

IN THE IOWA SUPREME COURT
No. 23-1729

DR. ALLEN DIERCKS and DIANE HOLST

Plaintiffs-Appellants

v.

SCOTT COUNTY, IOWA, an Iowa County
and **KERRI TOMPKINS**, Scott County Auditor

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE HENRY LATHAM,
SEVENTH JUDICIAL DISTRICT
Scott County Equity No. EQCE136057

DEFENDANTS'-APPELLEES' FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. THE DISTRICT COURT WAS CORRECT IN DETERMINING THE FIRST AND LAST NAMES AND RESUMES OF PERSONS WHO SUBMITTED SAID INFORMATION TO THE SCOTT COUNTY VACANCY COMMITTEE WERE CONFIDENTIAL BASED ON THE FACTS PRESENTED AND APPLICABLE LAW AND CODE.

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- II. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE DOCUMENTS SOUGHT FALL UNDER AN EXEMPTION TO THE OPEN RECORDS STATUE IOWA CODE § 22.7(18) WHETHER A COUNTY SUPERVISOR IS AN EMPLOYEE, EMPLOYER OR NEITHER.

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III. NO CLAIMS WERE SET FORTH IN THE DISTRICT COURT CASE THAT THE APPOINTMENT OF THE COUNTY SUPERVISOR AT ISSUE WAS DONE IN CLOSED SESSION AND NO ARGUMENT MADE RELATING TO THE “INCUMBENCY EFFECT” PRESENTED AND THEREFORE ANY ARGUMENT RELATED TO SUCH SHOULD BE DISREGARDED ON APPEAL

Rules

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ROUTING STATEMENT

This appeal should be transferred to the Court of Appeals under Iowa R. App. P. 6.1101(3) as it is a review of a trial court order which applied existing legal principles to the facts of a contested case.

STATEMENT OF THE CASE

Appellee is satisfied with Appellants’ description of the case, relevant events of prior proceedings, and the disposition of the case in the district court.

STATEMENT OF THE FACTS

Appellee is satisfied with Appellants’ Statement of the Facts as set forth in Appellant’s Brief other than to affirmatively add the clarification that although the

vacancy committee did not approve a motion or resolution to make applicant names or resumes confidential, that is not a requirement under Iowa law, nor a power vested in the vacancy committee. The auditor, Kerri Tompkins, reached out to the applicants upon the advice of the then acting Assistant Scott County Attorney. *January 6, 2023 Letter from Rob Cusack to Vacancy Committee, Def. Ex. E.* (App. 083). During communications between attorney for the Plaintiffs and the Assistant County Attorney, an offer was made by the Assistant Scott County Attorney to request an opinion from the Iowa Public Information Board, which was declined. *February 9, 2023 E-mail from Rob Cusack to Mike Meloy, Def. Ex. H.* (App. 086).

On July 5, 2023, Defendants filed a Cross-Motion for Summary Judgment asserting that the names and applications were confidential, that the Defendants had good reason to believe and in good faith believed in facts which, if true, would have indicated compliance with Iowa Code Chapter 22 and Defendants relied upon Iowa Supreme Court caselaw and the written opinions of the Scott County Attorney's Office in determining the names and applications were confidential. *Defendants' Counter Motion for Summary Judgment.* (App. 066-067).

SUMMARY OF THE ARGUMENT

This Court should uphold the district court's ruling in its entirety. The district court correctly concluded that the names and applications of the applicants

for the Board of Supervisors vacancy who did not waive confidentiality were confidential under the open records exemption set out in Iowa Code § 22.7(18).

ARGUMENT

- I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE FIRST AND LAST NAMES AS WELL AS THE APPLICATIONS OF THE APPLICANTS FOR SCOTT COUNTY SUPERVISOR ARE CONFIDENTIAL PURSUANT TO IOWA CODE § 22.7(18) OF THE IOWA OPEN RECORDS ACT AND THE RULING IN *PRESS CLUB*.

