IN THE SUPREME COURT OF IOWA

NO. 18-2201
SCOTT COUNTY NO. CVCV297911

DARREN PETRO,
Plaintiff-Appellant,

vs.

PALMER COLLEGE OF CHIROPRACTIC,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE STUART WERLING
THE HONORABLE MARY E. HOWES

DEFENDANT-APPELLEE'S FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Iowa Law Does Not Authorize Petro To Initiate A Direct Action In District Court Against Palmer For Claims Arising Solely Under A Local Civil Rights Ordinance

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II. THE DISTRICT COURT CORRECTLY INTERPRETED IOWA CODE SECTION 216.19(6) AND THE STEWART MEMO HAS NO BEARING ON THE DISTRICT COURT'S RULING

Cases

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III. PETRO'S BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW

Cases

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it requires the application of existing legal principles and issues appropriate for summary disposition. Iowa R. App. P. 6.1101(3)(a)-(b). This appeal does not present a substantial issue of first impression. *See, e.g., Quick v. Emco Enters., Inc.*, No. CL 103108, 2009 WL 7230815 (Iowa Dist. Jan. 16, 2009), *aff'd without opinion by* No. 09-0311, 2009 WL 5126144, at *4 (Iowa Ct. App. Dec. 30, 2009). The district court followed precedent and the plain language of the ICRA.

STATEMENT OF THE CASE

This case arises out of Darren Petro's ("Petro") withdrawal from Palmer. Petro alleges Palmer harassed and discriminated against him in order to coerce him into withdrawing from school, thereby constructively expelling him. App. 111 (Amended Petition, ¶41).

Following Petro's withdrawal from Palmer, he filed a complaint with the Iowa Civil Rights Commission ("ICRC") on April 25, 2014, claiming discrimination in education based upon his age and disability or perceived disability and that Palmer retaliated against him. App. 184 (ICRC Complaint 1 ¶¶ 12, 15, and 18).[1] The ICRC assigned claim number CP# 04-14-65682 ("ICRC 1") to Petro's April 25, 2014 complaint. The ICRC administratively closed ICRC 1 on September 18, 2014. App. 192-200 (Administrative Closure). Petro then filed an identical claim with the Davenport Civil Rights Commission, which automatically cross-filed the complaint with the ICRC on

[1] Unless specifically noted, each document referenced in support of Palmer's Proof Brief, was attached as an Exhibit in support of Palmer's Motion to Dismiss or Motion for Partial Summary Judgment.

November 6, 2014. App. 201-207 (DCRC Complaint; DCRC Amended Complaint). The ICRC assigned Petro's cross-filed duplicative complaint a new claim number CP# 11-14-66587 ("ICRC 2"). App. 208 (DCRC Amended Complaint).

The DCRC administratively closed Petro's DCRC Complaint on October 16, 2017, and Petro requested the DCRC to issue a right-to-sue letter. App. 296-297 (DCRC Administrative Closure; Petro's Request for Administrative Release). Petro then commenced this action in the Iowa District Court for Scott County under the DCRC's right-to-sue letter claiming discrimination in education solely under the Davenport Civil Rights Ordinance ("DCRO") based upon age and disability and that he was retaliated against. App. 224-233 (Petition). Palmer moved to dismiss the Petition on January 25, 2018, for lack of subject matter jurisdiction because Iowa law does not authorize Petro to initiate a direct action in district court against Palmer for alleged violations of the DCRO. App. 97-98 (Motion to Dismiss).

On January 29, 2018, after the deadline for Petro to request a right-to-sue letter under ICRC 1 had expired, Petro

secured a right-to-sue letter under ICRC 2 and filed an Amended Petition amending Counts II for disability discrimination and Count III for retaliation to include claims under the ICRA. App. 234-244 (Amended Petition). In addition to adding claims under the ICRA, Petro's Amended Petition set forth a new claim for breach of contract (Count IV). App. 242-243 (Amended Petition, Count IV).

Palmer moved for summary judgment on Petro's claims under the ICRA on the basis ICRC 2 was filed in violation of Iowa Code § 216.19(6) and the timeliness of Petro's ICRA claims is determined with reference only to ICRC 1. App. 169-172 (Palmer's Motion for Summary Judgment). Palmer also moved for summary judgment on Petro's breach of contract claim on the basis that Palmer's general statement of adherence to federal and state laws did not create a separate and independent contractual obligation, and Petro's attempt to invent a claim that sounds in tort by couching the claim in terms of breach of contract is otherwise impermissible and barred by the statute of limitations. App. 169-172 (*Id.*).

The district court agreed with the arguments set forth in Palmer's motions. The district court dismissed Petro's claims brought under the DCRO for lack of subject matter jurisdiction on November 30, 2018[2]; and the district court also granted Palmer summary judgment on Petro's ICRA claims and breach of contract claim on December 7, 2018. App. 334-368 (Ruling on Palmer's Motion to Dismiss; Ruling on Palmer's Motion for Summary Judgment).

The underlying facts of Petro's claims have no bearing on this appeal. This appeal involves statutory interpretation and remedies. Petro's attempt to bootstrap his unsubstantiated allegations of discrimination into "facts" is improper, unnecessary, and inflammatory argument that is intended to trigger an emotional response. (*See* Petro Proof Brief, pp. 16-24). This Court should disregard those "facts."

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[2] On December 19, 2018, the district court granted Palmer's Unopposed Motion for Order Nunc Pro Tunc, and entered an Order Nunc Pro Tunc clarifying its November 30, 2018 Ruling and Order on Palmer's Motion to Dismiss for Lack of Subject Matter Jurisdiction applied to all of Petro's claims brought under the DCRO. App. 372-373 (Order Nunc Pro Tunc).

STATEMENT OF FACTS

The underlying agency decisions that informed the district court's rulings begin and end at the ICRC. Following his withdrawal from Palmer, Petro filed ICRC 1 claiming discrimination in education based upon his age and disability or perceived disability and that Palmer retaliated against him. App. 184 (ICRC Complaint 1 ¶¶ 12, 15, and 18). In ICRC 1, Petro alleged he was "discriminated against because of a disability, real or perceived." App. 184 (*Id.*). In light of this allegation, the Complaint Form queried "what is your disability?", to which Petro responded "I HAVE LOW BACK PAIN AND PHYSICAL RESTRICTIONS CAUSED BY AN INJURY FROM MILITARY SERVICE." App. 184 (*Id.*). In response to the query about how Petro was retaliated against and by whom, Petro responded "SEE NARRATIVE PORTION OF COMPLAINT." App. 184 (*Id.*). Petro attached a four-page narrative. App. 187-191 (*Id.*).

The narrative included allegations that Palmer had perceived Petro as having a mental illness:

> On February 4, 2014 at approximately 2:40 I was told a text from a security staffer has been sent to several of my classmates. **The text stated that I am a mentally ill** ex-CIA officer, I have threatened two female professors in the classroom and that the school has posted guards outside specific classrooms where I was likely to attack. **There is absolutely no factual basis for any of these assertions**. This text message was passed around in class and the following weekend at the Groston seminar on Palmer campus.

App. 190 (*Id.*). Petro further contends that he was retaliated against on the basis that: (1) he was forced to quit classes because of a concern about being falsely accused and arrested by campus police; and (2) security officers and staff had been told he was a violent threat and, therefore, teachers and assistants were assigned to shadow him. App. 190 (*Id.*).

On September 18, 2014, the ICRC administratively closed ICRC 1 and provided its Screening Analysis. App. 192-200 (Administrative Closure). The ICRC notified Petro that he could request the ICRC to reconsider its decision and reopen the case within 30 days or he could request a right-to-sue letter within two years of the date of the notice. App. 192 (*Id.*). Petro did neither.

The Screening Analysis informed Petro that age is not a protected class under the education provision of the ICRA. App. 196 (*Id.*). The ICRC also determined there was no reasonable possibility for a probable cause determination on the disability claim or harassment claims. App. 199-200 (*Id.*). The Analysis summarized the allegations related to Petro's perceived disability claim, App. 194 (*Id.*) and the ICRC questioned Petro about the same—"Complainant reports he has never been diagnosed with any form of mental illness." App. 194 (*Id.* at fn. 4). The Analysis further summarized the allegations supporting Petro's retaliation claim based upon a perceived disability (that he "left the campus and has not returned because of the 'stress of the constant harassment' related to Palmer's portrayal of him as a 'violent threat'"). App. 194 (*Id.*).

Rather than take further action on ICRC 1, Petro elected to file a complaint with the DCRC alleging age discrimination on October 10, 2014. App. 201-206 (DCRC Complaint). Petro attached the identical narrative to his DCRC Complaint that he had attached to ICRC 1. On November 3, 2014, Petro filed an Amended Complaint with the DCRC stating he was also

"discriminated against on the basis of his disability or perceived disability" and that he was "subjected to unlawful retaliation after engaging in protected conduct; complaining about disability discrimination." App. 207 (DCRC Amended Complaint). Petro again attached the identical narrative to his DCRC Amended Complaint. App. 187-191; 210-213 (*Compare* ICRC 1 *with* DCRC Amended Complaint).

In response to the DCRC's question if Petro had filed the complaint with any other Federal, State, or Local Anti-Discrimination, Petro said "yes" and identified ICRC 1. App. 210 (DCRC Amended Complaint, Question 10). Notwithstanding Petro's earlier filing and response, on November 6, 2014, the DCRC cross-filed Petro's Amended Complaint with the ICRC, which the ICRC assigned a new claim number thus creating ICRC 2.

