

IN THE SUPREME COURT OF IOWA

No. 18-2096

O'BRIEN COUNTY NO. EQCV022991

MARCUS NEWS, INC.

Plaintiff-Appellant

vs.

THE O'BRIEN COUNTY BOARD OF SUPERVISORS

Defendant-Appellee

and

IOWA INFORMATION, INC.

Intervenor-Appellee

INTERVENOR-APPELLEE'S FINAL BRIEF

JEFF W. WRIGHT, AT0008716
JACOB B. NATWICK, AT0010523
Whorley Heidman Law Firm, L.L.P.
934 3rd Avenue, Suite 200
P.O. Box 309
Sheldon, Iowa 51102-3086
(712) 324-4385 - telephone
(712) 324-5106 – telefax
E-mail: Jeff.Wright@heidmanlaw.com
E-mail: Jacob.Natwick@heidmanlaw.com

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STATEMENT OF THE CASE

Intervenor-Appellee, Iowa Information, Inc., accepts the statement of the case found in the brief of Plaintiff-Appellant.

STATEMENT OF THE FACTS

Plaintiff-Appellant, Marcus News, Inc., is an Iowa corporation and is the publisher of The Sanborn Pioneer and O'Brien County's Bell-Times-Courier. *See* App. 90–96 at ¶¶ 1, 4 (Joint Stipulation of Facts, filed July 23, 2018 (hereinafter referred to as the “Stipulation”)). The Sanborn Pioneer and O'Brien County's Bell-Times-Courier are both published in Paullina, Iowa and both are papers meeting all of the requirements under Iowa Code section 618.3 for official publication newspapers of general circulation. *Id.* at ¶¶ 6–7. Intervenor-Appellee, Iowa Information, Inc., is an Iowa corporation and is the publisher of The N'West Iowa REVIEW and The Sheldon Mail-Sun. *Id.* at ¶¶ 2, 5. The N'West Iowa REVIEW and The Sheldon Mail-Sun are both published in Sheldon, Iowa and both are papers meeting all of the requirements under Iowa Code section 618.3 for official publication newspapers of general circulation. *Id.* at ¶¶ 9–10.

Under Iowa Code section 349.3, O'Brien County, having a population of less than fifteen thousand in 2018, was required to select two newspapers as official newspapers for the County. Iowa Code § 349.3. Four newspapers applied for selection as official newspapers for the County. *Id.* at ¶ 13. The N'West Iowa

REVIEW and The Sheldon Mail-Sun filed separate applications. *Id.* The Sanborn Pioneer and O'Brien County's Bell-Times-Courier filed a combined application. *Id.*

On January 7, 2018, Marcus News, Inc. submitted an affidavit to the O'Brien County Board of Supervisors, swearing that the total number of bona fide subscribers for the Sanborn Pioneer and O'Brien County's Bell-Times-Courier, when combined, was 814. *Id.* at ¶ 14. Based on the list of subscribers attached to the affidavit, the total number of subscribers for O'Brien County's Bell-Times-Courier was 471 and the total subscribers of the Sanborn Pioneer was 342. *Id.*

On January 8, 2018, Iowa Information, Inc. submitted an affidavit to the O'Brien County Board of Supervisors, swearing that the total number of bona fide subscribers of The N'West Iowa REVIEW was 1,146. *Id.* at ¶ 15. On January 8, 2018, Iowa Information, Inc. submitted an affidavit to the O'Brien County Board of Supervisors, swearing that the total number of bona fide subscribers of The Sheldon Mail-Sun was 784. *Id.* at ¶ 16.

As shown in the chart attached to the Joint Stipulation of Facts as Exhibit 1, approximately 94% of the subscribers to the Sanborn Pioneer are located in the northern part of O'Brien County (Sanborn, Sheldon, and Hartley). App. 97. As shown in the chart attached to the Stipulation as Exhibit 2, approximately 92% of the subscribers to O'Brien County's Bell-Times-Courier are located in the southern part of O'Brien County (Primghar, Paullina, Sutherland, Calumet, and Granville).

App. 98. The map attached to the Stipulation as Exhibit 7 was provided by Marcus News and shows the locations of the subscribers to the Sanborn Pioneer and O'Brien County's Bell-Times-Courier. App. 103. At the District Court hearing in this matter, Intervenor drew a line across Exhibit 7, which split the County into northern and southern parts to show that nearly all of subscribers to the Sanborn Pioneer are located in the northern part and nearly all of subscribers to O'Brien County's Bell-Times-Courier are located in the southern part. See App. 288–91 (Transcript of Hearing Re: Appeal). The line was drawn on the map just north of the city of Archer on a line parallel with Highway 18. *Id.*

A majority of the O'Brien County subscribers to The N'West Iowa REVIEW are located outside of the City of Sheldon, as shown by the chart attached to the Joint Stipulation of Facts as Exhibit 3. App. 99. The vast majority of the O'Brien County subscribers to The Sheldon Mail-Sun are located in the City of Sheldon, as shown by the chart attached hereto as Exhibit 4. App. 100. As noted by this Court in a prior case involving these two newspapers, there are clear differences between the editorial content and overall appearance of The Sheldon Mail-Sun and The N'West Iowa REVIEW. See *Iowa Information, Inc. v. The O'Brien County Board of Supervisors*, O'Brien County Case No. EQCV019970 (August 10, 2009) (A copy of the Findings of Fact, Conclusions of Law and Ruling on Appeal was attached to Intervenor's Trial Brief), App. 191–98.

On January 9, 2018, the O’Brien County Board of Supervisors selected The N’West Iowa REVIEW and The Sheldon Mail-Sun as the official newspapers for publication of official proceedings for O’Brien County for the year 2018. App. 93, at ¶ 17. The Board of Supervisors considered whether Plaintiff’s two newspapers were delivered to the same geographic area in determining whether to treat them as a single newspaper. *Id.* The Board ultimately determined that the Sanborn Pioneer and O’Brien County’s Bell-Times-Courier should be considered separate newspapers and could not be treated as one newspaper for purposes of Iowa Code section 349. *Id.*; *see also* App. 76–78 (Transcript of January 8, 2018 Board of Supervisors Meeting). As a result, the two newspapers with the highest number of subscribers, The N’West Iowa REVIEW and The Sheldon Mail-Sun, were selected as the official newspapers for O’Brien County for 2018. *Id.*

On January 25, 2018, Marcus News, Inc. filed an appeal of the O’Brien County Board of Supervisors’ selection of official newspapers. On March 20, 2018, Iowa Information, Inc. filed an Application to Intervene, which was granted on March 22, 2018. On July 13, 2018, the parties agreed to submit this matter on stipulated facts and to present only oral argument at the time of the hearing. *See* App. 88 (Order Continuing Trial and Setting Submission Schedule, dated July 13, 2018). The parties entered into a Joint Stipulation of Facts, which was filed with the

District Court on July 23, 2018. *See* App. 90–96. In addition to the Joint Stipulation of Facts, the parties filed written briefs.