- A. Preservation of Issue for Review

Appellants have properly preserved this issue for review. The issue of whether the names of applicants and applications for Scott County Supervisor are confidential has been presented at each stage of the proceedings.

- B. Standard of Review

Appellees agree with Appellants' standard of review for summary judgment set forth in Appellants' Proof Brief.

- C. The district court was correct in finding that the names and applications for the vacant board of supervisors position fell under the protection of § 22.7(18) and applicants did not consent to waiving the confidentiality of their information, preventing disclosure to Appellants.

Iowa Code §§ 69.8(4) and 69.14A provide the process by which a vacancy on the board of supervisors may be filled. 69.14A provides:

“1. A vacancy on the board of supervisors shall be filled by one of the following procedures:

a. By appointment by the committee of county officers designated to fill the vacancy in [section 69.8](#).

(1) The appointment shall be for the period until the next pending election as defined in [section 69.12](#), and shall be made within forty days after the vacancy occurs. If the committee of county officers designated to fill the vacancy chooses to proceed under this paragraph, the committee shall publish notice in the manner prescribed by [section 331.305](#) stating that the committee intends to fill the vacancy by appointment but that the electors of the district or county, as the case may be, have the right to file a petition requiring that the vacancy be filled by special election. The committee may publish notice in advance if an elected official submits a resignation to take effect at a future date. The committee may make an appointment to fill the vacancy after the notice is published or after the vacancy occurs, whichever is later. A person appointed to an office under this subsection shall have actually resided in the county which the appointee represents sixty days prior to appointment.”

Iowa Code § 69.14A(1)(b) provides the alternative method for filling a vacancy through special election. Because no petition was filed and the committee opted to appoint, no further discussion is needed on that process.

A committee was formed to appoint a person to fill a vacancy on the Scott County board of supervisors created when Tony Knobbe resigned his position on the board effective December 31, 2022 to assume the role of treasurer. *See* Iowa Code Section 69.8(4) (vacancies on the board of supervisors shall be filled by the treasurer, auditor, and recorder or as provided in section 69.14A. The committee was comprised of County Auditor Kerri Tompkins, County Treasurer Tony Knobbe, and County Recorder Rita Vargas (“the committee”). Iowa Code §

69.14A does not address procedural inquiries relating to how applications must be sought and accepted, whether a chair need be selected for the committee, or whether public comment may or shall be heard. The committee is therefore granted substantial leeway in determining how the appointment process should proceed.

For the appointment of the board of supervisors vacancy at issue, the committee, at a public meeting held on January 5, 2023, decided to *appoint* a person to fill the vacancy. The committee held the belief that the names and applications of the candidates were confidential. This belief was based on the counsel of the assistant Scott County Attorney and *City of Sioux City, Iowa v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988). *January 6, 2023 Letter from Rob Cusack to Vacancy Committee, Def. Ex. E.* (App. 083). *Press Club* held that under the statute allowing certain government communications to be confidential and exempt from open records requirements, applications had to be kept confidential unless applicants consented to public disclosure. *Id.* In retrospect, the appropriate handling of the confidentiality of the names and applications perhaps should have been an inquiry to all applicants as to whether they consented to the public disclosure of the requested information instead of inquiring into whether they were requesting confidentiality, but the end result is the same. The applicants who were comfortable with public disclosure of their information did

not request confidentiality and that information was publicly available and the persons who preferred confidentiality received just that.

Appellants believe elected officials are not employees. One of their points is that elected officials are sworn in while no other Scott County employees are sworn in. This is not accurate. Assistant County Attorneys are employees that are sworn in. *See Exhibit A* (App. P. 079). Scott County Sheriff's Deputies are employees that are sworn in. *See Exhibit B* (App. P. 80).

Whether elected officials are employees or not should not impact the confidentiality of their names and applications. This protection comes from the language of the statute which does not refer to whether or not the person is or isn't an employee. It references whether the persons receiving the communications could reasonably believe that the applicants would be discouraged from making them if they were available for public examination.

