IN THE SUPREME COURT OF IOWA

No. 23-0156

HEARTLAND CO-OP,
Plaintiff-Applicant,

v.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,
Defendant-Resister,

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. BERT
Case No. LACL152428

DEFENDANT-RESISTER'S RESISTANCE TO FURTHER REVIEW

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

COMES NOW Defendant-Resister, Nationwide Agribusiness Insurance Company ("Nationwide"), by and through undersigned counsel of record, and for their Resistance to Plaintiff-Applicant's Application for Further Review, states as follows:

1. The Iowa Court of Appeals correctly affirmed the district court's determination that Nationwide's policy unambiguously limits Heartland to a total of $3,000,000 in earnings and extra expense coverage for loss at all covered locations as opposed to each location as a result of the Derecho.

2. Heartland did not preserve error for purposes of appellate review regarding the categorization of the August 10, 2020 Derecho windstorm as a "single storm" and occurrence.

WHEREFORE, Defendant-Resister, Nationwide Agribusiness Insurance Company respectfully requests the Court **DENY** Plaintiff-Applicant's Application for Further Review.

ARGUMENT

I. The Iowa Court of Appeals' holding construing and interpreting the Nationwide insurance policy is in accordance with well-established Iowa Supreme Court precedent and not contrary to Iowa law.

Plaintiff-Applicant Heartland Co-Op ("Heartland") incorrectly argues three separate grounds warrant granting further review for this insurance coverage dispute. First, Heartland incorrectly categorizes the issues raised on appeal as issues of first impression on an important question of law requiring supreme court attention. *See* Iowa R. App. P. 6.1103(1). Second, Heartland misreads *Steel Prods. Co. v. Miller's Nat'l Ins. Co.*, (209 N.W.2d 32, 38 (Iowa 1973)) when it argues the Iowa Court of Appeals decision is contrary to established precedent. *See id*. Third, Heartland fails to appropriately assert a statutory ground for further review by asserting the Iowa Court of Appeals incorrectly applied Iowa's longstanding error-preservation requirements.[1]

A complete review of the insurance policy at issue and the relevant legal precedent leaves no doubt that the Iowa Court of Appeal's decision

[1] Heartland's half-hearted argument that the Iowa Court of Appeal's holding directly conflicts with Nationwide and the district court's "approaches" during the course of litigation does not allege grounds supporting further review. To the extent Heartland argues Nationwide cannot rely on the Court of Appeal's "approach" through the pendency of proceedings, as the successful party Nationwide is not limited to arguing grounds asserted or relied on in prior decisions. *See Johnston Equip. Corp. v. Industrial Indem.*,

affirming the district court correctly recognized the scope of coverage for earnings-and-extra-expense coverage is limited to one limit for a single business loss irrespective of the number of locations that suffer property damage from a sole covered cause of loss. This result is mandated by the clear and express terms of the policy; specifically, the necessary "box" for per-location coverage was not checked in the policy and coverage for earnings-and-extra-expense coverage is applied on a collective per-occurrence basis, not a per-location basis.

A. "Any one loss" is not a new provision in property insurance coverage and the Iowa Court of Appeals' interpretation and construction of the requirement within the context of the Nationwide policy was correct.

The Iowa Court of Appeals correctly ascertained that the fighting issue in this insurance coverage dispute is whether "any one loss" is defined by the Nationwide policy of insurance as applying to an insured's total operations across all locations (*See Slip op*. at 6), or whether the covered loss and coverage are tied to a single covered location (*See Slip op.* at 13). In applying the former interpretation, the Iowa Court of Appeals correctly determined the intent of the parties to the insurance contract was for the limit of $3,000,000 in earnings-and-extra-expense coverage to apply collectively

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489 N.W.2d 13, 16 (Iowa 1992) ("[A] party need not, in fact cannot, appeal from a favorable ruling.").

to a business interruption loss that occurred to "ALL COVERED LOCATIONS" from physical damage caused by a single covered cause of loss to the insured's property. *Slip op.* at 4.