Following the submission of the Joint Stipulation of Facts and the parties’ briefs, Judge Lester heard oral arguments from the parties on August 24, 2018. A copy of the transcript from that hearing is on file with the Court. *See* App. 262–315. The District Court entered its Ruling and Order on October 10, 2018, which affirmed the decision of the O’Brien County Board of Supervisors. *See* App. 323–24 (Ruling and Order, dated October 10, 2018). Specifically, the District Court affirmed the Board of Supervisors’ decision to consider the Sanborn Pioneer and O’Brien County’s Bell-Times-Courier as separate newspapers for the purposes of Iowa Code section 349.6. *Id.* The District Court also affirmed the Board of Supervisors’ decision designating The Sheldon Mail-Sun and The N’West Iowa REVIEW as the two official newspapers for O’Brien County for the year 2018. *Id.*

On October 24, 2018, Marcus News, Inc. filed a Motion for Reconsideration, asking the District Court to address and reconsider a number of issues. Intervenor, Iowa Information, Inc. filed a resistance to the Motion on November 2, 2018. The District Court entered an Order overruling all issues presented in Plaintiff’s Motion for Reconsideration on November 28, 2018. *See* App. 339–42 (Order Re: Plaintiff’s Motion for Reconsideration, dated November 28, 2018). On November 30, 2018, Marcus News, Inc. filed a Notice of Appeal.

ROUTING STATEMENT

Intervenor-Appellee disagrees with the routing statement of the Appellant. This is not a case with “substantial issues of first impression” as there is an established body of law in Iowa regarding statutory interpretation. Iowa R. App. P. 6.1101(2)(c). Instead, this case should be transferred to the Court of Appeals as it concerns “the application of existing legal principles.” Iowa R. App. P. 6.1101(3)(a).

ARGUMENT

I. The District Court Correctly Affirmed the O’Brien County Board of Supervisors’ Selection of Official Newspapers for 2018.

A. Preservation of Error

Error was preserved here by Plaintiff’s filing of a notice of appeal from the District Court’s Ruling and Order and the Order Overruling Plaintiff’s Motion for Reconsideration.

B. Scope of Review

Intervenor-Appellee agrees that the standard of review for equity cases is de novo. *Krupp Place 1 Co-op, Inc. v. Bd. of Review of Jasper Cty.*, 801 N.W.2d 9, 13 n.1 (Iowa 2011).

C. The District Court Properly Applied the Principles of Statutory Interpretation in Determining the Meaning of “Same Geographic Area” Under Iowa Code section 349.6.

The primary focus of the newspaper contest heard by the O’Brien County Board of Supervisors and by the District Court was whether to treat The Sanborn Pioneer and O’Brien County’s Bell-Times-Courier as one newspaper. If the subscribers of those two newspapers are combined, the total subscribers to those two newspapers would be 807 (with 7 duplicate subscribers eliminated), which would exceed the number of subscribers to The Sheldon Mail-Sun (but not The N’West Iowa REVIEW). Separated, neither of Marcus News’ two newspapers has more subscribers than The Sheldon Mail-Sun or The N’West Iowa REVIEW. Thus, the crux of the contest and of this appeal is Marcus News’ contention that its two newspapers should be treated as one pursuant to Iowa Code section 349.6. In the Joint Stipulation of Facts, both Marcus News and Iowa Information agreed that section 349.6 contains the relevant language to be applied by the Board and the District Court as to whether two newspapers can be combined. *See* App. 93, at ¶¶ 17–18. For the reasons that follow, this Court should affirm the decisions of the Board of Supervisors and the District Court because Marcus News’ two newspapers do not meet the requirements for treatment as a single newspaper under section 349.6.

In its arguments regarding the legislative purpose for Iowa Code chapter 349, Marcus News' attention is misplaced. Legislative purpose only becomes important to the interpretation and application of the statute to the extent that the language is ambiguous or unclear. *See Iowa Dep't of Transp. v. Soward*, 650 N.W.2d 569, 571 (Iowa 2002) (holding that when the text of a statute is clear and unambiguous, the Court does not need to look any further or rely on rules of statutory construction) (citing *Henriksen v. Younglove Constr.*, 540 N.W.2d 254, 258 (Iowa 1995)). In the present case, rather than focusing on the relevant language of the specific statute at issue, Marcus News centers its argument on the legislative history and purpose of the code chapter as a whole, relying on caselaw that predates the adoption of the statutory language at issue. *See* Final Brief of Plaintiff/Appellant, at 21–24.

The parties have agreed that the determinative language in this case is found in section 349.6. An analysis of the application of section 349.6 must begin, then, with an analysis of the actual language used in the statute. The relevant portion of Iowa Code section 349.6 reads as follows:

The county auditor shall, on the direction of the board while it is in session, open said envelopes. The board may receive other evidence of circulation. In counties in which two newspapers are to be selected, the two newspapers showing the largest number of bona fide yearly subscribers living within the county shall be selected as such official newspapers...

For purposes of this section, in counties where there are more newspapers than the number required for official county newspapers,

newspapers under common ownership published in the same city, and having approximately the same subscriber list or offered for sale in or delivered to the same geographic area, shall be treated as one newspaper. Each such newspaper under common ownership should be considered eligible for publishing public notices, but such newspapers shall be treated as one newspaper for payment purposes to allow for flexibility in notice publication schedules.

Iowa Code § 349.6 (emphasis added).

The parties stipulated that the two newspapers published by Marcus News and the two newspapers published by Iowa Information are under common ownership and published in the same city. *See* App. 91–92, at ¶¶ 4–7, 9–10. In order for two commonly owned newspapers, published in the same city, to be treated as one for the purpose of determining official newspapers, the two newspapers must meet one of the following requirements: (1) have approximately the same subscriber list; or (2) be offered for sale in or delivered to the same geographic area. Iowa Code § 349.6. The two newspapers published by Marcus News and the two newspapers published by Iowa Information do not have “approximately the same subscriber list” for purposes of Iowa Code section 349.6. *See* App. 94, at ¶¶ 29–30. Therefore, the determinative issue in this case is the meaning and application of the phrase “same geographic area” in Iowa Code section 349.6. Either publisher’s newspapers can only be combined if they are offered for sale in or delivered to the same geographic area.

Statutory interpretation is required to determine the meaning of the phrase “same geographic area,” a term that is not defined in the statute. The purpose of statutory interpretation is to determine the legislature’s intent. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000). “The first step in ascertaining the true intent of the legislature is to look at the statute's language.” *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 729 (Iowa 2008). When the text of a statute is clear and unambiguous, the Court does not need to look any further or rely on rules of statutory construction. *Soward*, 650 N.W.2d at 571. In determining legislative intent, the Court is bound by what the legislature said, not by what it should or might have said. *Krull v. Thermogas Co.*, 522 N.W.2d 607, 612 (Iowa 1994). Additionally, the Court must follow the legislature’s definitions and “may not add words or change terms under the guise of judicial construction.” *Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 533 (Iowa 1981). If the legislature has not defined words of a statute, the Court may refer to caselaw, similar statutes, dictionary definitions, and common usage. *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 761 (Iowa 1998).