Let us also distinguish persons employed by the county or those who have been elected from those who are merely prospective by virtue of making application for a position. Persons applying for a position are merely members of the public without any status, whether it be elected official, employee or any other title. 22.7(18) applies directly to applicants and not those who have already been placed into a position. By virtue of becoming a public official, a person makes

their personal information subject to disclosure, but by *applying* for a position does not necessarily create the same requirement.

It was argued in district court that once appointed, officials are employees of Scott County. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 070-071). They receive pay checks, they get IRS W-2 forms indicating they are employed by Scott County, they are covered under worker's compensation rules, they are covered under Scott County insurance and benefit plans, elected officials receive Iowa Public Employee Retirement benefits, among many other indications that they are employed by Scott County. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 070).

In addition, Scott County supervisors have designated duties set forth in statutes. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 070). For example, they are required to adopt a budget, levy taxes, approve zoning changes, make official canvass of votes, and approve beer, liquor and cigarette licenses. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 070). They are compensated for performing these duties, just as any other employee is compensated. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 070).

The word “employee” should be broadly construed. As the Court in *Press Club* noted:

“The appellant news organizations urge that the issue must be resolved favorably to them by virtue of the so-called “narrow” construction rule approved in the *Telegraph Herald* decision and in *Howard*. We disagree with that contention for two reasons. First, the entire thrust of Iowa Code section 22.7 is to describe information which is *not* required to be disclosed. Consequently, overutilization of the “narrow” construction principle could easily thwart rather than promote the legislative intent underlying that section. Second, and of more significance, the legislative exception upon which plaintiff relies in the present controversy is broadly inclusive in its provisions. Where the legislature has chosen to use broadly inclusive language to describe those areas where an established policy does not apply, mechanical application of a “narrow” construction rule does not aid in the ascertainment of the legislature's intent. If the legislature had intended a narrowly drawn exception, it would, we believe, have narrowly described the categories of information which were excluded from public disclosure.”

Id. at 897. *Defendants’ Brief in Support of their Counter Motion for Summary Judgment.* (App. 071).

The statute relied upon in the *Press Club* case is just as applicable to an application for the board of supervisors as it is to any other position in Scott County. *Defendants’ Brief in Support of their Counter Motion for Summary Judgment.* (App. 071).

Iowa Code § 22.7 states that certain public records “shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information,” and

proceeds to enumerate seventy-five examples of public records that *shall* be kept confidential. Iowa Code § 22.7(18) is the exemption to disclosure at issue in this appeal and states as follows:

“Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.

- (a) The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.

The Court in *Press Club* held that applications are confidential government communications unless the applicant consents to its treatment as a public record. *Id. Defendants’ Brief in Support of their Counter Motion for Summary Judgment*. (App. 071). This is important because it indicates that the application is confidential unless, and until, the applicant consents to it being made public. The confidentiality is conferred by statute. *Defendants’ Brief in Support of their Counter Motion for Summary Judgment*. (App. 071). It is not conferred by resolution or any other action made by the governing body. *Defendants’ Brief in Support of their Counter Motion for Summary Judgment*. (App. 071). A resolution

providing confidentiality is not required. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 071). Making a request of the applicant to see if they want the application to be confidential is not required. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 071-072). All that is necessary is that the application be tendered to the governing body – confidentiality then attaches. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 072).

Appellants argue that by applying for the vacant position, every applicant waived confidentiality and their information became publicly available. As stated above, confidentiality was held until consent was obtained. The applicants were not given notice that through their applications they were waiving confidentiality and therefore could have assumed that by law their information was confidential until some affirmative act on their part was made to waive the confidentiality. Consent should be affirmative and not assumed or inferred by conduct. When receiving medical treatment, one does not consent to let a provider do whatever they deem is appropriate because he walked through the door. Affirmative consent is required for treatments and procedures. When someone requests confidential medical records, an authorization is required to waive the confidential nature of those records as to the requesting party. Appellants label the conferred

confidentiality as “secrecy,” projecting onto applicants that they are deceptive, which is unfair.

