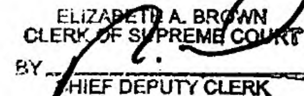
138 Nev., Advance Opinion 86

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,
Appellant,
vs.
BRIAN WILLIAMS; JAMES DZURENDA; ARTHUR EMLING, JR.; AND MYRA LAURIAN,
Respondents.

No. 81513



DEC 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Certified questions under NRAP 5 concerning a private citizen's enforcement, through a claim for damages, of due-process and search-and-seizure rights guaranteed under the Nevada Constitution and the defense of such actions. United States District Court for the District of Nevada; Andrew P. Gordon, District Judge.

Questions answered in part.

Gallian Welker & Associates, L.C., and Travis N. Barrick and Nathan E. Lawrence, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, and Kiel B. Ireland, Deputy Attorney General, Carson City,
for Respondents.

Institute for Justice and Benjamin A. Field, Arlington, Virginia, and Wesley Hottot, Seattle, Washington; Pisanelli Bice, PLLC, and Jordan T. Smith, Las Vegas,
for Amici Curiae Institute for Justice and Stephen Lara.

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McLetchie Law and Margaret A. McLetchie, Las Vegas; Roderick & Solange MacArthur Justice Center and Megha Ram, Washington, D.C., and Rosalind Dillon and Daniel Greenfield, Chicago, Illinois,
for Amicus Curiae Roderick & Solange MacArthur Justice Center.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, CADISH, J.:

The United States District Court for the District of Nevada certified four questions under NRAP 5 concerning a private plaintiff's ability to enforce by private right of action due-process and search-and-seizure rights guaranteed under the Nevada Constitution and a defendant's accompanying ability to defend such actions. While we decline to answer the certified question related to due-process rights, we elect to reframe the remaining certified questions to answer only the determinative issues in this case and, to that end, conclude that a private right of action for money damages exists to vindicate violations of search-and-seizure rights under the Nevada Constitution, but a qualified-immunity defense does not apply to such an action.

FACTS AND PROCEDURAL HISTORY

Appellant Sonjia Mack went to High Desert State Prison (HDSP) to visit an inmate. According to Mack, respondents Arthur Emling and Myra Laurian, officers at HDSP, escorted her to an administrative building, where "Laurian conducted a strip search of Mack" that did not turn up any contraband. Still, after the strip search, Emling interrogated Mack regarding her alleged possession of contraband and knowledge of

"ongoing crimes." Following the strip search and interrogation, the HDSP employees refused to allow Mack visitation. Shortly thereafter, Mack received a letter from HDSP indefinitely suspending her visiting privileges and requiring her to obtain written permission from respondents Brian Williams, the Warden of HDSP, or James Dzurenda, the then-Director of the Nevada Department of Corrections (NDOC), to return to HDSP.

As a result of this incident, Mack filed a civil-rights action against respondents (collectively, NDOC parties) in federal district court, asserting violations of her federal and state constitutional rights. As relevant to the certified questions, Mack asserted that Emling and Laurian's allegedly unlawful strip search of her violated her right to procedural due process under Nevada Constitution, Article 1, Section 8 and her right against unreasonable searches and seizures under Article 1, Section 18.[1] The NDOC parties moved for summary judgment on all state and federal claims; however, their motion focused exclusively on the federal claims and offered no arguments specific to the state-law claims. The U.S. District Court denied summary judgment on the state-law claim under Article 1, Section 8 against Emling and Laurian based on its conclusion that qualified immunity does not apply to claims based on state law. The court also denied summary judgment on the state-law claim under Article 1, Section 18 against Emling and Laurian based on its conclusion that genuine disputes of material fact existed as to "whether Mack was seized," "Mack consented to the strip search," and "Emling and Laurian had reasonable suspicion to strip search Mack."

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[1]Mack also asserted state constitutional claims against Williams and Dzurenda, but the district court entered summary judgment against her on those claims, and they are not at issue in this matter.

Moving for reconsideration, the NDOC parties argued, for the first time, that there was "no private right of action under the Nevada Constitution." Additionally, they argued that "if such a right exists, Nevada courts would apply the doctrine of qualified immunity." Based on these arguments, the U.S. District Court reconsidered its order to the extent it had allowed the state-law claims to proceed and certified four questions of law to this court:

> 1. Is there a private right of action under the Nevada Constitution, Article 1, Section 8?
> 2. Is there a private right of action under the Nevada Constitution, Article 1, Section 18?
> 3. If there is a private right of action, what immunities, if any, can a state-actor defendant raise as a defense?
> 4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

We accepted the certified questions and ordered briefing.

DISCUSSION

We elect to reframe and answer some of the certified questions

We have discretion under NRAP 5 to answer questions of Nevada law certified to us by federal courts when no controlling authority exists on those questions of law and they involve "determinative" matters of the case before the certifying court. NRAP 5(a); *see also Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014). "A certified question under NRAP 5 presents a pure question of law, which this court answers de novo." *Echeverria v. State*, 137 Nev., Adv. Op. 49, 495 P.3d 471, 474 (2021). Accepting "the facts as stated in the certification order and its attachment[s]," if any, we limit our role "to answering the questions of law posed." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (permitting parties to supply an appendix to

give "a greater understanding of the pending action" but disallowing use of the appendix "to contradict the certification order"). We nevertheless maintain "discretion to rephrase the certified questions as . . . necessary" to conform to our long-standing prohibition against advisory opinions. *Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 474-75 ("[M]ere considerations of efficiency cannot overcome the firm jurisdictional bar on advisory opinions."). While "further factual and legal development . . . does not make our answers to . . . certified questions impermissibly advisory," we decline to answer certified questions where our answers are "[in]sufficiently outcome-determinative to satisfy NRAP 5," such as where "Nevada law may [not] resolve the case . . . without need of further proceedings." *Parsons v. Colts Mfg. Co.*, 137 Nev., Adv. Op. 72, 499 P.3d 602, 606 (2021).