Marcus News argues that the legislative purpose of chapter 349 supports their argument that the Court should select the newspapers that would result in the largest total circulation in the County. *See* Final Brief of Plaintiff/Appellant, at 21–24. But to adopt that interpretation, the Court would need to add words to the statute, which

is not permitted. *See Iowa Beef Processors, Inc.*, 312 N.W.2d at 533. The statute clearly lays out the test for determining whether two newspapers may be combined, and the test does not include a determination of what result would produce the largest total number of subscribers amongst the several newspapers involved in the contest. Iowa Code § 349.6. In this case, the Court only needs to determine the meaning of “same geographic area” and whether Marcus News’ newspapers are delivered to the same geographic area, since the parties stipulated as to the other relevant factors contemplated by section 349.6.

In making the “same geographic area” determination, it is most important to focus on what the legislature actually said. *Krull*, 522 N.W.2d at 612. The legislature could have omitted the requirement that the two newspapers be delivered in the “same geographic area” or could have said that the subscribers must only be located in the same county. Notably, it limited the scope of the statute by including a requirement that the subscribers be located in the “same geographic area” and that language must be given meaning. As the District Court correctly found in its Ruling, “O’Brien County as a whole cannot be considered the ‘same geographic area’ under these facts without effectively doing away with the impact of the legislatively created limitations created by the phrase, itself.” *See App.* 321.

In a prior ruling from 2009 in the O’Brien County District Court, which was relied upon by the District Court in the present case, Judge Carr used the principles

of statutory interpretation described above to determine the meaning of “same geographic area” under section 349.6. See Findings of Fact, Conclusions of Law, and Ruling on Appeal, *Iowa Information, Inc. v. The O’Brien County Board of Supervisors*, O’Brien County Case No. EQCV019970, at 6–8 (August 10, 2009), App. 196–98. After applying standard dictionary definitions to “area”, “geographic”, and “same”, the District Court determined that “same geographic area” must mean that the “region” to which the newspapers are delivered within the County must be “nearly identical or equivalent.” *Id.* at 7 (citing Webster’s Third New International Dictionary (1966)), App. 197.

In the context of section 349.6, “same geographic area” must mean something less than the entirety of O’Brien County. Iowa Code section 349.6 exists to determine coverage areas within each county and only subscribers within the County are considered for the purpose of determining number of subscribers. Iowa Code § 349.7. If “same geographic area” were to mean the entirety of the County, the language would be superfluous, because the official newspaper application is already limited to only subscribers within the county. Iowa Code § 349.5; See *Iowa Auto Dealers Ass’n v. Iowa Dep’t of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981) (“[A] statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible.”) (citing *Hanover Insurance Co. v. Alamo Motel*, 264 N.W.2d 774, 778 (Iowa 1978)).

In reaching its conclusion in the present case, the District Court adopted the definitions applied by the O'Brien County District Court in 2009. *See* Ruling and Order, dated October 10, 2018, at pp. 5–6. If the legislature has not defined words of a statute, the Court may refer to caselaw, similar statutes, dictionary definitions, and common usage. *Bernau*, 580 N.W.2d at 761. In the present case, the legislature and the Iowa Supreme Court have not supplied a definition for “same geographic area,” so the District Court, both in the present case and in 2009, relied upon “straight-forward definitions of important terms.” *See* App. 320–21. In doing so, the District Court in 2009 and in the present case defined “same geographic area” as a nearly identical or equivalent region within the county. *Id.*

In making a determination on whether two newspapers are delivered to the same geographic area, the District Court decided it must consider the “specific area of interest,” “which is where the largest percentage of subscribers have their papers delivered.” *Id.* Marcus News has argued that the demarcation applied by the District Court in this case is arbitrary and vague, having no specific boundary, but the District Court made its determination based on the actual locations of the subscribers to the newspapers at issue in this case and in prior cases. *Id.* There is no other way for the Board of Supervisors to determine whether two newspapers are delivered to the “same geographic area” than to apply that requirement to the actual subscribers of the newspapers that apply in a given year. In each year, different newspapers can

apply to be the official newspaper(s) of the County, and the Board must apply the statutory language to the facts presented to it. Iowa Code § 349.1 (stating that the board of supervisors must select official newspapers every year). The statute does not require the County to designate certain geographic areas within the county on an ongoing or permanent basis. Instead, this Court should adopt the more reasonable interpretation of the District Court, which is that a determination of “same geographic area” must consider the specific area of interest within O’Brien County presented by the actual subscriber lists submitted to the Board of Supervisors, namely where the largest percentage of subscribers have their newspapers delivered.

Id.

D. The District Court Properly Determined that the Sanborn Pioneer and O’Brien County’s Bell-Times-Courier Should Be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6.

As shown in the chart attached to the Joint Stipulation of Facts as Exhibit 1, approximately 94% of the subscribers to The Sanborn Pioneer are located in the northern part of O’Brien County (Sanborn, Sheldon, and Hartley). App. 97. As shown in the chart attached as Exhibit 2, approximately 92% of the subscribers to O’Brien County’s Bell-Times-Courier are located in the southern part of O’Brien County (Primghar, Paullina, Sutherland, Calumet, and Granville). App. 98. When considering the specific areas of interest within O’Brien County where these subscribers are located, it is clear that they are not located within a region that is

nearly identical or equivalent. One of the newspapers is delivered almost exclusively to the southern part of O'Brien County and the other newspaper is delivered almost exclusively to the northern part of O'Brien County. These are distinct areas, created by examining the actual locations of subscribers, as opposed to established boundaries that may or may not be relevant when considering this or future subscriber lists.

These specific areas of interest were considered in another ruling of the O'Brien County District Court from 2007, wherein the County was divided into southern and northern parts by virtue of the facts presented to it. *See Ruling and Order, The Paullina Times and the Sutherland Courier v. The O'Brien County Board of Supervisors*, O'Brien County Case No. EQCV019463 (March 8, 2007), App. 199–216. In that case, the District Court described the following geographic areas within O'Brien County:

The individuals who subscribed to *The Times* and *The Courier* live primarily in *the southern part of O'Brien County, which includes the towns of Primghar, Paullina, Sutherland, Calumet, and two non-incorporated towns known as Germantown and Gaza. Both papers also have individual subscribers who live in the northern part of the county, including the towns of Hartley, Sanborn, Archer, and Sheldon...* Based on these facts, the court finds that while *The Times* and *The Courier* do not have approximately the same subscriber list, they are offered for sale in, and delivered to subscribers in approximately the geographic area.