In applying for further review, Heartland clings to the dissent's position that "when more than one location has physical losses, the business interruption at each of those locations is multiple losses too." *Slip op.*at 12. Respectfully, the dissent's reading confuses and misreads the requirements for coverage to attach. Under the dissent's interpretation, "any one loss" is inseparably linked to the specific item of property damaged, but that ignores specific requirements of the earnings-and-extra expense coverage and how Iowa courts have historically interpreted "any one loss."

The majority opinion points out that the dissent's over-reliance on "a covered location" to tie the earnings-and-extra-expense coverage to individual locations goes astray by conflating number of "losses" with the policy's requirement that coverage is only afforded when a covered location suffers property damage from a covered peril. *Slip op.* at 8. Stated differently, to warrant earnings-and-extra-expense coverage, the loss of business must arise from "physical loss of or damage to property at a 'covered location' that is caused by a covered peril." *Id.* And as the majority recognized, no one is disputing that "physical loss of or damage to property"

occurred at covered locations caused by a covered peril. *Id.* 8–9. The dissent's reliance on the singular "covered location" is further misplaced when read in context.

First, the Nationwide Policy explicitly provides the option for the earnings-and-extra-expense coverage to apply on a location basis, with a checkbox to be marked if the parties agreed that the coverage limit would apply per-location as advocated by Heartland. *Slip op.* at 4. The dissent shrugs this away as a "drafting choice" and "negative implication" not entitled to "much weight." *Slip op.* at 17. But implicit in this description is the acknowledgment that the unmarked per-location limit condition is *included* in the insurance contract below a directive to "check one," thus constituting a term which must be considered within the context of the entire policy when ascertaining the parties' intent. *See F.D.I.C. v. Davis*, 167 F.3d 1199, 1201–02 (8th Cir. 1999) (applying Missouri law and giving meaning to the phrase "if checked" in a promissory note dispute).

Additionally, dicta from Iowa precedent implies the checking of one box, to the exclusion of another in a policy of insurance, can be dispositive regarding the interpretation of that specific contractual term. *See Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 499–500 (Iowa 2013) (impliedly recognizing that checking a specified box from several options clearly

illustrates the intent of the parties). In *Boelman*, the primary issue was whether a liability policy's coverage for liability for damage to other's property afforded coverage for the death of 535 hogs while in the care, custody or control of the insured, despite an exclusion for loss arising from custom farming to include the care and raising of livestock. *Id.* As part of the policy language, the policy provided "Please check box that applies" in a policy endorsement that modified an exclusion to increase a threshold limit on business receipts applicable to an exception to an exclusion. *Id.* The court took the terms of the endorsement—including the selection of one "box" to the exclusion of others—at face value and presumed such selection represented the intent of the parties. *Id.* The same interpretative principle applies to Nationwide's policy. The failure to check the box provided for per-location coverage necessarily excludes that condition as forming a part of the parties' intent for the insurance contract.

Second, both the definition of "earnings-and-extra-expense loss" and "business" contained in the Policy and relied on by the dissent deal with the singular *insured's*—Heartland's—business earnings and its operations at each of the covered 86 locations. Heartland operates a single business, with multiple operations across 86 separate locations. It is Heartland's business earnings which is insured under the earnings-and-extra-expense coverage,

not the locations or the property itself. In that vein, it is property damage at the covered locations which is a precondition necessary to trigger the earnings-and-extra-expense coverage. This understanding and context is consistent throughout the Nationwide Policy, where coverage for various losses across Heartland's entire operations are commonly aggregated to account for the vagaries between locations. *See Slip op.* at 5 (detailing separate pages for each of Heartland's 86 business locations which include location-specific coverages, as opposed to aggregate business coverages provided for under location 87 for "ALL 'COVERED LOCATIONS'").