Applying these principles here, we find no controlling authority on a private plaintiff's ability to enforce the at-issue provisions of the Nevada Constitution. Nevertheless, as to the determinative nature of the questions, the U.S. District Court asks us to resolve the availability of a private right of action for violations of procedural due-process and search-and-seizure rights, yet, unlike the search-and-seizure claim, the certification order yields little information about the nature of the procedural due-process claim. While the order mentions that Mack asserts a protected liberty interest derived from prison regulations related to strip searches, it does not identify that claimed interest. Similarly, the certification order does not specify those regulations and does not describe any process, let alone a deficient one, adopted by state actors that allegedly denied Mack due process. *Cf. Eggleston v. Stuart*, 137 Nev., Adv. Op. 51, 495 P.3d 482, 489 (2021) (discussing comparable federal procedural due-process rights and observing that "[p]rocedural due process claims arise

where the State interferes with a liberty or property interest and the State's procedure was constitutionally insufficient"). Nor does the certifying court ask us to assume, without independently deciding, any legal principles related to the claim. *See Parsons*, 137 Nev., Adv. Op. 72, 499 P.3d at 606 (recognizing that we "accept the certifying court's determinations [of] . . . its own substantive and procedural law"). The insufficient facts, law, or context in the certification order regarding the nature of the procedural due-process claim would require us, in answering the question posed and in conflict with our caselaw, to conceive of the claim in the abstract and to apply a framework to factual and legal uncertainty. *See, e.g., Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981) ("This court will not render advisory opinions on . . . abstract questions.").

Even putting those concerns aside, our answer on the procedural due-process claim would "have, at best, a speculative impact in determining the underlying case," as the viability of the claim necessarily entails further proceedings before this court regarding whether a cognizable liberty interest exists, and assuming the prison regulations provide a "process," whether the process satisfies our due-process jurisprudence. *See Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006). Our answer, then, on that claim may not resolve the matter pending before the certifying court and instead may amount to an advisory opinion. By contrast, the certification order develops the factual and legal nature of the search-and-seizure claim, and our answer, if affirmative, leaves only factual determinations regarding well-settled principles on seizure, reasonable suspicion, and consent. Accordingly, while we decline to answer the first question, we determine it proper to answer the second question.

Moreover, the U.S. District Court calls on us to determine what remedies, if any, are available to private plaintiffs and what immunities, if any, are available to state actors if we conclude a private right of action under the Nevada Constitution exists. But Mack's remaining state-law claims under the Nevada Constitution seek only retrospective monetary relief for the allegedly unlawful strip search. Additionally, the NDOC parties raised only the defense of qualified immunity in their pleadings before the U.S. District Court. We would thus exceed our jurisdictional authority if we addressed the availability of any and all remedies and defenses to such claims, where only monetary relief and qualified immunity remain determinative of the cause before the district court. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("This court's duty is not to render advisory opinions . . . ."); *see also Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 475 (declining to answer a certified question on the State's immunity from liability based on the argument that appellants would assert certain claims later in the case).

Accordingly, we elect to rephrase and address the remaining certified questions to the extent necessary to avoid impermissible responses. Taking our analyses together, we consider the U.S. District Court's certified questions as follows:

> 1. Is there a private right of action for retrospective monetary relief under the Nevada Constitution, Article 1, Section 18?
>
> 2. If there is a private right of action, can a state-actor defendant raise qualified immunity as a defense?

Certified Question 1: The Nevada Constitution Article 1, Section 18 contains an implied private right of action for retrospective monetary relief

Mack contends that the mere articulation of a right in the Nevada Constitution establishes an implied private cause of action for violations of that right. She urges this court to rely on its inherent power and to analogize to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a federal right of action for damages for violations of the Fourth Amendment), in recognizing a private right of action under the Nevada Constitution. By contrast, the NDOC parties argue that neither the Nevada Constitution nor the Nevada Legislature has authorized monetary relief by private right of action. They contend that the lack of a legislative private right of action for monetary relief in this context forecloses an implied private right of action under the Nevada Constitution. As we discuss in more detail below, we do not find either position, by itself, wholly satisfactory to resolve the first certified question as rephrased.

The Nevada Constitution represents "the direct, positive, and *limiting* voice of the people." *Wren v. Dixon*, 40 Nev. 170, 187, 161 P. 722, 726 (1916) (emphasis added). In discussing our constitution, we have characterized its "prohibitory provisions" as "self-executing," thus "need[ing] no further legislation to put [them] in force." *See id.* at 194, 196, 161 P. at 729 (quoting, in part, *Davis v. Burke*, 179 U.S. 399, 403 (1900)); *Wilson v. Koontz*, 76 Nev. 33, 36-37, 38-39, 348 P.2d 231, 232, 233-34 (1960) (construing as "self-executing" a provision of the Nevada Constitution that "empower[s]" the people to propose and adopt amendments by voter referendum, based in part on express designation in the language of the amendment and in part on the nature of the amendment). We reaffirmed this principle in *Alper v. Clark County*, emphasizing that constitutional

provisions, "as prohibitions on the state and federal government, are self-executing." 93 Nev. 569, 572, 571 P.2d 810, 811 (1977) (discussing, specifically, the Takings Clause under the Nevada Constitution). As one of our sister courts explained, a "self-executing" provision "prohibit[s] certain conduct" by the government, as opposed to "indicat[ing] a general principle or line of policy," such that it does not depend on or require legislation for the people to enjoy or enforce the rights therein. *Jensen v. Cunningham*, 250 P.3d 465, 481-82 (Utah 2011) (quoting, in the second clause, *Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533, 535 (Utah 2000)) (concluding that a provision under the Utah Constitution guaranteeing search-and-seizure protections was "self-executing"); *see also Gray v. Va. Sec'y of Transp.*, 662 S.E.2d 66, 71 (Va. 2008) (providing that "constitutional provisions in bills of rights . . . are usually considered self-executing," as they "specifically prohibit particular conduct" by the government (quoting *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 681 (Va. 1985))). Drawing on this understanding of self-executing constitutional provisions, we held in *Alper* that the "effect" of the self-executing nature of the provisions "is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute." *Alper*, 93 Nev. at 572, 571 P.2d at 812.