App. 204 (emphasis added). In that case and in the present case, the District Court specifically described the cities located in the northern and southern parts of O'Brien County, creating two distinct geographic areas within O'Brien County. In the 2007 case, the County could combine two newspapers (The Times and The Courier) because both newspapers were delivered primarily to subscribers in the southern part of O'Brien County. *Id.* In the present case, the subscribers of the Sanborn Pioneer are almost all (94%) located in the northern part of O'Brien County and the subscribers of O'Brien County's Bell-Times-Courier are almost all (92%) located in the southern part of O'Brien County.

These geographic areas within O'Brien County are not created arbitrarily by Iowa Information to serve its interests but are a direct result of the Board of Supervisors and the District Court considering the specific areas of interest where those newspaper subscribers were located. A division of the County into northern and southern parts was necessitated by the specific facts at issue in the 2007 case and is again required in the present case with respect to Marcus News. Exhibit 7 is a map provided by Marcus News showing the location of the subscribers to its two newspapers. App. 103. It shows a clear delineation between the subscribers to the two newspapers. The subscribers of the Sanborn Pioneer are centered in and around Sanborn and the subscribers of O'Brien County's Bell-Times-Courier are located

primarily in the southern O'Brien County communities of Primghar, Paullina, and Sutherland. *See* App. 97–98; App. 322.

It would be difficult to conclude that Marcus News' two newspapers are delivered to the same region within O'Brien County under any definition of "same" when looking at the specific locations of the subscribers of the two newspapers. *See* App. 103. As noted in the case from 2009, the Court has defined "same" to mean "nearly identical or equivalent." Findings of Fact, Conclusions of Law and Ruling at 7, *Iowa Information, Inc. v. The O'Brien County Board of Supervisors*, O'Brien County Case No. EQCV019970 (August 10, 2009), App. 197. Therefore, the subscribers of each newspaper must be located in a nearly identical or equivalent area within the County. As described above, the entire County cannot be considered the same geographic area, because it would render parts of chapter 349 superfluous. Iowa Code § 349.5; *See Iowa Auto Dealers Ass'n*, 301 N.W.2d at 765.

This Court should affirm the District Court's decision that the Sanborn Pioneer and O'Brien County's Bell-Times-Courier are separate newspapers and cannot be combined for the purposes of Iowa Code section 349.6. Specifically, this Court should affirm the decision of the District Court that the Sanborn Pioneer and O'Brien County's Bell-Times-Courier are not "offered for sale in or delivered to the same geographic area." Iowa Code § 349.6. When considering the specific area of interest within O'Brien County, there are two clear regions created by the actual

locations of the subscribers of the Sanborn Pioneer and O'Brien County's Bell-Times-Courier, specifically the northern and southern parts of O'Brien County. *See* App. 103. As a result, the District Court's ruling should be affirmed.

E. The District Court Properly Determined that The Sheldon-Mail Sun and The N'West Iowa REVIEW Should Be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6.

The O'Brien County District Court has now twice determined that The Sheldon Mail-Sun and The N'West Iowa REVIEW cannot be combined for purposes of Iowa Code section 349.6. In the present case and in 2009, the District Court determined that The Sheldon Mail-Sun and The N'West Iowa REVIEW are not offered for sale in or delivered to the "same geographic area." In the present case, the District Court determined that the rationale from the 2009 case continues to apply to the present facts. *See* App. 340. Specifically, The Sheldon Mail-Sun, being a newspaper focused on the City of Sheldon, is primarily delivered to subscribers located in and around Sheldon. *See* App. 100. In contrast, The N'West Iowa REVIEW is a newspaper focused on regional issues in Northwest Iowa, and as such is delivered throughout the County, with a majority of its O'Brien County subscribers located outside the City of Sheldon. *See* App. 99.

In 2009, the District Court in O'Brien County determined that The N'West Iowa REVIEW and The Sheldon Mail-Sun should not be treated as one newspaper. Findings of Fact, Conclusions of Law and Ruling, *Iowa Information, Inc. v. The*

O'Brien County Board of Supervisors, O'Brien County Case No. EQCV019970 (August 10, 2009), App. 191–98. In that ruling, the District Court found that 96.5% of The Sheldon Mail-Sun subscribers were located within the Sheldon Community School District. *Id.* at 196. By contrast, 70% of the O'Brien County subscribers to The N'West Iowa REVIEW came from outside the district. *Id.* Focusing on the “real area of interest”, the District Court concluded that the area of circulation of the two newspapers within O'Brien County was not similar. *Id.* at 197.

The District Court in the present case concluded that the 2009 ruling “and the rationale applied therein continues to apply to the present situation.” *See* App. 340.¹

¹ At trial Iowa Information argued that issue preclusion prevented Marcus News from raising this same issue again. *See Dorsey v. Dorsey*, 545 N.W.2d 328, 330 (Iowa Ct. App. 1996) (holding that parties were precluded from relitigating issues that were raised and resolved in a previous action). As noted by Marcus News in its brief, these same issues continue to be raised by the same and related parties in the District Court in O'Brien County. *See* Final Brief of Plaintiff/Appellant, at 6. At some point, the parties should be bound by the decisions of the District Court and should be prevented from raising the same issues after each yearly selection of newspapers.

Issue preclusion requires that four conditions be met: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 689 (Iowa 1999). In the current case, the four prerequisites are satisfied, and Marcus News, Inc. should have been precluded from raising the issue of whether The N'West Iowa REVIEW and The Sheldon Mail-Sun should be treated as one newspaper. The issue decided in the prior case was identical, material, relevant, necessary, and essential to the previous

The distribution of subscribers to Iowa Information’s two newspapers did not change materially between 2009 and 2018. As the District Court concluded in 2009, The Sheldon Mail-Sun and The N’West Iowa REVIEW cannot be combined under Iowa Code section 349.6 because they are not offered for sale in or delivered to the same geographic area within O’Brien County.

As was the case in 2009, the large majority (87%) of subscribers to The Sheldon Mail-Sun are located in the City of Sheldon. App. 100. By contrast, the majority (58%) of O’Brien County subscribers to The N’West Iowa REVIEW are located outside the City of Sheldon. App. 99. The division of subscribers has remained largely the same from 2009 to the present. *See Findings of Fact, Conclusions of Law and Ruling, Iowa Information, Inc. v. The O’Brien County Board of Supervisors*, O’Brien County Case No. EQCV019970 (August 10, 2009), App. 191–98; App. 99–100. As noted in the previous case, the statute does not say substantially or approximately the same, but merely “the same,” which the District Court defined as “nearly identical or equivalent” using ordinary dictionary definitions. *Id.*; Iowa Code § 349.6. The statute could have said “approximately the same geographic area” as it did for other language of the statute (“approximately the

judgment. *See Findings of Fact, Conclusions of Law and Ruling, Iowa Information, Inc. v. The O’Brien County Board of Supervisors*, O’Brien County Case No. EQCV019970 (August 10, 2009), App. 191–98. No parties appealed the 2009 ruling of the District Court.

same subscriber list”), but it did not. Iowa Code § 349.6. As noted above, the Court may not add words to a statute. *Iowa Beef Processors, Inc.*, 312 N.W.2d at 533. The geographic area of the subscribers to The N’West Iowa REVIEW and The Sheldon Mail-Sun are not nearly identical or equivalent based on the requirements of the statute.