Additionally, the dissent's reliance on cases tying business-interruption loss to physical loss at the insured location misunderstands what is actually being tied. As previously discussed, earnings-and-extra expense coverage is only available if a covered location suffers property damage or loss from a covered peril. That is, the insured property must suffer covered physical damage before earnings-and-extra-expense coverage is available. *See Wakonda Club v. Selective Ins. Co.*, 973 N.W.2d 545, 554 (Iowa 2022) (denying coverage for extra expense coverage where "Wakonda Club's reliance on the mere loss of use of its property without a physical element to that loss defeats its claim"). The "tying" of business interruption coverage to an insured's premises is only relevant to the extent the physical damage

interrupts "use and occupancy [of the premises] on gross earnings of the business which is insured." *Steel Prods Co.*, 209 N.W.2d at 38. And as the Court implicitly recognized in *Wakonda Club*, the extra expense coverage—if applicable—applies in the aggregate to the insured's business operations irrespective of the number of operations involved or the completely different functions impacted by the property damage arising from a single covered cause of loss. *See id.* at 549.

Heartland seizes on the dissent's confusion regarding the relationship between "physical damage," covered property, and business interruption coverage by pointing to *Steel Products Co.* as contrary to the Court of Appeal's decision. Heartland is mistaken. *Steel Products Co.* itself rebuts Heartland's reading when it analogizes the coverage issue in *Steel Products Co.* with the coverage issue in *Northwestern States Portland Cement Co. v. Hartford F.I. Co.* (360 F.2d 531, 534 (8th Cir. 1966) (applying Iowa law)). *Steel Prods. Co.*, 209 N.W.2d at 38.

In *Northwestern States*, the insured operated two adjacent cement plants when one of the plants suffered a fire, a covered cause of loss to insured property. *Northwestern States Portland Cement Co.*, 360 F.2d at 532. The insured transferred all of its operations to the second plant whilst repairs were performed on the damaged property. *Id.* Following the fire, the

insured sought business interruption coverage in the form of "lost production less noncontinuing expenses;" i.e., the insured sought to tie its business interruption coverage to the specific loss of production at the damaged property. *Id.* The 8th Circuit recognized the essential nature of business interruption coverage like earnings-and-extra-expense coverage "is to protect the earnings which the insured would have enjoyed had there been no interruption of the business." *Id* at 534. The *Northwestern States* court reiterated that pursuant to the terms of the policy, "it is the actual loss sustained resulting directly from the interruption of business not exceeding the gross earnings . . . not the value of any particular intermediate product used in the manufacturing process . . . ." *Id.* Thus, it was the fire's impact on the aggregate operations of the insured's business—its loss of sales income arising from the impact on continuation of production and operations—that was the true focus of determining the scope of coverage, not the impact on the damaged property caused by the covered cause of loss.

After recognizing the insured had an obligation to "take affirmative action to reduce the loss of earnings" on its business, the *Northwestern States* court affirmed obligatory remediation efforts "must reduce the loss resulting from the interruption of business, if possible, . . . by making use of other property at the location" including the use of the other plant to

maintain business sales and prevent further business interruption loss. *Id.* As explained in *Northwestern States*, once property damage to covered property occurs as a result of a covered cause of loss, the focus turns to the impact on the insured's business *as a whole*, irrespective of the scope or number of properties impacted by the covered cause of loss.

Steel Products Co. incorporates *Northwestern States*' lessons in its discussion of business interruption and earnings-and-extra-expense coverage by reiterating that the damages and scope of loss owed an insured is consistently "reduced earnings computation" of the insured's business, in the aggregate, which is directly traceable to the damage to property caused by a covered cause of loss. *See Steel Products, Co.*, 209 N.W.2d at 37–38. The same analysis, undertaken by the Court of Appeals in this case, warrants affirming the district court's conclusion. Heartland's contrary arguments misread *Steel Products, Co.*, fail to address *Northwestern States*, and fall short of demonstrating that further review is necessary absent a showing that some Iowa Supreme Court precedent is contradicted by the Iowa Court of Appeal's decision. The Application for Further Review must be denied.

B. Heartland's and the dissent's interpretations are not reasonable and fail to construe the Nationwide Policy as a whole.