Article 1, Section 18 of the Nevada Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches." Nev. Const. art. 1, § 18. Considering the same language in the federal constitution, we have described search-and-seizure rights as "protect[ion] against 'unreasonable' invasions of privacy . . . by the government." *Hiibel v. Sixth Judicial Dist.*

Court, 118 Nev. 868, 872, 59 P.3d 1201, 1204 (2002) (discussing the Fourth Amendment to the U.S. Constitution, which is substantively identical to Article 1, Section 18 of the Nevada Constitution). That is, the language of Section 18 imposes "a limitation," as opposed to "an affirmative obligation," on a state actor's "power to act," rendering this provision prohibitory. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *cf. Daniel v. Cook County*, 833 F.3d 728, 733 (7th Cir. 2016) (describing the "individual rights" in the analogous U.S. Constitution's Bill of Rights as "negative rights, meaning that [the Bill of Rights] protects individuals from some forms of government intrusions upon their liberty, without imposing affirmative duties on governments to care for their citizens"); *Alper*, 93 Nev. at 572, 571 P.2d at 811 (describing "[t]he right to just compensation for private property taken for the public use" as "prohibitions on the [S]tate"). As our caselaw suggests, the provision, because of its prohibitory nature, is self-executing and thus is not dependent on "subsequent legislation to carry [it] into effect." *Wilson*, 76 Nev. at 39, 348 P.2d at 234 (quoting *Willis v. St. Paul Sanitation Co.*, 50 N.W. 1110, 1111 (Minn. 1892)). It thus follows from our decisions in *Alper* and *Wilson* that the self-executing search-and-seizure provision of the Nevada Constitution contains a private cause of action to enforce its proscription, regardless of any affirmative legislative authorization. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

True, a damages remedy does not automatically follow from the conclusion that a private right of action exists. *See Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996). While we held in *Alper* that a private right

of action for money damages exists under the Takings Clause of the Nevada Constitution, that clause specifically contemplates "compensation," so we did not need to deeply analyze the propriety of a damages remedy there. *See Alper*, 93 Nev. at 572, 571 P.2d at 811; *see also* Nev. Const. art. 1, § 8, cl. 3. Helpfully, several other courts have considered the question we confront today regarding the availability of money damages for violations of self-executing provisions of their respective state constitutions. *See, e.g.*, *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 342-43 (Cal. 2002) (addressing whether the California Constitution's self-executing provision on procedural due process supports an action for money damages); *Godfrey v. Iowa*, 898 N.W.2d 844, 871 (Iowa 2017) ("The Iowa constitutional provision regarding due process of law . . . has traditionally been self-executing without remedial legislation for equitable purposes, and there is no reason to think it is not self-executing for the purposes of damages at law."); *Dorwart v. Caraway*, 58 P.3d 128, 136 (Mont. 2002) ("We conclude that the *Bivens* line of authority buttressed by § 874A of the Restatement (Second) of Torts are sound reasons for applying a cause of action for money damages for violations of those self-executing provisions of the Montana Constitution."); *Brown*, 674 N.E.2d at 1139 (recognizing the New York Constitution's equal-protection and search-and-seizure provisions as "self-executing" and considering the availability of money damages for violations thereof); *Spackman*, 16 P.3d at 538 ("[A] Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law. The Restatement (Second) of Torts supports this view.").

Most famously, the U.S. Supreme Court in *Bivens* recognized that, "in the absence of affirmative action by Congress," a private damages action exists for injuries that result from violations of the Fourth

Amendment of the U.S. Constitution by federal actors, despite that the amendment "does not in so many words provide" for such enforcement.[2] *Bivens*, 403 U.S. at 396-97. There, the appellant brought a damages action against federal narcotic agents after they entered his home, "manacled [him] in front of his wife and children," and conducted a warrantless and suspicionless search of his home. *Id.* at 389. In so recognizing a private damages action, the Court observed that its holding "should hardly seem a surprising proposition," given that, "[h]istorically, 'damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. In the Court's view, provision of a damages remedy simply accorded with the common practice of courts to "adjust their remedies" as the circumstances demanded "so as to grant the necessary relief." *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Moreover, the Court identified "no special factors counseling hesitation in the absence of affirmative [legislative] action," such as "federal fiscal policy," "equally effective" alternative remedies, or explicit legislative prohibition of such claims. *See id.* at 396-97 (internal quotation marks omitted).

While the *Bivens* decision is persuasive, it is nevertheless incomplete in our view to resolve the first rephrased certified question. As the California Supreme Court observed, the *Bivens* decision asked whether "a court *should create* or *recognize* a tort action premised upon violation of

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[2]However, the U.S. Supreme Court did not explicitly premise its decision on the principle of self-executing rights. *See Bivens*, 403 U.S. at 396 (reasoning that while the text of the Fourth Amendment does not explicitly provide an enforcement mechanism for violations therein, settled legal principles nevertheless permit federal courts to provide an available remedy for the invasion of legal rights guaranteed therein).

a constitutional provision" absent affirmative legislative action, without addressing whether the at-issue constitutional provision *evidenced an intent* to provide or withhold such an action. *Katzberg*, 58 P.3d at 347-48. Moreover, in subsequent decisions, the U.S. Supreme Court has critiqued the normative approach of the *Bivens* decision based on its view that judicial provision of a remedy for a constitutional violation often encroaches on a legislative task. *See, e.g., Ziglar v. Abbasi*, ___ U.S. ___, ___, 137 S. Ct. 1843, 1855-57 (2017). That is, the Court's subsequent *Bivens* jurisprudence has treated Congress as "better equipped to create a damages remedy," lest the Court "arrogate legislative power." *Egbert v. Boule*, ___ U.S. ___, ___, 142 S. Ct. 1793, 1803 (2022) (internal alterations omitted) (quoting, in the second clause, *Hernandez v. Mesa*, ___ U.S. ___, ___, 140 S. Ct. 735, 741 (2020)). In so doing, it has narrowed the appropriate circumstances in which a damages remedy exists and has effectively accomplished the result that only Congress may confer a damages remedy on private plaintiffs. *See id.* (observing that "Congress is 'far more competent than the Judiciary' to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain" (internal citations omitted) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988))).