The Sheldon Mail-Sun, being focused on the City of Sheldon, has a large majority of its subscribers in and around Sheldon. App. 100. The N’West Iowa REVIEW, being a regional newspaper, delivers to several counties in Northwest Iowa.² Within O’Brien County, the majority of its subscribers are located outside of the City of Sheldon. App. 99. Focusing on the specific area of interest created by the subscriber lists submitted by the two newspapers, there are two separate and distinct geographic areas served by these two newspapers. Because the subscriber lists are not approximately the same and the geographic areas to which the newspapers are delivered are not the same, The N’West Iowa REVIEW and The Sheldon Mail-Sun cannot be treated as one newspaper for purposes of Iowa Code

² Although not directly relevant to the determination under Iowa Code chapter 349 because the statute focuses on subscribers within the county, the total number of paid subscribers of The N’West Iowa REVIEW as of September 23, 2017 in O’Brien County and elsewhere, as shown in its official U.S.P.S. Statement of Ownership, Management, and Circulation, was 5,165.

chapter 349. Iowa Code § 349.6. The District Court’s decision not to combine the two newspapers published by Iowa Information should be affirmed.

II. The Legislative Purpose and History of Iowa Code Section 349.6 Support the District Court’s Ruling.

A. Preservation of Error

Error was preserved here by Plaintiff’s filing of a notice of appeal from the District Court’s Ruling and Order and the Order Overruling Plaintiff’s Motion for Reconsideration.

B. Scope of Review

Intervenor-Appellee agrees that the standard of review for equity cases is de novo. *Krupp Place 1 Co-op, Inc.*, 801 N.W.2d at 13 n.1.

C. The Legislative Purpose and History of the 1986 Amendment to Iowa Code Section 349.6 Support the District Court’s Ruling.

Iowa Information disagrees that the District Court and this Court should consider the legislative purpose and history of Iowa Code section 349.6 when formulating a ruling. As described above, statutory interpretation only requires consideration of legislative history when a statute is ambiguous. Iowa Code § 4.6; *see also Midwest Auto. III, LLC v. Iowa Dep’t of Transp.*, 646 N.W.2d 417, 424 (Iowa 2002) (finding that it is a “well-established principle that we consider legislative history to ascertain legislative intent only when a statute is ambiguous”).

The District Court determined that the statute is clear and unambiguous and declined to consider the legislative purpose as proposed by Marcus News. *See* App. 323.

Although Marcus News describes its arguments as relating to “legislative purpose,” it is primarily focusing on the legislative history of Iowa Code chapter 349 as a whole. *See* Final Brief of Plaintiff/Appellant, at 21–24. Specifically, Marcus News cites caselaw that predates the 1986 Amendment to section 349.6 that added the language relevant to this case.³ *Id.* As stated in Iowa Code section 4.6, legislative history is only relevant to the Court if the Court finds the language of section 349.6 to be ambiguous. For the reasons described herein and in the District Court’s rulings, there is no need to review the legislative history because the language of the statute is clear and unambiguous. If, however, this Court determines that an analysis of the legislative purpose and history of section 349.6 is appropriate and relevant, Marcus News’ interpretation of the legislative purpose is inaccurate and incomplete. The legislative purpose and history of the relevant portion of section 349.6 support the District Court’s interpretation of the statute.

³ The *Albia* case that Marcus News cited and quoted in its brief, specifically with regard to the legislative purpose of 349.6, explicitly states that it has no applicability to cases decided under section 349.6. *Albia Pub. Co. v. Klobnak*, 434 N.W.2d 636, 639 n.1 (Iowa 1989) (“We recognize that the Iowa legislature has recently amended chapter 349 to provide that in case of a contest under section 349.6, ‘newspapers under common ownership published in the same city, and having approximately the same subscriber list ... shall be treated as one newspaper.’ 86 Iowa Acts ch. 1013, § 1. Thus our rule would apply only where no contest exists, as in the case before us.”).

As agreed by the parties, the determinative statutory language in this case was added by the 1986 Amendment to section 349.6. *See* App. 93, at ¶ 18. Therefore, any analysis of the legislative purpose or history of the statute should focus on this particular language rather than any statements regarding the purpose of chapter 349 as a whole that predated the Amendment. *See City of Cedar Rapids v. James Properties, Inc.*, 701 N.W.2d 673, 677 (Iowa 2005) (“[A]n amendment to a statute raises a presumption that the legislature intended a change in the law.’). The statute existed before the 1986 Amendment, and to the extent that the legislature determined that section 349.6 needed a change, the reason it made that change should be examined, rather than the history underlying the statute as it existed prior to the Amendment.⁴ *Id.*

The second paragraph of section 349.6 was added by the legislature in 1986. *See* Acts 1986 (71 G.A.) ch. 1013, § 1, eff. Jan. 1, 1987. This Amendment was

⁴ Marcus News argues that all provisions of Iowa Code chapter 349 should be interpreted to arrive at the largest general circulation of official publications of the county. *See* Final Brief of Plaintiff/Appellant, at 21–24. However, the legislature has more than total circulation in mind when creating chapter 349 and included limitations in chapter 349, including with regard how many newspapers may be selected by the County. *See* Iowa Code §§ 349.3, 349.6. In the present case, O’Brien County has a population of less than 15,000, so the Board of Supervisors was only permitted to select two official newspapers. Iowa Code § 349.3. If total circulation was the sole driving purpose for chapter 349 and section 349.6, as suggested by Marcus News, the legislature would not have set restrictions on how many newspapers can be selected to publish official notices.

introduced in the Iowa Senate and later amended by the Iowa House of Representatives. *See* S.F. 326, 71st Gen. Assem., 1st Sess. (Iowa 1986). The original Senate File included an Explanation that read as follows:

This allows the board of supervisors to select as an official newspaper only one newspaper of a publisher having two or more newspapers with approximately the same subscriber list or offered for sale or delivered to the same geographic area.

Id. The Senate file was later amended by the House, and the amended version was enacted on March 13, 1986. *Id.*; Acts 1986 (71 G.A.) ch. 1013, § 1, eff. Jan. 1, 1987. The second paragraph of section 349.6 that was added in 1986 has not changed since that time. When trying to ascertain the legislative purpose of the 1986 Amendment section 349.6, Iowa Information submits that the Explanation provided by the legislature has much more relevance than statements from statutes and caselaw that predate the enactment of the Amendment. *See City of Cedar Rapids*, 701 N.W.2d at 677 (“We give weight to explanations attached to bills as indications of legislative intent.”).