Appellants contend that the committee “has no basis to reasonably believe that disclosing” the records “would discourage people from submitting their application” because citizens have a right to apply for public office and presumable because it is a part time position. *Appellants’ Proof Brief*, pp. 32-33. It is illogical for Appellants to argue something as subjective as the basis for someone else’s reasonable beliefs. There are likely many employers who would not be enthused to know one of their employees was applying for a certain position, especially if that position required time away from job duties during their work hours or if the person worked in a position where hours were rigid and obtaining the position would require leaving the employer. Twenty-seven people applied for the vacancy and only one obtained the position so the release of personal information at the risk of a current employer finding out could be discouraging in a situation where a position is not guaranteed.

Finally, the Court in *Press Club* noted that it was not its place to balance competing policy interests. The Court stated:

“Notwithstanding the spirit of disclosure evidenced by this legislation, the legislature has denoted numerous areas where confidentiality is to be maintained. In controversies such as the present one, it is not the responsibility of this court to balance the competing policy interests. The balancing of those interests is the province of the legislature, and we act only

to devine the legislature's intent with regard to those important policy issues.”

Id. at 897.

Because the legislature has enacted a statute that the Iowa Supreme Court has interpreted to grant confidentiality to applications, competing policy interests should not be considered.

The applications, whether for an employee, employer, or elected official, all meet the criteria for being confidential until it is waived and this is regardless of label. It is dependent on whether it was reasonable to believe that the applicants would be discouraged from applying if they knew their names and applications would become available for general public examination.

Appellants, in their quest to make § 22.7(18) not apply to the case at hand, reference § 22.7(11)(a), as creating a distinction between officials, officers and employees of governmental bodies to prove that a county supervisor is not an employee. *Appellants' Proof Brief*, p. 43. First, it should be noted that this applies to confidential personnel records, which implies that the person is not an *applicant* but rather already hired, but the statute also goes on to use the general term of “employment” to apply to all three categories of individuals. Just because *Press Club* didn't specifically state that applications for officials, officers and employees are confidential does not mean it does not apply here.

The undersigned ventures that “employment application” as referenced in *Press Club*, would encompass not only those applications for employees, but also those for employers, officials and even independent contractors and that getting lost in the semantics of the ruling in *Press Club* loses sight of the language and context of § 22.7(18) which makes no reference to what type of position a person may be applying to, but rather the communication itself being confidential due to concerns over discouraging people from applying in the first place. *Press Club* dealt with an application to be an employee, but the ruling does not hinge on categorizing an application as one for employee or not. Its application is appropriate to the facts of the instant case.

In this case, Appellees relied on the decision of a court, that being the court in *City of Sioux City, Iowa v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988) and the verbal and written opinion of the Scott County Attorney’s Office, when it made the decision to inquire into whether the applicants wanted their information to be *kept* confidential. *Defendants’ Brief in Support of their Counter Motion for Summary Judgment*. (App. 073). Reliance on this was reasonable as the assistant Scott County Attorney who provided this guidance to the committee, informed Kerri Tompkins, committee member, that her name as a person being considered for the appointment to the vacant position of Scott County Auditor was confidential unless waived. *Defendants’ Brief in Support of their*

Counter Motion for Summary Judgment. (App. 073). Committee member Treasurer Knobbe was on the board of supervisors at that time and he was informed of the confidentiality of applicant Tompkins. *Defendants' Brief in Support of their Counter Motion for Summary Judgment.* (App. 073).

Iowa Code Section 22.10 provides that, even if the court finds a violation of Chapter 22 occurred, damages shall not be assessed if the person:

“(3) Reasonably relied upon a decision of a court, a formal opinion of the Iowa public information board, the attorney general, or the attorney for the government body, given in writing, or as memorialized in the minutes of the meeting at which a formal oral opinion was given, or an advisory opinion of the Iowa public information board, the attorney general, or the attorney for the government body, given in writing.”