In a letter dated November 14, 2014, Palmer's former counsel requested the ICRC to dismiss ICRC 2 because the allegations were the same as the allegations in ICRC 1. App.

27-28 (November 14, 2014 Letter).[3] Civil Rights Specialist Stewart examined ICRC 2 and determined, based on information available at the time, that ICRC 2 was not a duplicate complaint, and wrote a memo to that effect. App. 214-215 (Stewart Memo). As discussed below, the district court ultimately disagreed with Stewart's analysis. While Stewart incorrectly determined ICRC 1 and ICRC 2 were not duplicative, the Stewart Memo acknowledged the ICRC's Screening Analysis documented Petro's perceived disability claim: "Complainant alleged Respondent made claims he suffered from some sort of mental illness and that he had stated he did not have any such condition." App. 214 (*Id.* at fn. 4).

There is no difference regarding the disability and retaliation claims as raised in ICRC 1 and ICRC 2 except the

[3] This letter was not attached as an Exhibit in support of Palmer's Motion to Dismiss or Motion for Partial Summary Judgment; however, Palmer's Reply to Petro's Resistance to Palmer's Motion for Summary Judgment incorporates by reference Palmer's judicial review pleadings. Palmer incorporated its judicial review pleadings in the event the district court indulged Petro's attempt to relitigate his Chapter 17A arguments. (*See* App. 324-325, Palmer Reply Brief). The parties discussed the November 14, 2014 letter in the judicial review proceedings.

format of the complaints. The format of the complaints differ because ICRC 1 was submitted on an ICRC Complaint Form, whereas ICRC 2, which the DCRC cross-filed, was submitted on a DCRC Complaint Form. App. 183-186; 207-210 (*Compare* ICRC 1 *with* DCRC Amended Complaint). The bases for both complaints, however, are identical. Petro answered "yes" to the ICRC Complaint Form's question "[d]o you believe you were discriminated against because of a disability, real or perceived?" and were you retaliated against. App. 184 (ICRC 1). In ICRC 2 Petro states he was discriminated against on the basis of "his disability or perceived disability" and that he was "subjected to unlawful retaliation after engaging in protected conduct; complaining about discrimination." App. 207 (DCRC Amended Complaint).

Petro also used the identical narrative for ICRC 1 and ICRC 2, which does not include any allegations of retaliation after February 4, 2014. App. 187-191; 210-213 (*Compare* ICRC 1 *with* DCRC Amended Complaint). Consequently, at that point, Petro had one complaint pending with the DCRC, the cross-filed complaint pending with the ICRC, and one complaint

administratively closed with the ICRC predicated solely on the same acts and practices.

The DCRC proceeded to investigate Petro's DCRC Complaint and concluded there was probable cause for discrimination (despite the ICRC's previous administrative closure based on the same facts). App. 216-221 (DCRC Probable Cause Finding). The DCRC Probable Cause Finding reveals Petro did not provide any additional allegations during the DCRC investigation of the perceived disability claim other than what he previously stated in ICRC 1:

> **Disability:** Complainant states that his disability claim is based on a perception held by Respondent that he was "mentally ill and dangerous" because of his military and/or CIA background. Complainant denies that he is mentally ill and/or dangerous. Complainant states that due to this perception a text message was sent out by Respondent stating that he was mentally ill and was an ex-CIA officer that had threatened two female professors and that the school had guards posted outside specific classrooms where he was "likely to attack." Complainant states that there is no factual basis for these assertions by Respondent and that they are based on stereotypes and stigma. Complainant states that the text was passed around his class.

App. 217 (*Id.*). In its analysis, the DCRC noted the following regarding the perceived disability claim:

> **Disability Discrimination (Harassment and Constructive Discharge):** Complainant alleges Respondent discriminated against him on the basis of perceived disability by submitting an EARS report and sending a text to faculty and students stating that he was mentally ill ex-CIA officer that had threatened two female professors and that the school had guards posted outside specific classrooms where he was "likely to attack," causing Complainant to withdraw from classes.

App. 218-219 (*Id.*). The DCRC further stated that "[t]he Complainant is a person with a physical disability; however, he alleges that the Respondent also perceived him to be a person with a mental disability." App. 219 (*Id.*). The DCRC also determined Palmer "retaliated against [Petro] because he engaged in a protected activity by ultimately forcing him to withdraw from classes." App. 220 (*Id.*).