1. Section 349.6 Only Requires a Publisher to Publish Official Notices in One of the Two Newspapers Combined by the Board of Supervisors.

The Explanation provided by the Senate, where this Amendment was introduced, provides the best understanding of the rationale of the legislature for adding this language to the statute. *See City of Cedar Rapids*, 701 N.W.2d at 677.

It also cuts against the argument of Marcus News that this Amendment was driven by the legislature's desire to secure as large of a circulation base for official notices as possible. Had that been the purpose, the legislature would have required publication of all official notices in *both* of the newspapers combined under section 349.6. Instead, the purpose was to allow the county to select *one* of the two combined newspapers to publish the notices, and to only pay one of the two newspapers. See S.F. 326, 71st Gen. Assem., 1st Sess., Explanation (Iowa 1986) (“This allows the board of supervisors to select as an official newspaper *only one* newspaper...” (emphasis added)). The language of the original Senate bill was changed by the House, but the purpose behind it was not modified in the final version, part of which reads as follows:

Each such newspaper under common ownership should be considered eligible for publishing public notices, but such newspapers shall be *treated as one newspaper for payment purposes* to allow for flexibility in notice publication schedules.

Iowa Code § 349.6 (emphasis added).

The House version, as opposed to the Senate version, does not require the Board of Supervisors to select one of the two newspapers. *Id.* Instead, the Board can select the publisher, and then *each* of the publishers' newspapers so combined is eligible for publishing the public notices to allow “flexibility” in publishing schedules, but the county only must pay the publisher for one newspaper. *Id.* This

language does not require, as Marcus News assumes, that both newspapers so selected and combined must publish all county notices. *Id.* If the two newspapers of Marcus News were combined, they would only be required to publish in one of their two newspapers, and the same is true if Iowa Information were combined. *Id.* (“*Each* such newspaper under common ownership should be considered eligible for publishing public notices...” (emphasis added)).

The language of the statute and the Explanation also cut against Marcus News’ arguments regarding legislative purpose, specifically their claim that the intent of the 1986 Amendment was to increase the total circulation within the County. If either Marcus News’ newspapers or Iowa Information’s newspapers were combined under this statute, the publishers could decide to publish in only one of their two newspapers, and the circulation for county official notices would be far lower.⁵ If the legislative purpose for this Amendment had been to ensure the largest total

⁵ The total number of subscribers to the newspapers selected by O’Brien County to publish official notices is 1,930. App. 92–93, at ¶¶ 14–16. If the two newspapers of Marcus News were combined, and Marcus News elected to publish in only The Sanborn Pioneer, the total number of subscribers receiving County notices would be 1,488. *Id.* If the two newspapers of Marcus News were combined, and Marcus News elected to publish in only O’Brien County’s Bell-Times-Courier, the total number of subscribers receiving County notices would be 1,617. *Id.* If the two newspapers of Iowa Information were combined along with the two newspapers of Marcus News, and both parties elected to publish in their respective newspaper with the largest number of subscribers, the total number of subscribers would still be 1,617. *Id.*

circulation possible for official notices, the legislature would have required publication in all of the newspapers so combined. Instead, this new language in section 349.6 allowed a board of supervisors to address a situation where two newspapers had significant overlap in their subscriber lists or regional coverage areas. Combining the newspapers under the statute would not increase total circulation as suggested by Marcus News and was not necessary or required in this case under section 349.6.

2. Section 349.6 Is a Tool that Allows a Board of Supervisors, Not a Publisher, to Combine Two Newspapers Under Certain Circumstances.

The 1986 Amendment was not intended as a way for a *publisher* to combine two of its distinct newspapers when submitting an application. Instead, the intent was to allow the *board of supervisors* to combine two newspapers meeting the requirements of the Amendment to section 349.6. *See* S.F. 326, 71st Gen. Assem., 1st Sess., Explanation (Iowa 1986) (“This allows the *board of supervisors* to select as an official newspaper only one newspaper of a publisher...” (emphasis added)). There is nothing in the statute or the legislative history to suggest that a publisher of two newspapers, with distinct identities and postal identification numbers, should be allowed to file a combined application. The Board of Supervisors could have rejected the application of Marcus News for noncompliance with Iowa Code chapter 349, since it combined the subscriber lists for two distinct newspapers. *See* Iowa

Code § 349.4 (stating that an application may be submitted by “[a]ny publisher who desires that the publisher’s newspaper be so selected,” which notably limits the application to a singular newspaper).

In this case, both the language of the statute and the underlying purpose confirm that the purpose was not to increase total circulation numbers by combining newspapers owned by the same publisher. If that were the case, the legislature would not have included language in the statute and explanation that require publication in only one of the two newspapers so combined. Iowa Code § 349.6; S.F. 326, 71st Gen. Assem., 1st Sess., Explanation (Iowa 1986). The legislature further did not intend for publishers to use this statute as a tool to increase their subscriber count. It was intended to allow the *board of supervisors* to combine newspapers when those newspapers have approximately the same subscriber lists or are delivered to the same distinct area within the county. *Id.* As described above, the Board of Supervisors in this case did not make such a finding and the application of the plain language of the statute supports the decisions of the Board of Supervisors and the District Court. Although this case can be decided on the plain language of the statute, the District Court’s ruling should be affirmed even if this Court considers the legislative history of section 349.6.

III. The Bona Fide Subscribers of The Sheldon Mail-Sun and The N'West Iowa REVIEW Are Shown in their Affidavits in Compliance with Iowa Code chapter 349.

A. Marcus News Did Not Preserve Error on the Issue of Whether to Strike Iowa Information's Subscriber Lists Because the Issue Was Not Considered or Decided by the District Court.

Intervenor-Appellee disagrees that error was preserved on the issue of whether to strike some of the subscribers on the lists of Iowa Information or the entire lists. In its Order Re: Plaintiff's Motion for Consideration, the District Court stated:

Under the applicable standard discussed above, the Court declines to consider Plaintiff's argument to strike Intervenor's subscriber list in its entirety. Plaintiff's argument is overruled. Under the foregoing standards governing motions to reconsider, the Court cannot accept or rule on additional and new arguments raised by either party. After thorough review of the Court's notes and the case file, the Court concludes that Plaintiff's argument that Intervenor violated the statutory requirements and, accordingly, its subscriber list should be stricken was not properly raised at the time of trial and cannot be considered here.

App. 341.

The parties agreed to a Joint Stipulation of Facts in this case and agreed to hold a hearing based solely on oral argument. *See* App. 88. The Stipulation, including the exhibits attached thereto and the documents filed by the Board of Supervisors with the District Court, was the only evidentiary record available to the District Court and provide the only facts available to this Court. In the stipulation,

the parties reserved only the following rights with respect to the presentation of facts: “(i) argue the inferences from such agreed-upon facts, and (ii) the application of law to such agreed-upon facts.” *See* App. 90.