However, we remain "free to interpret [our] own constitutional provisions" as we see fit, regardless of any similarities between our state and federal constitutions. *See State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003) (quoting *Osburn v. State*, 118 Nev. 323, 326, 44 P.3d 523, 525 (2002)) (referencing the search-and-seizure clauses of the U.S. Constitution and the Nevada Constitution); *see also California v. Greenwood*, 486 U.S. 35, 43 (1988). The Nevada Constitution places limitations on legislative action, while it leaves interpretation and

enforcement of the Nevada Constitution to the judiciary. *See Wren*, 40 Nev. at 187, 161 P. at 726; *cf. Clean Water Coal. v. M Resort*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (recognizing, in the context of legislative action, the judiciary's obligation "[u]nder constitutional checks and balances principles" to enforce constitutional restrictions on such "law-making authority"). Our caselaw makes clear that when it comes to the self-executing rights contained within our Constitution's provisions, the Legislature lacks the authority to pass legislation that abridges or impairs those rights; likewise, the availability of remedies that follow from violations of those rights does not depend on the Legislature's benevolence or foresight. *Alper*, 93 Nev. at 572, 571 P.2d at 811-12. Thus, we do not view the question before us as simply a battle between judicial and legislative competence. Accordingly, the *Bivens* decision and its progeny do not by themselves resolve whether Mack may enforce her search-and-seizure rights under our Constitution by a private action for money damages.

By contrast, the California Supreme Court has recognized its state constitution similarly embodies the self-executing principle and has developed a framework to approach, on a case-by-case basis, whether to recognize a damages action for violations of an at-issue self-executing constitutional provision. *See Katzberg*, 58 P.3d at 342-43, 350. Its approach—unlike the U.S. Supreme Court's—focuses first on "the language and history of the constitutional provision" at issue to ascertain whether "an affirmative intent either to authorize or to withhold a damages action to remedy a violation" exists. *Id.* at 350. It then enforces any affirmative intent either way. *Id.* We believe this first step reflects our general approach to constitutional interpretation in other contexts, as it treats the

plain language of the Constitution as controlling to the extent the language therein expresses an intention to grant or to withhold a private right of action. *See Schwartz v. Lopez*, 132 Nev. 732, 745, 382 P.3d 886, 895 (2016). Moreover, the framework's recognition that the mere absence of any indicative language within a provision does not foreclose a private damages action comports with our recognition that self-executing rights require no specific language or procedure for their private enforcement. *See Alper*, 93 Nev. at 572, 571 P.2d at 812.

But absent such affirmative indication of intent, the California Supreme Court undertakes second a "'constitutional tort' analysis." *See Katzberg*, 58 P.3d at 350. While a "constitutional tort" generally refers to a damages action "for violation of a constitutional right against a government or individual defendants," *Brown*, 674 N.E.2d at 1132, a constitutional-tort analysis denotes a methodology that answers on a case-by-case basis the central question of whether to recognize a private damages action under a state constitution,[3] *see Katzberg*, 58 P.3d at 355. To that end, the California Supreme Court relies on § 874A of the Restatement (Second) of Torts, which several authorities have also described as reflected or illustrated in the *Bivens* decision, although that decision makes no explicit reference to the Restatement approach. *See id.* at 355-57; *see also Brown*, 674 N.E.2d at 1138. Section 874A of the Restatement provides that if

> a provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may provide such remedy if (1) it is in furtherance of the purpose of the [provision] and

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[3]As damages remain the only remedy at issue in this matter, we express no view on the applicability of this framework to other forms of relief.

(2) is needed to assure the effectiveness of the provision.

Restatement (Second) of Torts § 874A (Am. Law Inst. 1979); *see also id.* § 874A cmt. a. As we discuss in more detail below, the Restatement uses a factor-based approach that incorporates flexibility, while encouraging judiciousness in determining whether an at-issue self-executing provision is enforceable by the requested remedy in the absence of affirmative language to the contrary. It also incorporates a degree of deference to legislative determinations insofar as it directs courts to consider the existence of alternative legislatively enacted remedies. Nevertheless, it does not treat legislative action as dispositive, which aligns with our acknowledgment in *Alper* that the Legislature lacks authority to curtail or weaken self-executing rights. *See Alper*, 93 Nev. at 572, 571 P.2d at 812.

Even if the constitutional-tort analysis favors a damages action, the California Supreme Court determines third whether "any special factors counsel[ ] hesitation in recognizing a damages action." *Katzberg*, 58 P.3d at 350. This third step invokes *Bivens* and its progeny, as the U.S. Supreme Court's *Bivens* jurisprudence has consistently relied on the absence or existence of special factors in ultimately recognizing or declining to recognize damages as an available remedy under the U.S. Constitution for private actors. *See id.* at 358; *see also Bivens*, 403 U.S. at 396; *Ziglar*, ___ U.S. at ___, 137 S. Ct. at 1860. While we do not adopt the U.S. Supreme Court's current test for the so-called "*Bivens* action," we hold that consideration of these "special factors" further encourages cautious and prudent judicial decision-making, while maintaining fidelity to our separation-of-powers structure of governance. *See Ziglar*, ___ U.S. at ___, 137 S. Ct. at 1857-58 (explaining that "separation-of-powers principles are . . . central to the analysis" of whether a factor is "special" in that it

"cause[s] a court to hesitate"); *cf. Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92, 212 P.3d 1098, 1103 (2009) (explaining that the Nevada Constitution has "embraced" the separation-of-powers doctrine "to prevent one branch of government from encroaching on the powers of another branch").

Based on the above discussion, we believe that the *Katzberg* framework is persuasive and compatible with our caselaw on self-executing provisions. Accordingly, we formally adopt the *Katzberg* framework to resolve questions of whether a damages action exists to enforce self-executing provisions of the Nevada Constitution. We now turn to applying this framework.