Defendants' Brief in Support of their Counter Motion for Summary Judgment. (App. 072).

In this case, the committee was provided with written notice that the County Attorney's Office considered the applicants and their applications confidential. *January 27, 2023 Letter from Rob Cusack to Diane Holst, Def. Ex. G.* (App. 085). On January 5, 2023, an email, including a letter from the undersigned to attorney for Appellants dated April 20, 2016, was sent to defendant Tompkins setting forth the opinion that the names and applications were confidential. *See Exhibits C and D* (App. P. 080-081). On January 6, 2023, a letter to the committee was sent indicating the opinion that the names and applications were confidential. *Exhibit E*

(App. P. 083). On January 27, 2023, another email was sent to defendant Tompkins. *Exhibit F* (App. P. 084). Attached to that email was the Scott County Attorney's Office opinion that the names and applications were confidential. *Exhibit G* (App. P. 085).

The committee, and more specifically, defendant Tompkins reasonably relied upon these written opinions. *Affidavit of Rita Vargas* (App. P. 077-078), *Affidavit of Tony Knobbe* (App. P. 087-088). Further, defendants relied upon the Court's opinion in *City of Sioux City, Iowa v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988).

Finally, any insinuation that Scott County deliberately kept names "secret" for any other reason that it reasonably felt it was following the law is incorrect. That sentiment was communicated to attorney for Appellants by the Scott County Attorneys Office with an offer to get an opinion from the Iowa Public Information Board in order to avoid litigation. *Exhibit H* (App. P. 086). There was no reply to that offer.

The district court was correct in ruling that Iowa Code § 22.7(18) applies to this case and that the default rule in this situation was for information to be kept confidential. *Ruling on the Cross-Motions for Summary Judgment*, p. 3-4 (App. P. 108-112). The district court correctly found that some applicants consented to their names being publicly available and some refused and the information would

remain confidential. *Ruling on the Cross-Motions for Summary Judgment*, p. 4 (App. P. 111).

Appellants cannot show that names and applications for the board of supervisors vacancy do not fall under the exception set forth in Iowa Code § 22.7(18). How those applicants' future position was categorized is not determinative of the issue. The district court's ruling should be affirmed.

II. THE DISTRICT COURT WAS CORRECT IN RULING THE APPELLANTS' REQUEST DID NOT FALL UNDER AN EXCEPTION TO § 22.7(18) AND RULING THE APPELLANTS DID NOT PROVIDE A COMPELLING ARGUMENT THAT THE APPLICANTS WOULD NOT BE EMPLOYEES

A. Preservation of Issue for Review

Appellants have properly preserved this issue for review.

Standard of Review

B. Appellees agree with Appellants' standard of review for summary judgment set forth in Appellants' Proof Brief.

C. The district court correctly ruled that the Appellants' requests did not fall under the exceptions to confidentiality enumerated in §§ 22.7(18)(a)-(c) and additionally found Appellants did not provide a compelling argument that applicants to fill the vacancy would not be employees.

The district court, through its ruling, determined that Appellants did not satisfy the requirements of Iowa Code § 22.10(2) by ruling that "the information of the non-consenting applicants cannot now be made available." *Ruling on Cross-*

Motions for Summary Judgment, p. 4 (App. P. 111). The court had already determined that § 22.7(18) applied to the information sought and was therefore deemed confidential. *Ruling on Cross-Motions for Summary Judgment, p. 4* (App. P. 111). Therefore, the requirements for release of the requested information would need to meet both the general requirements of § 22.10(2) but also would have required the consent of the individuals.

