BEFORE THE IOWA SUPREME COURT

NO. 20-0575
BLACK HAWK CO. CASE NO. EQCV139257

THE IOWA ASSOCIATION OF BUSINESS AND INDUSTRY,

Plaintiff-Appellant,

v.

THE CITY OF WATERLOO, THE WATERLOO COMMISSION ON HUMAN RIGHTS and MARTIN M. PETERSON, in his official capacity,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF BLACK HAWK COUNTY
HON. JOHN BAUERCAMPER

APPELLANT'S BRIEF

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Issue Presented

Iowa Code section 364.3(12)(a) prohibits cities from enacting or enforcing an ordinance that regulates hiring practices in a manner that exceeds the regulation of hiring practices under federal or state law. On November 4, 2019, the Waterloo City Council, by a 4-3 vote, enacted Ordinance 5522, which regulates hiring practices on when and whether an employer can consider an applicant's criminal history. The question presented is:

> Does Waterloo Ordinance 5522's regulation of hiring practices exceed the regulation of hiring practices under federal or Iowa law?

Routing Statement

This case should stay with the Supreme Court. Whether Waterloo has exceeded its home-rule authority is a matter of constitutional significance and the preemption statute at issue, Iowa Code section 364.3(12), has never been interpreted by this Court. It should be.

The question presented also has ramifications that go well beyond this case, making it ripe for this Court's review. In 2017, the legislature passed, and the Governor signed, Iowa Code section 364.3(12) in response to a patchwork of county and city ordinances that were enacted to regulate employee-relations matters. By its terms, section 364.3(12) prohibits cities from enacting regulations that go beyond state or federal regulation of hiring practices, employee benefits, scheduling practices, and other conditions of employment. Section 364.3(12) is broad in its reach, and intentionally so, but under the district court's interpretation the statute preempts very little. The outcome of this case will therefore determine more than whether Waterloo Ordinance 5522 is preempted: It will determine whether section 364.3(12) means much at all.

That is a significant question that affects cities, counties (there is a parallel county provision), employers, and employees across the state. The issue should be decided by the Supreme Court.

Statement of the Case

On November 4, 2019, the Waterloo City Council voted 4-3 to enact Ordinance 5522, which regulates two general categories of hiring practices: (1) when an employer can inquire about an applicant's criminal history and (2) whether and how the employer can consider that criminal history in making its hiring decisions. (App. 103-04, 117).

As to the first category, i.e., when an employer can inquire about criminal history, the Ordinance prohibits all employers from asking about criminal history on an application, and it prohibits employers with 15 or more employees from making any inquiry into an applicant's criminal history until a conditional offer of employment has been made. (App. 104).

As for the second category, i.e., whether and how an employer can consider an applicant's criminal history, Ordinance 5522 prohibits employers with 15 or more employees from making an adverse hiring decision based (1) "solely on the applicant's record of arrests or pending criminal charges that have not yet resulted in a conviction," (2) "on criminal records which have been lawfully erased or expunged, which are the subject of an executive pardon, or which were otherwise legally nullified," or (3) "on an applicant's criminal record without a legitimate business reason." (App. 105). The ordinance, which is enforced by the Waterloo Human Rights Commission and the City Attorney,

contains a 294-word, multi-paragraph definition of "legitimate business reason." (App. 104-05).

Shortly after the City of Waterloo enacted Ordinance 5522, the Iowa Association of Business and Industry (ABI), whose members are regulated and affected by Ordinance 5522, filed a petition in Blackhawk County, requesting that the district court declare that Ordinance 5522 is expressly preempted by Iowa Code section 364.3(12) and asking that the court enjoin the City, the Waterloo Human Rights Commission, and the City Attorney from enforcing the ordinance. (App. 6-14).

One week after the defendants filed their answer, ABI moved for summary judgment. As ABI explained, the issue presented is a purely legal one. Iowa Code section 364.3(12) states that a "city shall not adopt, enforce, or otherwise administer an ordinance . . . providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to . . . hiring practices . . . or other terms or conditions of employment." Waterloo conceded that Ordinance 5522 regulates terms and conditions of employment, and hiring practices specifically, so the only question for the district court was whether the ordinance's regulations exceed the regulation of hiring practices under either federal or state law.

ABI argued that they do. Both state and federal law regulate hiring practices in multiple ways, but no state or federal law bans employers from

including a criminal-history inquiry on an application (yet Ordinance 5522 does). And no state or federal law places blanket restrictions on the consideration of an applicant's criminal history (yet Ordinance 5522 does).