Article 1, Section 18 of the Nevada Constitution neither establishes nor precludes a private right of action for monetary relief for violations of its guarantees

As noted above, the Nevada Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches." Nev. Const. art. 1, § 18. The provision unambiguously does not explicitly authorize a right of action for money damages; however, it unambiguously does not explicitly preclude a right of action for money damages, either. Further, Article 1 of the Nevada Constitution does not otherwise contain a provision that expressly provides or forecloses a right of action for money damages to enforce individual rights therein.[4]

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[4]The two provisions of the Nevada Constitution that provide express rights of action were not ratified by the voters until 2006 and 2018, respectively. *See* Nev. Const. art. 15, § 16, cl. B (providing a right of "action against" an employer who violates minimum-wage requirements of the section); Nev. Const. art. 1, § 8A, cl. 4 (providing a right of "action to compel a public officer or employee to carry out any duty" of the section related to

Moreover, nothing in the language of the Nevada Constitution as a whole requires the Legislature to authorize suits against state actors for violations of the protections therein. *See Alper*, 93 Nev. at 572, 571 P.2d at 812. We cannot assume, as the NDOC parties suggest, that the absence of language providing a right of action for monetary relief establishes the converse, that none exists. Unlike the statutory-rights context, where we treat "legislative intent" as the "determinative factor" in considering whether the judiciary may imply a right of action to enforce statutory rights, *see Baldonado v. Wynn Las Vegas*, 124 Nev. 951, 958-59, 194 P.3d 96, 100-01 (2008), in the constitutional-rights context, we "retain[ ] the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution," *Bauserman v. Unemp't Ins. Agency*, No. 160813, ___ N.W.2d ___, 2022 WL 2965921, at *6 (Mich. July 26, 2022); *see also* Nev. Const. art. 6, § 1 (vesting judicial power of the state in our courts). As the Michigan Supreme Court said of its own state's constitution, the Legislature's ability to create statutory rights "has no bearing on whether the Legislature has the authority to restrict rights codified in the Constitution, let alone whether those rights remain fallow without legislative enactment." *Bauserman*, 2022 WL 2965921, at *12. Constitutional rights must remain enforceable in the absence of some action by the Legislature, or risk that constitutional rights become all but "a mere hope." *Id.* at **11, 13. Therefore, we reject

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the "rights" of a "victim of a crime"). Thus, those provisions do not support the claim that Article 1, as originally ratified in 1864, provides no right of action absent express language or legislative authorization. *Cf. Ramsey v. City of North Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 617 (2017) (explaining that "contemporaneous" interpretation "of a constitutional provision is a safe guide to its proper interpretation" (quoting *Halverson v. Miller*, 124 Nev. 484, 488-89, 186 P.3d 893, 897 (2008))).

the NDOC parties' invitation to apply a *Baldonado*-type analysis to the certified question.

Nor can we assume one step further that *only* the Legislature possesses the authority to create a private damages action. Article 4 of the Nevada Constitution, which creates our state's legislative branch, does not commit to the Nevada Legislature the sole authority to recognize causes of action to enforce individual rights. *Cf. id.* at *12 (discussing that a separation-of-powers form of governance establishes each branch's "authority within its purview" but does not "explore the boundaries of that purview" (emphasis omitted)). Article 4 states only that "[p]rovision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution." Nev. Const. art. 4, § 22. We have previously described this language as "vest[ing] in the Legislature" the authority "to waive sovereign immunity." *See Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 475 ("In Nevada, the power to waive sovereign immunity is vested in the Legislature." (citing Nev. Const. art. 4, § 22)). But we do not read the authority to waive the State's sovereign immunity or the authority to establish the State's liabilities to unequivocally vest the Legislature with the *exclusive* power to recognize judicial mechanisms to enforce rights guaranteed by the Nevada Constitution.[5] *See generally*

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[5]The waiver statute provides that "[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided" in the statutory scheme. NRS 41.031(1). State actors are also subject to liability based on the waiver. *Cf.* NRS 41.0349 (indemnifying state actors who have "a judgment . . . entered against" them "based on any act or omission relating to [their] public duty or employment," except in limited, enumerated situations). The statutory scheme even

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("Nothing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered.").

As the NDOC parties point out, we have previously acknowledged the availability of certain forms of relief for constitutional violations that had at the time of our decisions already been legislatively authorized. *See, e.g., City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013) (discussing availability of preliminary injunctive relief in a constitutional challenge); *Tam v. Colton*, 94 Nev. 453, 455-56, 581 P.2d 447, 449-50 (1978) (concluding that appellant "ha[d] the requisite standing to challenge" the constitutionality of NRS 396.040 and obtain declaratory relief). However, the legislatively authorized relief in both the declaratory-relief statute, NRS 30.040, and the injunctive-relief statute, NRS 33.010, does not apply solely to, or even expressly mention, constitutional challenges. Importantly, we have never suggested that the availability of the relief necessarily depended on the legislative authorization, as such a suggestion conflicts with our understanding of self-executing provisions described above. *See Godfrey v. State*, 898 N.W.2d 844, 865 (Iowa 2017) ("It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were

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appears to assume that a right of action under the Nevada Constitution already exists. *See, e.g.*, NRS 41.0334(1), (2)(b) (providing immunity for situations that fall within the subsection but restoring the waiver for "any action for injury, wrongful death or other damage" that results "from the deprivation of any rights, privileges or immunities secured by the United States Constitution or the Constitution of the State of Nevada").

dependent on legislative action for enforcement. It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens.").

And our decisions have, in other contexts, recognized a cause of action under the Nevada Constitution, *see, e.g., Fritz v. Washoe County*, 132 Nev. 580, 583-84, 376 P.3d 794, 796 (2016) (permitting an aggrieved party to file a claim for inverse condemnation against state actors to recover "just compensation" after "a governmental entity takes property without [such] compensation, or [without] initiating an eminent domain action"), despite that it does not expressly provide one, *see* Nev. Const. art. 1, § 8, cl. 3 (guaranteeing "just compensation" for "[p]rivate property . . . taken for public use"). Accordingly, we do not interpret the absence of language in the Nevada Constitution regarding a private damages action to enforce Article 1, Section 18 as a limitation on the judiciary's inherent powers to recognize such an action. *See* Nev. Const. art. 6, § 1 (vesting the "[j]udicial power of this State . . . in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace"); *see also Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Ultimately, then, although the Nevada Constitution does not address enforcement of individual rights, it also does not foreclose an implied right of action for money damages based on violations of those rights. Confronted with no affirmative indication of intent, we accordingly move to step two of our newly adopted framework.

Applying the constitutional-tort analysis embodied in the Restatement favors monetary relief as an available remedy to vindicate rights guaranteed by the Nevada Constitution Article 1, Section 18

As noted above, the Restatement indicates that a remedy should exist for violations of a prohibitory constitutional provision if such a

remedy is (1) "in furtherance of the purpose of the" provision and (2) "is needed to assure the effectiveness of the provision."[6] Restatement (Second) of Torts § 874A (Am. Law Inst. 1979); *see also id.* § 874A cmt. a (applying the Restatement approach to constitutional provisions). The Restatement also lists several factors to consider in applying that analysis: (1) "[t]he nature of the legislative provision," (2) "[t]he adequacy of existing remedies," (3) the extent to which a tort action "supplement[s] or interfere[s] with" existing remedies and enforcement, (4) "[t]he significance of the purpose" of the provision, (5) "[t]he extent of the change in tort law," and (6) "[t]he burden" on the judiciary. *See id.* § 874A cmt. h. However, ultimately, the Restatement recognizes judicial "discretion" and directs courts to use such discretion "cautiously and soundly." *Id.* § 874A cmt. d.

As the Restatement's primary test considers whether the proposed remedy is consistent with the purpose of and necessary to enforce the provision, the analysis necessarily depends on existing alternative remedies. *See id.* § 874A cmt. h(2). While the existence of alternative remedies represents only one of many factors, it may, depending on the circumstances, carry more weight than some of the other factors set forth in the Restatement. *See, e.g., Katzberg*, 58 P.3d at 357 (applying several factors but ultimately concluding that "the availability of meaningful alternative remedies leads [the court] to decline to recognize" a damages action there); *Bivens*, 403 U.S. at 397 (discussing that no "equally effective"

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[6]By its terms, the Restatement analysis applies both to legislative and constitutional provisions. Restatement (Second) of Torts § 874A cmt. a (Am. Law Inst. 1979). By adopting the Restatement in the constitutional context, we do not abrogate our caselaw on implied statutory rights of action. *See Baldonado*, 124 Nev. at 958-59, 194 P.3d at 101 (setting forth three factors for determining whether to "create a private judicial remedy").

remedy was available for appellant). But, here, the Legislature has not "crafted a meaningful alternative remedy for the constitutional violation[s]." *See Binette v. Sabo*, 710 A.2d 688, 697-98 (Conn. 1998). And even if the Legislature has authorized injunctive and declaratory relief for such claims (an argument we questioned above), equitable relief rarely, if ever, suffices to remedy a past wrong, as Mack has assertedly suffered here. *See Bivens*, 403 U.S. at 409-10 (Harlan, J., concurring) ("For people in [appellant's] shoes, it is damages or nothing."); *see also Brown*, 674 N.E.2d at 1141 (reasoning that injunctive and declaratory relief "fall short" of deterring "invasion[s] of personal interests in liberty").

Similarly, we reject the NDOC parties' assertion that state tort law provides meaningful redress for invasions of the constitutional right at issue here. Although other courts have determined tort remedies suffice to compensate for personal invasions of certain constitutional rights, *see, e.g.*, *Katzberg*, 58 P.3d at 340, 356 (deeming defamation tort remedies sufficient to compensate for harm based on a violation of appellant's due-process liberty interest over the failure of university regents to provide him with a timely "name-clearing" hearing after his removal as department chair at a university medical center), we disagree that any commonalities between state tort-law claims and constitutional protections, *see Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 370-71, 212 P.3d 1068, 1082-83 (2009) (precluding certain common-law tort claims under "the general rule against double satisfaction" where those claims were premised on violations of appellant's Fourth Amendment rights for which he had brought a cognizable § 1983 claim), provide meaningful recourse for violations of the constitutional right against unreasonable searches and seizures by government agents, as state tort law ultimately protects and serves

different interests than such constitutional guarantees, *see Bivens*, 403 U.S. at 394-95. A state actor's legal obligation under a state constitution "extends far beyond that of his or her fellow citizens" under tort law; accordingly, a state actor is "not only . . . required to respect the rights of other citizens" but also "sworn to *protect and defend* those rights." *Binette*, 710 A.2d at 698. Absent a damages remedy here, no mechanism exists to deter or prevent violations of important individual rights in situations like that allegedly experienced by Mack.[7] Thus, a damages remedy is warranted under this factor of the Restatement test, as monetary relief remains necessary to enforce the provision for individuals in Mack's shoes, and a damages remedy furthers the purpose of the search-and-seizure provision to the extent it acts as a deterrent to government illegality.

Nor do any of the other factors identified in the Restatement disfavor a damages remedy here. The nature of the constitutional provision, *see* Restatement (Second) of Torts § 874A cmt. h(1), h(4) (Am. Law Inst. 1979), demands that this court exercise its authority and responsibility to enforce the limitations that the Nevada Constitution imposes on the State and its actors for such fundamental rights, *see Bauserman*, ___ N.W.2d at ___, 2022 WL 2965921, at **6, 8. Further, conduct proscribed and regulated by the search-and-seizure provision has been well developed and mostly well settled by this court, such that a damages action will not create a new burden on state actors or interfere with existing principles related to search-and-seizure jurisprudence. *See* Restatement (Second) of Torts § 874A cmt.

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[7]Because we find no meaningful remedy already exists, we do not need to reach the issue of what alternative or superseding remedies satisfy our newly adopted framework or our caselaw on self-executing provisions. *See Alper*, 93 Nev. at 572, 571 P.2d at 812 (explaining that self-executing provisions "cannot be abridged or impaired by statute").

h(3), h(5) (Am. Law Inst. 1979). And, finally, we do not believe that any additional burden on the judiciary as a result of recognizing a damages action for violations of Article 1, Section 18 of the Nevada Constitution outweighs the need to recognize one where, as here, a fundamental right is implicated but no civil remedy is otherwise available. *See id.* § 874A cmt. h(6). Because the Restatement's constitutional-tort analysis favors a damages action to vindicate search-and-seizure rights under the Nevada Constitution, we accordingly move to the third and final step of our newly adopted framework.

No special factors lead us to hesitate in recognizing a damages action to enforce Article 1, Section 18 of the Nevada Constitution

As mentioned above, the nonexhaustive "special factors" considered in the third step of the constitutional-tort framework we adopt today derive in part from *Bivens*, among other cases, and include "deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." *See Katzberg*, 58 P.3d at 350. Applying these factors, we conclude that none disfavor a damages action here.

First, no legislative judgments regarding a damages action for constitutional violations exist to which to accord deference. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962))). Second, as to policy consequences, a private right of action for money damages here would not impose new limitations on government conduct, given the already developed status of search-and-seizure jurisprudence. *Cf. State v. Bayard*, 119 Nev. 241, 247,

71 P.3d 498, 502 (2003) (recognizing that an arrest in violation of NRS 484.795 violates the Nevada Constitution's search-and-seizure guarantees, even though it "does not offend the Fourth Amendment"). The lack of a damages remedy itself produces adverse policy consequences insofar as it renders illusory the guarantees of the Nevada Constitution in situations like the present.

Third, a private right of action for money damages does implicate legislative fiscal policy because, as the court has recognized, the Legislature has already decided to presumptively waive the State's sovereign immunity. *See Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 476. In so doing, the Legislature has consented to damages liability, except as specifically enumerated in the statutory-waiver scheme. *Id.* In *Echeverria*, this court recognized as much when it held that NRS 41.031's waiver subjected the State to damages liability under the Fair Labor Standards Act (FLSA), even though the waiver does not mention the State's liability under federal law.[8] *See id.* at 476-77. And the Legislature has already chosen to indemnify its employees for certain judgments. *See* NRS 41.0349 (setting forth parameters for indemnification).

Fourth and fifth, a damages action for retrospective harm presents no practical issues of proof beyond what the judiciary handles every day. Nevada courts routinely and competently assess personal-injury

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[8]We also note that the Legislature has capped damages for claims "sounding in tort." *See* NRS 41.035(1). While this matter does not present the need to reach whether the damages action we recognize today falls within the statutory cap's ambit, we observe that the issue of whether such an action "sound[s] in tort has the potential to affect the extent of the State's [damages] liability." *See Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 476 n.6 (emphasis omitted).

type damages, including inherently subjective damages. *See, e.g.*, *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 206-07, 912 P.2d 267, 272 (1996) (affirming an award of compensatory damages unless the award is "so excessive" as to shock the conscience). Damages simply do not represent a "revolutionary" or remarkable remedy. *See, e.g.*, *Bauserman*, ___ N.W.2d at ___, 2022 WL 2965921, at **9-10 ("We share this view and make the unremarkable observation that damages are an available remedy for the state's constitutional violations."). Damages remain a traditional—and indeed, a preferred—remedy for legally recognized wrongs. *Cf. Korte Constr. Co. v. State ex rel. Regents of Nev. Sys. of Higher Educ.*, 137 Nev. 378, 378, 492 P.3d 540, 541 (2021) ("Nevada recognizes that equitable remedies are generally not available where the plaintiff has a full and adequate remedy at law."). And we have observed, seemingly without controversy, the availability of equitable remedies to redress constitutional violations, despite that none of the at-issue constitutional provisions expressly provide for such remedies. *E.g.*, *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013) (discussing availability of preliminary injunctive relief in a constitutional challenge). None of the parties have offered any sound basis to treat equitable remedies differently from legal remedies for purposes of recognizing a private right of action here. *See Bauserman*, ___ N.W.2d at ___, 2022 WL 2965921, at *11 (discussing that there is no "specific reason" to treat enforcement of constitutional rights through monetary relief any differently from cases permitting injunctive relief, despite an absence of explicit legislative authorization). Thus, the "special factors" identified in the framework we have adopted today support that Mack may bring a private right of action for money damages to enforce her search-and-seizure rights under Nevada

law. Accordingly, we answer the first rephrased certified question in the affirmative: a private right of action under Article 1, Section 18 for retrospective monetary relief exists.

Certified Question 2: Qualified immunity is not a defense to an implied private right of action for retrospective monetary relief under the Nevada Constitution Article 1, Section 18

Mack argues that qualified immunity is not available because it is a federal doctrine that deals only with clearly established federal law. By contrast, the NDOC parties contend that we must adopt qualified immunity as a defense to mitigate the substantial costs to ensue if we also extend a *Bivens* rationale to the Nevada Constitution.

Qualified immunity is a federal, judicially created doctrine that immunizes state, local, and federal officials from liability for discretionary functions unless (1) the official violated a federal constitutional right, and (2) the right was clearly established at the time the challenged conduct occurred. *Lane v. Franks*, 573 U.S. 228, 243 (2014); *see also Pagán v. Calderón*, 448 F.3d 16, 31 (1st Cir. 2006) ("Qualified immunity is a judge-made doctrine . . . ."). Other courts agree that qualified immunity, as a federal doctrine, does not protect government officials from liability under state law. *E.g.*, *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013); *Jenkins v. City of New York*, 478 F.3d 76, 86 (2d Cir. 2007); *Samuel v. Holmes*, 138 F.3d 173, 179 (5th Cir. 1998); *Andreu v. Sapp*, 919 F.2d 637, 640 (11th Cir. 1990). Accordingly, we have applied qualified immunity only in the context of federal-law claims. *See, e.g.*, *Grosjean*, 125 Nev. at 359-61, 212 P.3d at 1076-77 (addressing whether private actors could claim qualified immunity from appellant's 42 U.S.C. § 1983 claim). Instead, the availability of qualified immunity for state-law claims depends on whether state law authorizes such an immunity. *E.g.*, *Jenkins*, 478 F.3d

at 86 (applying a doctrine "under New York" law that is "similar" to qualified immunity under federal law).

In contrast to our authority to determine that Article 1, Section 18 is enforceable by a damages action, only the Legislature retains "the power to waive sovereign immunity." *Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 475. As stated above, the Legislature has exercised that power in NRS 41.031(1). *Id.* "The plain language of NRS 41.031(1) waives the State's [and a state actor's] immunity from liability unless an express exception to the waiver applies" to restore that immunity. *Id.* at 476. We have emphasized that "Nevada's qualified waiver of sovereign immunity is to be broadly construed." *Id.* (quoting *Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007)). Accordingly, we have "repeatedly refused to imply provisions not expressly included in the legislative scheme" regarding Nevada's immunity waiver. *Id.* (quoting *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 110, 412 P.3d 28, 30 (2018)). While several "exceptions to, and limitations on, the waiver" exist, *id.*, the Legislature has not provided for a state-law equivalent of qualified immunity in the manner it exists under federal law, *see* NRS 41.032-.0337 (providing circumstances under which sovereign immunity has been restored). Absent such "express exception to the waiver" of immunity, we cannot supply the defense of qualified immunity to claims under the Nevada Constitution. *Echeverria*, 137 Nev., Adv. Op. 49, 495 P.3d at 476 ("If the Legislature meant to pass a law that waived immunity from one category of liabilities only, it could easily have done so expressly."). Otherwise, we threaten to "undermine this [S]tate's public policy, reflected in NRS 41.031, that [state actors] should generally take responsibility when [they] commit[ ] wrongs." *Id.* Accordingly, qualified immunity, as that doctrine is understood under

federal law, is not a defense available to state actors sued for violations of the individual rights enumerated in Nevada's Constitution. Thus, we answer the second rephrased certified question in the negative: qualified immunity is not a defense to a private damages action under Article 1, Section 18.

CONCLUSION

Today, we consider four questions certified to us by the U.S. District Court for the District of Nevada regarding the remedies and defenses available for private plaintiffs to enforce due-process and search-and-seizure rights under our Nevada Constitution. However, NRAP 5 calls on us to exercise our discretion to answer only determinative and concrete certified questions. With those rules in mind, we decline to answer the first certified question and elect to rephrase the remaining three certified questions.

In answering the certified questions as rephrased, we conclude first that, yes, a private right of action against state actors for retrospective monetary relief exists to enforce search-and-seizure rights under Article 1, Section 18 of the Nevada Constitution. In reaching this conclusion, we recognize that it is not necessary for the Nevada Constitution to expressly confer such a remedy, nor for the Nevada Legislature to expressly authorize one, because the search-and-seizure rights are self-executing limitations on, and thus inherently enforceable against, arbitrary abuse of government power. And while we acknowledge our authority and obligation to enforce the Nevada Constitution, we adopt today a framework for answering whether a self-executing provision of the Nevada Constitution is enforceable through a damages remedy that we believe harmonizes our understanding of self-executing provisions with our desire to defer to

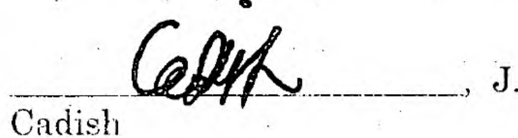
legislative judgments, protect fundamental rights, and exercise caution in judicial decision-making.

Applying this framework, we ask whether the language and history of the at-issue constitutional provision establishes an affirmative indication of intent to provide or withhold the requested remedy, and if so, enforce that apparent intent. However, because the Nevada Constitution specifies no such intent for search-and-seizure rights, we consider whether the several factors set forth in § 874A of the Restatement (Second) of Torts favor the requested remedy. Applying this constitutional-tort analysis, the lack of any remedy for individuals in Mack's shoes to enforce fundamental rights against unreasonable searches and seizures leads us to conclude that a damages remedy remains essential to effectuate and advance the goals of Article 1, Section 18. Because we conclude that consideration of that and other factors favors a damages action, we turn to the final step and determine whether any special factors counsel hesitation against recognition. Concluding, however, that a damages action here does not implicate any of the identified special factors, we hold that Mack's claim for money damages under Article 1, Section 18 of the Nevada Constitution is cognizable.

Having answered the first rephrased certified question in the affirmative, we respond to the second rephrased certified question and conclude that, no, qualified immunity, a federally created doctrine, is not a defense to claims under Article 1, Section 18 of the Nevada Constitution in the absence of legislative authorization. As only the Legislature may waive sovereign immunity of state actors, so too only the Legislature may restore sovereign immunity to state actors. It is not within our inherent judicial

power to create exceptions to sovereign immunity or to the waiver of sovereign immunity.

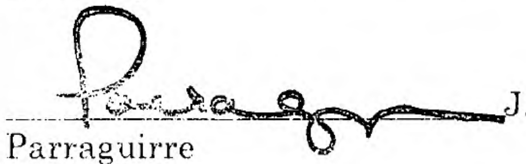
Appellant Sonjia Mack visited HDSP, where, allegedly without consent or suspicion, she was subjected to a strip search by NDOC employees. In holding that she may seek money damages for harm suffered from violations of her search-and-seizure rights under the Nevada Constitution, Article 1, Section 18, we do not create a new cause of action. We simply recognize the long-standing legal principle that a right does not, as a practical matter, exist without any remedy for its enforcement.



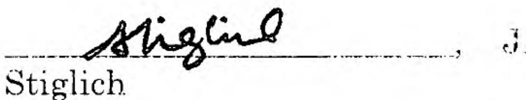
_______________, J.
Cadish

We concur:

_______________, C.J.
Hardesty



_______________, J.
Parraguirre



_______________, J.
Stiglich

_______________, J.
Pickering

_______________, J.
Herndon