In its Application for Further Review, Heartland makes a point to argue that the words "any one loss" and "aggregate loss" are "facially

inapposite terms" and "equating the terms requires an interpretive stretch that is not reasonable and is not tied to the language of the policy." Application at 10. But, this argument is belied by the terms of the Policy and attempts to remove those terms from the context in which they are placed. *See Farm Bureau Life Ins. Co. v. Holmes Murphy & Assocs., Inc.*, 831 N.W.2d 129, 134 (Iowa 2013) ("We read the insurance contract in its entirety, rather than reading clauses in isolation, to determine whether a policy provision is subject to two equally proper interpretations.").

It makes perfect sense that Nationwide's Policy would place a cap on the limit of "aggregate loss" recoverable from "any one loss" to Heartland's business operations. *See Boelman*, 826 N.W.2d at 501 ("We read the policy as a whole when determining whether the contract has two equally plausible interpretations, not seriatim by clauses."). This construction is fairly common in many insurance contexts where a foundational term is undefined and a coverage limit is at issue. *See Just v. Farmers Auto Ins. Assoc.*, 877 N.W.2d 467, 471–78 (Iowa 2016). For example, in *Just*, the Iowa Supreme Court examined whether a multi-vehicle collision which happened over a matter of seconds constituted a single "accident" or multiple accidents for purposes of motor vehicle liability coverage. *Id.* at 471–72. The term "accident" was undefined but other language in the policy limited the

amount of liability coverage afforded irrespective of the number of vehicles involved in a single accident. *Id.* at 472. While not dispositive, the Court recognized the limiting language provided "an important clue" as to the meaning of "accident" because of the risk that interpreting multiple collisions as multiple accidents would render the limiting language nearly superfluous. *Id.* The Court also recognized that the purpose of a coverage limit "is to cap the amount of risk the insurer is willing to cover relative to the premium paid," thus drawing a direct and reasonable correlation between the amount of coverage sought and, the negotiated premium for that coverage. *Id.* at 475. Finally, the Court reiterated that the absence of additional clarifying language does not render an insurance policy ambiguous and all that is required is "sufficient clarification" to give words their ordinary meaning and avoid strained interpretations. *Id.* at 479–80.

Like *Just*, contextual clues support the Iowa Court of Appeal's conclusion that as applied to the facts of this case, Nationwide's Policy reasonably limits the scope of earnings-and-extra-expense coverage to $3,000,000 for the aggregate business interruption loss suffered by the insured arising from property damage from a single covered cause of loss suffered at "ALL COVERED LOCATIONS". The "ALL COVERED LOCATIONS" limit was placed separate and apart from the 86 individual

locations because the limit was intended to cap coverage for losses suffered by Heartland's business in the aggregate per covered cause of loss, irrespective of which or how many physical properties were impacted by the covered cause of loss.

Further, language elsewhere in the Policy expressly provides that an option was available to provide a cap on coverage on a per-location basis, but the "box" for a "per location limit" cap was left unchecked, in favor of a "per location loss" cap. The Court of Appeals recognized the problems which would arise if Heartland's argument were taken to its reasonable conclusion. *Slip op.* at 10. In a near mirror-image of the *Just* analysis, the Court of Appeals grappled with Heartland's assertion that each shut-down of a discrete Heartland property constituted a separate loss, and rejected that conclusion because under that approach, there is no limit to where an insured could draw separate losses. *Compare id.* at 10 *with Just*, 877 N.W.2d at 475. Such unilateral line-drawing by an insured would negate any relationship between the amount of coverage afforded and the premium paid by the insured, and radically change how insurance risk is weighed by both insureds and insurers. Heartland has not pointed to any relevant or persuasive provision of the Nationwide Policy eliciting any inclination on the part of Nationwide that it intended to take the radical and unprecedented

step of upsetting the traditional relationship between an insurance premium and the risk insured against when it issued its Policy.