In their resistance and cross-motion for summary judgment, Waterloo argued that its criminal-history ordinance is targeted at racial discrimination and thus, according to Waterloo, the ordinance is consistent with both federal and state law. Waterloo claimed that "since minorities, particularly African Americans, have a disproportionate number of criminal convictions," the consideration of criminal history may decrease the number of minority hirings. (App. 123). Based on these broad statistics on minority conviction rates, along with "personal anecdotes from community members" (App. 119), Waterloo asserted that "the consideration of criminal history during the hiring process will have a disproportionate effect on these minorities living within the City." (App. 41). And because both the Iowa Civil Rights Act and Title VII of the Civil Rights Act of 1964 prohibit practices that cause a disparate impact based on race, Waterloo argued that Ordinance 5522 does not exceed state or federal law.

Waterloo also claimed that the Iowa Civil Rights Act "specifically authorizes" cities to prohibit the consideration of criminal history during the hiring process because the ICRA says that it "shall not be interpreted" to limit a city from "enacting any ordinance or other law which prohibits broader or

different categories of unfair or discriminatory practices." (App. 41, quoting Iowa Code § 216.19(1)).

Finally, Waterloo argued that ABI does not have standing because the association itself is not damaged by Waterloo's ordinance.

Senior Judge Bauercamper held a one-hour summary judgement hearing by telephone.[1] The hearing was not transcribed, but the district court did not ask questions and, with one exception,[2] the parties repeated the arguments made in the briefs.

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[1] Chief Judge Lekar originally assigned the case to herself and entered an order granting Waterloo's unresisted request for an extension of time to file a resistance to ABI's motion for summary judgment. (App. 25-26). After Waterloo filed its resistance to summary judgment and a cross motion for summary judgment, Judge Lekar reassigned the case outside election district 1B and to Senior Judge Bauercamper "[b]ecause this case involves the City of Waterloo and the Waterloo City Attorney." (App. 54). Chief Judge Lekar concluded that it was necessary to reassign the case "to avoid even the appearance of a conflict arising out of the fact that the judges of Judicial Election Subdistrict 1B have professional contact with those parties and agencies of those parties on a regular business basis." (App. 54).

[2] During the argument, Waterloo told the district court that it should consider recent legislative action in deciding whether Waterloo Ordinance 5522 is preempted by Iowa Code section 364.3(12). (App. 75). In response, ABI argued that, under the plain terms of the statute, Ordinance 5522 is preempted; thus there is no reason to consider recent legislative activity. But ABI further argued, during the hearing and in supplemental briefing ordered by the court, that if recent legislative action were to be considered, it would weigh in favor of ABI's position. (App. 75-76). The Iowa House of Representatives recently passed a bill, House File 2309, which states that a party who successfully challenges an ordinance under Iowa Code section 364.3(12) shall be awarded attorney fees. (https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=HF2309). The purpose of the bill, as described by House Judiciary Chairman Steve Holt, was

The district court entered an order on April 4, siding with ABI on standing and with Waterloo on the merits. (App. 91-99). On standing, the court ruled that because ABI has members who would have standing to challenge the statute, and because the participation of those members is not necessary to decide the specific legal claim, ABI satisfies the test for association standing. (App. 96).

On the merits, the district court ruled that Ordinance 5522 does not exceed state law because, according to the court, it simply prohibits practices that "have been shown to have a disparate impact on minority groups, especially African Americans," and is therefore consistent with the Iowa Civil Rights Act and Title VII of the Civil Rights Act of 1964. (App. 97).

The district court also ruled that Ordinance 5522 is not preempted by section 364.3(12) because the Iowa Civil Rights Act states that it is not to be interpreted to prevent cities from enacting "'broader or different categories of unfair discriminatory practices.'" (App. 97, quoting Iowa Code § 216.19(1)(c)).

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to send the message to Waterloo and other cities that they must comply with section 364.3(12). James Q. Lynch, *Legislator says Iowa law prohibits 'ban the box' policies*, Cedar Rapids Gazette, Jan. 29, 2020, available at https://www.thegazette.com/subject/news/government/legislator-says-iowalaw-prohibits-ban-the-box-policies-20200129. "What Waterloo did was clearly against the preemption [bill] that we did a few years ago," Representative Holt said. (App. 77), quoting House Debate on House File 2309, at 2:23:21, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20200305010350877&dt.

ABI appealed the district court's final ruling on April 6, two days after it was filed and the same day ABI was notified of the ruling through EDMS.[3]

Error Preservation

In its petition and in its motion for summary judgment, ABI argued that Ordinance 5522's regulation of hiring practices exceeds the regulation of hiring practices under state and federal law and is thus preempted by Iowa Code section 364.3(12)(a). The argument was preserved.

Standard of Review

This Court has said it generally reviews "rulings on motions for summary judgment for correction of errors at law" but that "[w]hen the summary judgment was on a constitutional issue," review is de novo. *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). Whether a city has exceeded its home-rule authority is a constitutional issue, but on summary judgment the distinction between the two standards (correction for errors at law and de novo) is without a difference. Summary judgment involves only questions of law and not the resolution of disputed material facts, so this Court does not defer to the district court. *See* Iowa R. Civ. P. 1.981(3) (stating that summary judgment is granted

[3] ABI's claim is that, on its face, Ordinance 5522 is preempted by Iowa Code section 364.3(12). There are no adjudicative facts relevant to deciding that claim, other than the fact that the ordinance was enacted by Waterloo. *See Welsh v. Branstad,* 470 N.W.2d 644, 648 (Iowa 1991) (explaining the difference between adjudicative facts and legislative facts). So for all practical purposes, the statement of the case is also the statement of the facts relevant to this appeal.

only if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

Argument

The Iowa Constitution gives cities "home rule power and authority" to determine their affairs, so long as the exercise of that authority is "not inconsistent with the laws of the general assembly." Iowa Const. art. III, § 38A. In other words, the Iowa legislature has complete power to preempt any city ordinance and regulation, if it so chooses.

In 2017, the legislature exercised that power to broadly preempt city regulation of the employer/employee relationship to the extent it exceeds or conflicts with federal or state law. In relevant part, the statute, Iowa Code section 364.3(12)(a), states that a "city shall not adopt, enforce, or otherwise administer an ordinance . . . providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to . . . hiring practices . . . or other terms or conditions of employment." Put another way, section 364.3(12) is an express declaration by the Iowa legislature that a city can regulate hiring practices, but *only* to the same or lesser extent that state or federal law regulates hiring practices. A city's attempt to regulate hiring practices to any greater degree (i.e., to "exceed" federal *or* state restrictions on hiring practices) is expressly preempted.

Waterloo's criminal-history ordinance violates that statute. An ordinance that regulates the use of criminal background checks and the consideration of criminal history as part of the hiring process is a law that regulates "hiring practices"; Waterloo does not dispute that. And Ordinance 5522's regulation of hiring practices exceeds the regulation of hiring practices under state and federal law.

Ordinance 5522 regulates hiring practices in five specific ways, two of which relate to when an employer can inquire about an applicant's criminal history and three that relate to whether and to what extent an employer can consider criminal history in hiring. Both federal and state law regulate hiring practices and, to some extent, they even regulate the inquiry into and consideration of an applicant's criminal history. But each operative term of Ordinance 5522 exceeds federal and state law when it comes to hiring practices, so the ordinance is preempted in its entirety.

Because section 364.3(12) preempts city ordinances to the extent they exceed federal *or* state law regulation of hiring practices, we discuss each separately.

I. Waterloo Ordinance 5522's regulation of hiring practices exceeds the regulation of hiring practices under federal law.

There are numerous federal laws that regulate hiring practices, some of which may even expressly or tangentially regulate the inquiry into, or

consideration of, an applicant's criminal history. But no federal law goes as far as Ordinance 5522. The Fair Credit Reporting Act places restrictions on the use of criminal background checks and requires that employers follow certain procedures when they make adverse-hiring decisions based upon those background checks. *See* 15 U.S.C. § 1681, *et seq*. But neither the Fair Credit Reporting Act nor any other federal statute or regulation makes it "illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check."[4]

But Ordinance 5522 does. It precludes all employers from asking about criminal history on an application, and it prohibits employers with 15 or more employees from making any inquiry into an applicant's criminal history until a conditional offer of employment has been made. (App. 104, Ordinance 5522, § B(1)). So Ordinance 5522 exceeds federal law on these issues.

Federal discrimination statutes also place some restrictions on the consideration of an applicant's criminal history, but only to the extent that those practices cause discrimination on the basis of race, color, national origin, sex, religion, disability, or age. *See EEOC Guidance*, (citing Title VII of the Civil Rights

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[4] *Background Checks: What Employers Need to Know*, EEOC and FTC Guidance, available at https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm (hereinafter, *"EEOC Guidance"*).

Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206 (d); and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.). Ordinance 5522 goes well beyond that. It places blanket restrictions on an employer's ability to inquire about and consider criminal history when making hiring decisions, regardless of whether that consideration has the effect of discriminating against an applicant on the basis of a federally protected class. So, by definition, Ordinance 5522 exceeds federal law when it comes to the regulation of hiring practices.

The district court ruled that, because "[c]riminal history considerations have been shown to have a disparate impact on minority groups, especially African Americans," Ordinance 5522 is essentially equivalent to Title VII. (App. 97). That conclusion is based on an understanding of Title VII that is much too broad and a reading of Ordinance 5522 that is much too narrow.

A Waterloo employer does not violate Title VII by considering an applicant's criminal history, unless the applicant can prove that the employer's hiring practice causes a disparate impact between the number of "*qualified* persons in the labor market and the persons holding at-issue jobs." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (emphasis added). In other words, the consideration of an applicant's criminal history doesn't become illegal under Title VII simply because "arrest rates among blacks are higher than those among whites." *Matthews v. Runyon*, 860 F. Supp. 1347, 1357 (E.D. Wis. 1994). The focus

is on the qualified applicant pool, which may differ from job to job or company to company; it's not something that usually can be proven by general population statistics alone. *See EEOC v. Freeman*, 961 F. Supp. 2d 783, 798 (D. Md. 2013), *aff'd in part sub nom*, 778 F.3d 463 (4th Cir. 2015) (ruling that the EEOC had not shown a disparate impact based on the use of criminal background checks).

The Fifth Circuit made this very point when reviewing a disparate-impact claim that challenged the use of criminal background checks, ruling that "[e]ven if the court were to accept at face value [the plaintiff's] premise that background checks, generally, have a disproportionate impact on the black population, generally, her claim would still fail," because "[r]eliance on a policy's disparate impact on the general population, rather than on the applicant pool, is misplaced." *Canada v. Texas Mut. Ins. Co.*, 766 F. App'x 74, 78–79 (5th Cir. 2019). Or as another federal court put it: "[T]he higher incarceration rate [of African Americans] might cause one to fear that any use of criminal history information would be in violation of Title VII. However, this is simply not the case." *Freeman*, 961 F. Supp. 2d at 786.

But even if arrest rates in the qualified applicant pool were higher for African Americans, a Waterloo employer still wouldn't violate Title VII by considering criminal history, unless the employer's specific practice had a disparate impact on the hiring of African Americans by that employer. In *Matthews*, for example, the court ruled that the US Postal Service's policy of

considering arrests records for mail handlers did not violate Title VII because, even though arrest rates were higher "among blacks than whites in the Milwaukee area," the plaintiff had not shown "that a lower percentage of blacks were hired or employed as mail handlers than constitute qualified persons in the relevant labor market." *Matthews*, 860 F. Supp. at 1357.

Ordinance 5522 requires no such proof of discriminatory impact. An employer who asks applicants about their criminal history on an application would violate the ordinance *even if* the arrest rate among African Americans in the qualified labor pool were disproportionately *lower* than the arrest rate for Caucasians, and *even if* the employer had hired only African Americans for every job opening in the last two years. The same thing is true for the other operative provisions of Ordinance 5522: They all exceed Title VII, and every other federal law, when it comes to regulating hiring practices. The ordinance is therefore preempted by Iowa Code section 364.3(12) and in violation of Article III, Section 38A of the Iowa Constitution.

II. Waterloo Ordinance 5522's regulation of hiring practices exceeds the regulation of hiring practices under state law.

Section 364.3(12) preempts any ordinance that regulates hiring practices to a greater degree than federal law, so it's not necessary to also determine whether Ordinance 5522 also exceeds state law. But it does. The Iowa Civil Rights Act follows the same relevant standards as Title VII when it comes to

disparate-impact claims (*see Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 517–19 (1990)), so Ordinance 5522's restrictions also exceed Iowa's civil rights laws, and every other Iowa law, when it comes to the regulation of hiring practices.

The district court nevertheless ruled that Ordinance 5522 is not preempted by section 364.3(12) because it "is consistent with the authority given to cities by Section 216.19(1)(c) to provide 'broader or different categories of unfair or discriminatory practices.'" (App. 97, MSJ Order 7, quoting Iowa Code § 216.19(1)(c)). That is an incorrect reading of section 216.19(1)(c). The Iowa Civil Rights Act does not *give* cities the authority to enact ordinances that provide for "broader or different categories of unfair or discriminatory practices"; it says that "[n]othing in [the Iowa Civil Rights Act], *shall be construed* as indicating . . . limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices." Iowa Code § 216.19(1)(c) (emphasis added).