“A stipulation of facts is binding on the parties.” *Krupp Place 1 Co-op, Inc. v. Bd. of Review of Jasper Cty.*, 801 N.W.2d 9, 13 (Iowa 2011). After agreeing to submit the case on stipulated facts and oral arguments, Marcus News raised a fact question at the hearing regarding the duration of the subscriptions of some subscribers to the two newspapers of Iowa Information. *See* App 281–82. At the time the Stipulation was agreed upon and submitted, this information, and any alleged factual dispute raised by this information, was available to Marcus News. *See* App. 120–75. Rather than take depositions or ask for live testimony regarding this issue, Marcus News presented an argument based on a mistaken interpretation of the documents that would require the Court to make several assumptions regarding facts not in evidence.

First, the District Court would have had to assume that the subscribers shown on Exhibit 9 were not subscribers before the most recent term of their subscription started as shown on Exhibit 9. *Id.* There is no information contained in Exhibit 9 that states that any of these subscribers were new subscribers at the time they purchased their renewal subscriptions. *Id.* Additionally, in the Affidavits submitted by Iowa Information to the Board of Supervisors, Peter Wagner swore under oath

that all of the subscribers included on the lists were “bona fide yearly subscribers.” *See* App. 32, 50. In order to strike any of the subscribers of the newspapers, the District Court would have needed to find that those sworn statements were false or fraudulent. The District Court declined to rule on this issue, finding that it was not properly raised at the time of trial.

This issue has not been preserved for appeal. “It is a fundamental doctrine of appellate review that issues must ordinarily be both raised *and decided* by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (emphasis added). The District Court declined to decide this issue because it was a factual issue and no evidence had been presented to it by Marcus News. Because the District Court did not decide this issue, error was not preserved. *See Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017) (“A supreme court is ‘a court of review, not of first view.’” (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005))).

In this case, all facts were stipulated and the parties only presented oral arguments. No testimony or other evidence was introduced to support Marcus News’ claims regarding the validity of the subscriber lists. “A stipulation admitting certain designated facts does not relieve a party of the necessity of proving facts not admitted...” *Bartels v. Hennessy Bros., Inc.*, 164 N.W.2d 87, 91 (Iowa 1969). If no evidence is raised at the district court level regarding a factual issue, error is not

preserved for review. *See Davis v. Am. Int'l Bridge, Inc.*, 910 N.W.2d 621, 628 (Iowa Ct. App. 2017). As described above, Marcus News' claims would have required fact finding by the District Court, but the parties agreed that no evidence would be presented at the time of trial. *See App. 88.* Because no evidence was presented on this factual issue, error has not been preserved.

The District Court correctly declined to consider this issue because it was not properly raised by Marcus News at the time of trial. As a result, Marcus news has failed to preserve error on this issue.

B. Scope of Review

Intervenor-Appellee agrees that the standard of review for equity cases is *de novo*. *Krupp Place 1 Co-op, Inc.*, 801 N.W.2d at 13 n.1.

C. All of the Subscribers Shown in the Affidavits of Iowa Information, Inc. Were Bona Fide Yearly Subscribers as Defined in Iowa Code Section 349.7.

The subscriber lists presented to the Board of Supervisors were by sworn Affidavit, which stated that all of the subscribers to The Sheldon Mail-Sun and The N'West Iowa REVIEW were bona fide yearly subscribers. Iowa Code section 349.5 requires that the affidavit include the names of all "bona fide yearly subscribers living within the county." Marcus News argues that because some of the subscribers to The Sheldon Mail-Sun and The N'West Iowa REVIEW had subscription terms for less than twelve months, they do not qualify as "bona fide yearly subscribers."

Notably, however, Marcus News fails to cite to or provide the definition of “bona fide yearly subscribers.”

For the purposes of Iowa Code chapter 349, “bona fide yearly subscribers” are those subscribers “who have been subscribers at least *six consecutive months* before the date of application.” Iowa Code § 349.7 (emphasis added). Twelve-month subscriptions are not required by the statute. All of the subscribers shown in the lists attached to the Stipulation as Exhibit 9 have renewal terms of at least six months and were subscribers at the date of application submitted to the Board of Supervisors. *See* App. 120–75. The only limitation placed on this statute by Iowa courts is that subscribers whose subscriptions had expired for more than one year cannot be considered bona fide subscribers. *See Dunham v. Clayton*, 470 N.W.2d 362, 365 (Iowa 1991); *Kane v. Sturgis*, 200 N.W. 329, 330 (Iowa 1924). All subscribers in the lists submitted by The Sheldon Mail-Sun and The N’West Iowa REVIEW had renewed their subscriptions within one year of the date of the application. *See* App 120–75. As such, all subscribers are “bona fide subscribers.”

Additionally, Marcus News misinterprets the data presented in Exhibit 9. The durations on that list merely show the length of a subscriber’s renewal term. All subscribers in question were subscribers immediately before their renewal term shown in Exhibit 9 began and all renewed their subscription for an additional six months, but as noted above this is a fact question, and Marcus News waived any

factual disputes it could have raised by agreeing to submit this case on stipulated facts. *See Krupp Place 1 Co-op, Inc.*, 801 N.W.2d at 13 (“A stipulation of facts is binding on the parties.”). The Affidavits that were provided to the O’Brien County Board of Supervisors and that are on file with the Court state under oath the total number of “bona fide subscribers” as defined by section 349.7. Peter Wagner swore that there were 784 bona fide yearly subscribers of The Sheldon Mail-Sun and 1,146 bona fide yearly subscribers of The N’West Iowa REVIEW. Nothing in Exhibit 9, or otherwise in the factual record available to the District Court, contradicts the Affidavits or the number of subscribers stated therein.

This Court should affirm the District Court’s ruling confirming the selection of The Sheldon-Mail Sun and The N’West Iowa REVIEW as the official newspapers for O’Brien County for the year 2018.

D. Even if the Subscribers in Question Were Stricken from the Affidavits by the Board or By the District Court, It Would Not Have Impacted the Outcome.

Even if the individuals who renewed their subscriptions for only six months were removed from the subscriber lists of The Sheldon Mail-Sun and The N’West Iowa REVIEW, it would have made no difference to the outcome of the case. As shown in Exhibit 9 to the Stipulation and noted in Marcus News’ brief, only 28 of the 784 total subscribers to The Sheldon Mail-Sun renewed for a term of six months. *See Final Brief of Plaintiff/Appellant*, at 34; App. 120–75. Only 37 of the 1,146 total

subscribers to The N'West Iowa REVIEW renewed for a term of six months. *Id.* Even if the District Court removed all of those subscribers from Iowa Information's lists, it would not affect the outcome of the case. The N'West Iowa REVIEW would still have the most total subscribers and The Sheldon Mail-Sun would still have more subscribers than either of Plaintiff's two newspapers.