Finally, the absence of additional clarifying language defining "any one loss" does not mean that Heartland's flawed interpretation, as adopted by the dissent, is reasonable. The earnings-and-extra-expense coverage was not issued in a vacuum. The terms of the Policy make clear that Nationwide was aware that Heartland wished to ensure 86 different physical locations across multiple states involving multiple different lines of business, all reliant on different threads of commerce, and all operated under the Heartland umbrella. Heartland would have this Court find that the only way Nationwide can provide earnings-and-extra-expense coverage to Heartland's business—across 86 different locations, operating 86 different footprints, with 86 different personnel requirements, subject to multiple different state regulations and regulators from employment requirements to building and repair requirements—is to exhaustively identify each location's limit of coverage based on the business conducted at one discrete moment in time, binding that coverage for the remainder of the policy period irrespective of changes in operations or circumstances at that location. Such an interpretation is not only unreasonable but contrary to established practice

and the realities of insuring expansive corporate endeavors across multiple states in today's economic environment.

C. Conclusion

Because the Court of Appeals decision applied well-established interpretative principles in reaching its holding, is not contrary to established Iowa Supreme Court precedent, and no new issue requiring the attention of the Supreme Court is raised in this appeal, Heartland's Application for Further Review must be denied.

II. Heartland did not preserve error regarding whether the 2020 Derecho constituted a "single storm" or single covered peril.

In its Application for Further Review, Heartland disputes its waiver of the "single storm" issue on both factual and legal grounds. Confusingly, Heartland argues the finding of waiver "is dictum," and then proceeds to acknowledge it "focused its opening brief on the meaning of 'any one loss,'" before asserting that the factual grounds for reversal on the "single storm" issue were raised in a Reply Brief. Application at 17, 20. None of these arguments explain or otherwise excuse Heartland's failure to cite to any factual basis or legal authority in its appellate brief on the issue, thus waiving the issue on appeal. *See* Iowa R. Civ. P. 6.903.

The full extent of Heartland's "argument" in a footnote of its appellate brief on the "single storm" issue is as follows:

> "However, to the extent the Court finds the phrase 'any one loss' is defined by whether there was a single covered peril, as the district court found, Heartland disputes that the derecho was a single covered peril. In such case, Heartland should be permitted to prove at trial that the derecho constituted multiple covered perils from which Heartland sustained multiple covered losses.

Heartland's Appellate Brief at 33, n. 1. This statement in Heartland's Appellate Brief is facially insufficient to preserve an error for appellate review.

There is no citation to the docket or parties' briefings identifying what factual basis Heartland is relying on to generate a material question of fact, and no citation to legal authority supporting the argument that a fact question was generated or that said-question was material to the legal issue before the district court. Heartland's discussion of the issue was limited to two sentences relegated to a footnote without context or further discussion anywhere in its brief regarding what "dispute" Heartland had with the district court's analysis. *See Soo Line R.R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (holding the random mention of an issue, without elaboration or supportive authority, is insufficient to raise the issue for appellate consideration); *Shri Lambodara, Inc. v. Parco, Ltd.*, 995 N.W.2d 505, 510 (Iowa Ct. App. 2023) ("[S]aving development of an argument for the reply brief is improper and deprives the appellee of any

opportunity to respond on the merits."); *State v. Schweitzer*, 646 N.W.2d 117, 121 (Iowa Ct. App. 2002) ("Raising this issue in a footnote [on appeal], however, is considered insufficient for purposes of error preservation."). Heartland's efforts to avoid the natural consequences of failing to raise the "single storm" issue are equally insufficient.

Regarding the assertion that the Court of Appeal's finding of waiver "is dictum," the Court of Appeal's dispensed with that notion without question. *Slip Op.* at 3, n. 2 ("Therefore, we *find* the issue waived.") (emphasis added). The Court of Appeal's finding of waiver should not be viewed as dicta because it represents a distinct decision on a question which fairly arose in the course of legal proceedings, the merits of which are necessary to the full resolution of the case. *Galvin v. Citizens' Bank of Pleasantville*, 250 N.W. 729, 730 (Iowa 1933). Specifically, the issue—if properly preserved—would necessarily require addressing because a determination regarding the existence of a material question of fact lays at the heart of a ruling on summary judgment. *See* Iowa R. Civ. P. 1.981(3), (5) *accord Banwart v. 50th St. Sports, LLC*, 910 N.W.2d 540, 545 (Iowa 2018).

As to the failure to cite record or legal authority in support of its position, Heartland can only muster the excuse that error preservation rules are not designed to be hypertechnical and there is no authority to cite in

support of its position beyond the contents of the record before the district court. *See* Application at 19. Heartland fails to mention that its position is contrary to persuasive authority recognizing derecho and related hurricanes and windstorms as discrete, singular storms for purposes of "occurrence" requirements. *See Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 682–83 (5th Cir. 2011) ("[Hurricane] Katrina was a single event, . . . even if the storm included multiple 'acts' of rain and wind."); *des Longchamps v. Allstate Prop. & Cas. Ins. Co.*, 102 F.Supp.3d 299, 302–03 (D.D.C. 2015) (treating a derecho and Hurricane Sandy as separate and discrete loss-causing storms); *Andrews v. Merchants Mut. Ins. Co.*, 2016 WL 3690091 at *1 n. 2 (D.N.J. 2016) (citing the National Weather Service for the legal conclusion that a derecho is a single storm similar to a tornado or hurricane, capable of causing widespread destruction); *In re Farmers Ins. Co. Wind/Hail Storm Litigation*, 481 S.W.3d 422, 424–25, 426–27 (Tex. M.D.L. Panel 2015) (recognizing large discrete storms like hurricanes and windstorms as "one event").

Finally, Iowa's appellate courts regularly remind litigants issues first raised or developed in an appellant's reply brief will not be considered on appeal. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 770–71 (Iowa 2009); *Sun Valley Iowa Lake Assoc. v. Anderson*, 551 N.W.2d 621, 642

(Iowa 1996); *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). Heartland's reference to *Terry v. Dorothy* should not mitigate its failure to abide by the overwhelming accumulation of precedent requiring more than the "random mention" of an issue to preserve the issue. *See Soo Line R.R. Co.*, 521 N.W.2d at 691.

In *Terry*, the court recognized that the appellant "clearly presented" the issue in its primary appellant brief, cited "various cases explaining basic principles of contract law," and argued those principles applied to the legal issue and relief disputed as being preserved on appeal. *Terry v. Dorothy*, 950 N.W.2d 246, 250 (Iowa 2020). While Iowa's "issue preservation rules are not designed to be hypertechnical," they do require putting the appellate court on notice of the issue to satisfy the notice requirement of issue preservation. *Id.*; *Mitchell v. Cedar Rapids Comm. School Dist.*, 832 N.W.2d 689, 695 (Iowa 2013).

Heartland relegated discussion of the "single storm" issue to a footnote in its appellate brief, failed to cite any authority—factual or legal—in support of its dispute with the district court's findings, and did not apply any legal authority or basic principles of argument to rebut what Heartland found objectionable with the district court's findings. Heartland's general averment to its alternative argument regarding the "single storm" or single

covered peril finding lacked any specificity or notice specifically challenging an aspect of the district court's holding on that issue. The failure to put either the Iowa Court of Appeals or Nationwide on adequate notice that the issue was being presented for appellate review waived preservation of the issue, and Heartland's Application for Further Review on that ground should be denied.

CONCLUSION

For the foregoing reasons, Nationwide Agribusiness Insurance Company respectfully requests the Court **DENY** Heartland's Application for Further Review.

CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Appellee's Resistance was the sum of $0.00 .

/s/ Benjamin J. Kenkel
Benjamin J. Kenkel AT0014368

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.1103(5)(a) because this brief contains 4,155 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.1103(5)(a).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.1103(2)(c), 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 Microsoft Word in 14 point, Times New Roman font.

/s/ Benjamin J. Kenkel
Benjamin J. Kenkel AT0014368

July 9, 2024
Date

CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 2024, I electronically filed the foregoing document with the Clerk of the Supreme Court by using the EDMS system which gives notice thereof to counsel of record below:

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CERTIFICATE OF FILING

The undersigned hereby certifies that a copy of the Defendant-Resister's Resistance to Application for Further Review was filed via EDMS on the 9th day of July, 2024, with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, Iowa, 50319.

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