The distinction is subtle but important for our purposes. The ability of cities to pass laws that go beyond state law doesn't come from the Iowa Civil Rights Act; it comes from Iowa Code Chapter 364, which is aptly titled "Powers and Duties of Cities." Under Iowa Code section 364.3(3)(a), a city "may set standards and requirements which are higher or more stringent than those imposed by state law, *unless a state law provides otherwise*." (emphasis added). By

declaring that the Iowa Civil Rights Act "shall not be construed" to prohibit cities from enacting broader categories of discrimination, the legislature was merely saying that the Iowa Civil Rights Act itself was not implicitly limiting the power of cities to go beyond state law, meaning that it is not a state law that "provides otherwise," within the meaning of section 364.3(3)(a).

Iowa Code section 364.3(12)(a), on the other hand, is an express limitation on cities' authority to go beyond state or even federal law. So there is no conflict between section 364.3(12) and section 216.19(1)(c). And the latter does not limit the former. Section 216.19(1)(c) is merely a statement of what the Iowa Civil Rights Act does not do. Section 364.3(12) is a statement about what cities cannot do. Those are two very different things that do not implicate, affect, or conflict with one another in any way.

By misreading section 216.19(1)(c), a provision that simply states how the Iowa Civil Rights Act should *not* be interpreted, the district court made section 364.3(12) meaningless—at least when it comes to "hiring practices." Under the district court's reasoning, a city could regulate virtually any hiring practice by merely labeling that practice as "discriminatory." Cities could forbid employers from asking where an applicant went to school, claiming that such questions discriminate based on education. Cities could prohibit in-person interviews, believing that they unfairly discriminate based upon the applicants' attractiveness. And cities could limit interviews to 20 minutes, believing that

lengthy interviews discriminate against those with attention-deficit disorder. The possibilities are endless, because determining whom to hire always comes down to some form of discrimination—i.e., treating one person differently than others based upon certain characteristics—so the regulation of hiring practices is generally if not always premised on some category of discrimination. Thus, under the district court's ruling, there isn't a hiring practice that cities *can't* regulate.

That cannot be the law, or at least it's not supposed to be. When interpreting statutes, courts must "assume that the legislature intends to accomplish some purpose and that the statute was not intended to be a futile exercise." *State v. Reed*, 596 N.W.2d 514, 515 (Iowa 1999). Yet that is what the district court's order has done—made section 364.3(12) futile.

The only reasonable, and textually accurate, way to reconcile section 364.3(12) with section 216.19(1)(c) is to recognize that the latter is merely a declaration of what the Iowa Civil Rights Act does not do, while section 364.3(12) is a direct statement about what cities cannot do. Cities cannot enact ordinances that go beyond state *or* federal regulation of hiring practices. Because Ordinance 5522 does exactly that—meaning it goes beyond federal and state law—the district court should have enjoined defendants from enforcing it.

Conclusion

If Waterloo's goal is to prevent racial discrimination, then it can do so—head on. It can pass an ordinance that directly prevents race discrimination. The

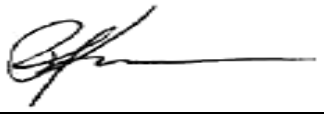
ICRA does that; Title VII does that. But Ordinance 5522 is something else. It is so much broader. It restricts the hiring practices of Waterloo employers regardless of whether those practices cause discrimination against African Americans. It prohibits employers from asking about an applicant's criminal history during an interview, even when state and federal law do not. It prohibits employers from considering an applicant's criminal history, even when state and federal law do not. In other words, Ordinance 5522 exceeds federal and state law.

That is inconsistent with the plain terms of Iowa Code section 364.3(12). Indeed, by prohibiting cities from enacting ordinances that regulate hiring practices to a greater degree than state or federal law, the legislature was preventing exactly what Waterloo has done here. The district court's ruling should therefore be reversed, and the defendants should be enjoined from enforcing Ordinance 5522.

Statement on Oral Argument

Because of the COVID-19 outbreak and the disruption of the workforce, it is important for employers and employees alike that this case be decided as soon as practicable. ABI therefore waives oral argument in an effort to expedite this case but remains willing and able to present oral argument if that is the Court's preference.

BELIN McCORMICK, P.C.

By: 

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Proof of Service

I hereby certify that on the 15th day of September, 2020, I electronically filed the foregoing Appellant's Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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Certificate of Compliance

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,175 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Garamond 14 pt.

/s/ Lori McKimpson

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