As previously decided by the Iowa Supreme Court, the remedy for the inclusion of names of business and individuals that do not qualify as subscribers is to strike those names from the list, not to strike the entire list. *See Dunham*, 470 N.W.2d at 365 (“We are of the opinion that the district court was fully authorized by the evidence to strike from the list of the *Times* the names in question.” (quoting *Ashton v. Story*, 64 N.W. 804, 805 (Iowa 1895))). In the present case, Marcus News argues that the District Court would have the authority to “strike the improper subscribers or even strike the entire affidavit.” *See* Final Brief of Plaintiff/Appellant, at 35. Marcus News provides no citations to authorities for striking the entire subscriber list.

If the District Court had stricken the subscribers in question from the lists of The Sheldon Mail-Sun and/or The N'West Iowa REVIEW, it would have had no impact on the outcome of the case. It is therefore a moot point because it would not have changed the outcome, regardless of the Court's decision on whether to combine either publishers' newspapers. *See In re Tr. No. T-1 of Trimble*, 826 N.W.2d 474,

482 (Iowa 2013) (stating the rule that a case is “moot” if it involves issues that are “academic or nonexistent” and determining that “[a]n opinion involves merely academic issues if discussing the issues would have no effect on the underlying dispute”). In this case, had the District Court considered this issue and stricken all of the subscribers identified by Marcus News in its arguments, it would have had no effect on the underlying dispute. As a result, the District Court’s ruling should be affirmed.

CONCLUSION

The District Court correctly affirmed the decision of the O’Brien County Supervisors to select The Sheldon Mail-Sun and The N’West Iowa REVIEW as the official newspapers of O’Brien County for 2018. The District Court’s ruling depended on an interpretation of section 349.6 and whether Marcus News’ two newspapers could be combined by Marcus News under that statute. Relying on the principles of statutory interpretation, the District Court found that the legislative intent for section 349.6 was clear from the language of the statute. Specifically, for two newspapers to be delivered to the “same geographic area” the subscribers must be located within a nearly identical or equivalent region within the county. When looking at the specific area of interest, created by the location of actual subscribers to the two newspapers of Marcus News, the District Court correctly concluded that those two newspapers were not delivered to the “same geographic area” and

therefore could not be combined under section 349.6. The District Court also correctly found that the two newspapers of Iowa Information were separate and distinct under the same definition of “same geographic area,” using the same rationale that applied in a previous District Court case.

Even if this Court concludes that section 349.6 is ambiguous and considers the legislative history, it should reject the arguments of Marcus News and uphold the District Court’s decision. The statutory language at issue in this case was added in 1986. At that time, the legislature explained that the change allowed the board of supervisors, rather than the publisher, to combine two newspapers that had similar subscriber lists or were delivered to the same geographic area. It also clarifies that when two newspapers are so combined, the publisher is only required to publish official notices in one of its two newspapers, which undercuts the argument of Marcus News that the purpose of this amendment is solely to increase total circulation within the county.

This Court should also reject any claims made by Marcus News regarding the propriety of Iowa Information’s subscriber lists. Marcus News failed to preserve error on this issue, because it was never decided by the District Court. Even if error was preserved, the plain language of the statute does not support the claims made by Marcus News as each of the subscribers would qualify as “bona fide yearly subscribers” under the statutory definition. Finally, this question is merely academic

because even if all of the alleged nonqualifying subscribers were stricken from the lists, it would not affect the outcome in this case.

The District Court's rulings in this case should be affirmed.

REQUEST FOR ORAL ARGUMENT

Intervenor-Appellee requests to be heard by way of oral argument.

WHORLEY HEIDMAN LAW FIRM, P.L.L.C.

By: /s/ Jacob B. Natwick
JEFF W. WRIGHT, AT0008716
JACOB B. NATWICK, AT0010523
934 Third Avenue, Suite 200
P.O. Box 309
Sheldon, Iowa 51201-0309
Telephone: (712) 324-4385
Facsimile: (712) 324-5106
Email: jeff.wright@heidmanlaw.com
Email: jacob.natwick@heidmanlaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE

CERTIFICATE OF COMPLIANCE

Intervenor-Appellee, Iowa Information, Inc., pursuant to Iowa Rules of Appellate Procedure 6.903(1)(g)(1), hereby certify that this brief contains 10,352 words of a 14 point proportionally spaced Times New Roman font and it complies with the 14,000 word maximum permitted length of the brief.

WHORLEY HEIDMAN LAW FIRM, P.L.L.C.

By: /s/ Jacob B. Natwick
JEFF W. WRIGHT, AT0008716
JACOB B. NATWICK, AT0010523
934 Third Avenue, Suite 200
P.O. Box 309
Sheldon, Iowa 51201-0309
Telephone: (712) 324-4385
Facsimile: (712) 324-5106
Email: jeff.wright@heidmanlaw.com
Email: jacob.natwick@heidmanlaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE

CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Intervenor-Appellee's Final Brief with the Clerk of the Supreme Court by using the EDMS filing system.

WHORLEY HEIDMAN LAW FIRM, P.L.L.C.

By: /s/ Jacob B. Natwick

JEFF W. WRIGHT, AT0008716

JACOB B. NATWICK, AT0010523

934 Third Avenue, Suite 200

P.O. Box 309

Sheldon, Iowa 51201-0309

Telephone: (712) 324-4385

Facsimile: (712) 324-5106

Email: jeff.wright@heidmanlaw.com

Email: jacob.natwick@heidmanlaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE

PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the attached Intervenor-Appellee's Final Brief on counsel for all other parties electronically utilizing the EDMS filing system, which will provide notice to:

Ray H. Edgington
Colby M. Lessmann
613 Pierce Street
P.O. Box 1557
Sioux City, IA 51102

WHORLEY HEIDMAN LAW FIRM, P.L.L.C.

By: /s/ Jacob B. Natwick
JEFF W. WRIGHT, AT0008716
JACOB B. NATWICK, AT0010523
934 Third Avenue, Suite 200
P.O. Box 309
Sheldon, Iowa 51201-0309
Telephone: (712) 324-4385
Facsimile: (712) 324-5106
Email: jeff.wright@heidmanlaw.com
Email: jacob.natwick@heidmanlaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Intervenor-Appellee's Final Brief was the sum of \$0.00 exclusive of service tax, postage, and delivery charges.

WHORLEY HEIDMAN LAW FIRM, P.L.L.C.

By: /s/ Jacob B. Natwick

JEFF W. WRIGHT, AT0008716

JACOB B. NATWICK, AT0010523

934 Third Avenue, Suite 200

P.O. Box 309

Sheldon, Iowa 51201-0309

Telephone: (712) 324-4385

Facsimile: (712) 324-5106

Email: jeff.wright@heidmanlaw.com

Email: jacob.natwick@heidmanlaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE