improved quality of law-enforcement investigations that use the LAP. (*Id.*; *see also* D. Kelly Weisberg, "Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years," in

Hastings Women's Law Journal, vol. 30, no. 2 (2019), p. 226 (noting that "[v]ictims' protective actions included: removing or hiding a partner's weapons, obtaining mace or pepper spray, establishing a safety code to alert family/friends of trouble, improving home security, applying for an order of protection, obtaining medical care from a health care practitioner, going somewhere where the partner could not find or see them, and seeking advocacy services.").

Despite foreseeing the harm that became a reality, Officer Pratt and his colleagues released Gabby back to her abuser. At this moment, Plaintiffs believe the danger to Gabby would have screened as "high danger" under the LAP, which means she was at an increased risk of homicide. If Moab's officers had followed state law and the LAP, Gabby would have been apprised of the true nature of the risk to her life and given the tools needed to protect herself. Instead, Officer Pratt and Officer Robbins sympathized with Brian, thereby likely enabling and emboldening his future abuse. (*See id.* ¶ 7; *see also id.* ¶ 14 ("When [Officer Pratt] told Brian his conclusion that Gabby was the primary aggressor and that Brian was 'the victim of domestic assault,' Brian laughed."). Moreover, their involvement caused Gabby's parents—who spoke with Gabby at the scene and demanded she fly home to get away from Brian—to stand down on the belief that Moab and its officers would protect their daughter. (*Id.* ¶ 15). On these allegations, it cannot be said that Plaintiffs "would not be entitled to relief . . . under any facts it could prove to support its claim." *Erickson*, 2020 UT App. 91, ¶ 6. Consequently, the Court should deny Moab's proximate cause argument and its Motion.

Conclusion

Gabby's tragic murder at the hands of her fiancé was preventable. Moab and its officers simply needed to follow Utah law and Moab's domestic violence protocol—the LAP. This they did not do. Now, after the outcome that Officer Pratt foresaw has become a reality, Moab raises

the Act and the battery exception to immunize it from suit. The Court should find this effort to be inefficacious under Section 5. That section, as informed by Utah's unique history, shows that all Utahans have the fundamental right to pursue a wrongful death cause of action, even against a municipality. The settlers of this state intended to safeguard that right. They endured government-sanctioned persecutions and were turned away when seeking legislative and judicial redress. When they ultimately found their way to the west, the created a legal regime that protected every citizen's right to seek redress for the death of a loved one. They enshrined those protections in territorial era statutes and vested the right of a wrongful death cause of action in the Utah Constitution. This Court should recognize these facts and hold that Moab does not enjoy immunity in this case under the Act. Only in this way, can the Court protect the guarantees found in Section 5 as understood by those who drafted Utah's Constitution and ratified it as the supreme law of the State of Utah.

DATED this 9th day of July, 2024.

/s/ Judson D. Burton
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Opposition to Defendant Moab City Police Department's Motion to Dismiss was served on the following via the electronic filing system:

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