Iowa Code § 22.10(2) requires that once the party seeking judicial enforcement has shown that the chapter applies to the defendants, that the records are government records and defendant refused to make the records available that the burden would then be on the Defendants to show compliance. As stated above, the Appellees complied with Appellants' requests to the fullest extent they believed was allowed under the law. Records for the applicants who did not wish to remain confidential were provided, explanations were given to explain the decision to withhold the others and an offer was made to get an opinion from the Iowa Public Information Board.

It does not appear from the ruling that the district court shifted the burden of proof and required a compelling reason for receipt of the records but was instead ruling separately that Appellants hadn't proven that the applicants would not be employees. Although Appellants contend no ruling was given on the issue of employee versus employer, from the statement given by the district court that "the

Plaintiffs have not provided a compelling reason to believe applicants filling this vacancy are not employees,” the court did in fact rule on the issue. *Ruling on Cross-Motions for Summary Judgment, p. 4* (App. P. 111).

III. NO CLAIMS WERE SET FORTH IN THE DISTRICT COURT CASE THAT THE APPOINTMENT OF THE COUNTY SUPERVISOR AT ISSUE WAS DONE IN CLOSED SESSION AND NO ARGUMENT MADE RELATING TO THE “INCUMBENCY EFFECT” PRESENTED AND THEREFORE ANY ARGUMENT RELATED TO SUCH SHOULD BE DISREGARDED ON APPEAL

A. Preservation of Issue for Review

These issues were not preserved for review. The issue of whether a stage of the vacancy filling process occurred in a closed session and whether that was inappropriate was never raised at the district court level. Likewise, no evidence was presented at the district court level related to the “incumbency effect” and how that would support Appellants’ access to certain records. Attempts to raise issues not preserved for appellate review in amicus briefs are not allowed under Iowa Rule of Appellate Procedure 6.906(5)(b)(3).

B. No argument was made nor evidence presented in district court regarding closed sessions relating to appointments or the “incumbency effect”

The amicus brief filed herein spends substantial space arguing when it is appropriate and not appropriate to conduct closed session discussions relating to

appointments. *Amicus Brief*, pp. 10-11, 15-18. Any and all discussion relating to the application of closed session requirements should be disregarded as this topic was not touched upon nor ruled upon at the district court level. The amicus brief is not merely adding to the Appellant's arguments but attempting to present new statutory arguments relating to the appointment of individuals to positions like county supervisor.

Additionally, the amicus brief argues for Appellants' position through discussion of the "incumbency effect," which was never raised at the district court level and would be inappropriate to consider on appeal. *Amicus Brief*, pp. 29-30.

CONCLUSION

The names and applications of the candidates for the board of supervisors vacancy who did not consent to the release of information are confidential under Iowa Code. The district court was correct in finding that the information sought by Appellants could not be released. Appellees complied with the requests of Appellants as fully as was possible at the time based upon good faith reliance on caselaw and the opinion of the Scott County Attorney's Office.

Because the district court was correct in granting summary judgment in favor of the County, Appellees respectfully requests this Court affirm the district court's ruling in its entirety.

Respectfully submitted,

/s/ Kristina K. Lyon

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WAIVER OF ORAL ARGUMENT

Scott County respectfully requests that this case be set for nonoral submission.

CERTIFICATE OF FILING

I hereby certify that I have filed Appellees' Final Brief by electronically filing a copy with the Clerk of the Supreme Court, on the 1st day of March, 2024.

/s/ Kristina K. Lyon
Kristina K. Lyon ATC820046
Assistant Scott County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2024, I served the Appellees' Final Brief on Michael J. Meloy, attorney for Appellants, by electronically filing the same with the Iowa Judicial Branch District Court EDMS System.

/s/ Kristina K. Lyon
Kristina K. Lyon ATC820046
Assistant Scott County Attorney

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
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this brief contains 4,349 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Kristina K. Lyon

Kristina K. Lyon ATC820046

03/01/2024

Date

ATTORNEY'S PRINTING COST CERTIFICATION

The undersigned certifies that the actual cost of printing Brief for Appellee was \$0.

/s/ Kristina K. Lyon

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Assistant Scott County Attorney