After DCRC-sponsored conciliation failed, the DCRC declined to hold a public hearing on Petro's DCRC Complaint. App. 295 (DCRC 10.16.17 Letter). The DCRC administratively closed Petro's DCRC Complaint on October 16, 2017. App. 296 (DCRC Administrative Closure). Petro did not seek judicial

review within thirty days of the administrative closure of his DCRC Complaint.[4] Instead, Petro requested the DCRC to issue a right-to-sue letter. App. 297 (Petro's Request for Administrative Release). In doing so, Petro stated: "It is my understanding that if the Commission issues a right-to-sue letter, no further action will be taken by the Commission and this case will be administratively closed." App. 297 (*Id.*).

Petro commenced action in the Iowa District Court for Scott County claiming discrimination in education under the DCRO based upon age and disability and that he was retaliated against. App. 224-233 (Petition). After Palmer moved to dismiss Petro's claims under the DCRO for lack of subject matter jurisdiction, Petro secured a right-to-sue letter under ICRC 2 and filed an Amended Petition. App. 234-244 (Amended Petition). The Amended Complaint amended Count II for

[4] Petro sought judicial review of the administrative closure of his DCRC Complaint on December 21, 2018—431 days after the closure and the same day he filed his notice of appeal. Petro's Petition for Judicial Review is pending in Polk County Case No. CVCV057458 with the proceeding stayed until conclusion of this appeal.

disability discrimination and Count III for retaliation to include claims under the ICRA. App. 240-242 (*Id.*).

Palmer filed a timely Petition for Judicial Review in Scott County Case No. CVCV298255 challenging the authority of the ICRC to issue a right-to-sue letter under ICRC 2 on the basis that ICRC 2 was filed in violation of Iowa Code section 216.19(6). App. 258-261 (Palmer's Petition for Judicial Review). On August 14, 2018, the district court denied Palmer's Petition for Judicial Review, but specifically held that Palmer "is not foreclosed from raising its Iowa Code § 216.19(6) arguments that Petro's ICRC complaint was duplicative in Scott County Case No. CVCV297911." App. 270 (Ruling on Palmer's Petition for Judicial Review). The district court held further that "[i]f Petro's second complaint is found by the district court to be duplicative of his first complaint with the ICRC, then the district court should dismiss Petro's pending discrimination action." App. 268 (*Id.*). In reaching this conclusion, the district court specifically rejected Petro's argument that Palmer was required to file an administrative appeal from the Stewart Memo: "The Stewart memo clearly constituted intermediate agency action

and not final agency action….Because Palmer was authorized to request the ICRC to reopen and reconsider its administrative closure of Petro's second complaint, Stewart's memo was intermediate agency action and does not bar Palmer from raising its duplicative arguments under Iowa Code § 216.19(6) in Petro's district court case…." App. 269-270 (*Id.*). Petro did not appeal the district court's Ruling on Palmer's Petition for Judicial Review.

In addition to adding claims under the ICRA, Petro's Amended Petition set forth a new claim for breach of contract. App. 242-243 (Amended Petition). Under Count IV, Petro alleges Palmer "breached the contract by violating the policies, procedures, regulations, catalogue and/or handbook in its treatment of Petro and constructively expelling him" and "breached the implied covenant of good faith by harassing and discriminating against Petro in order to coerce Petro into withdrawing from school, thereby constructively expelling him." App. 243 (*Id.*). Petro has yet to identify a single promise or obligation giving rise to a valid contract claim, making only a single parenthetical reference to Palmer's Equal Protection

Institutional Policy. (Petro Proof Brief, p. 39). In Palmer's online application, all applicants for admission are advised of Palmer's Equal Protection Institutional Policy:

> [i]n order to provide an environment that encourages respect, dignity and equal opportunity and is in compliance with applicable federal and state laws and regulations, Palmer College of Chiropractic does not discriminate in employment or in educational programs, services or activities on the basis of age, race, creed, color, sex, national origin, ancestry, citizen status, religion, disability, veteran status or other characteristics protected by law.

App. 272 (Palmer College of Chiropractic Online Admissions Application). Palmer's student handbook also incorporates by reference Palmer's Equal Protection Institutional Policy. App. 273-276 (Palmer's Student Handbook).

Petro's official date of withdrawal from Palmer was February 24, 2014. App. 283 (Petro's Notice of Withdrawal from Palmer). Petro does not claim Palmer retaliated against him or that individuals discriminated against him based upon any protected status following his withdrawal. App. 310 (Petro's Response to Palmer's Statement of Undisputed Material Facts, ¶ 30).

ARGUMENT

I. IOWA LAW DOES NOT AUTHORIZE PETRO TO INITIATE A DIRECT ACTION IN DISTRICT COURT AGAINST PALMER FOR CLAIMS ARISING SOLELY UNDER A LOCAL CIVIL RIGHTS ORDINANCE

A. Error Preservation.

Palmer agrees this issue was properly preserved.

B. Scope and standard of review.

Palmer agrees the standard of review is for correction of errors at law.

C. Argument.

Petro urges this Court to disregard longstanding Iowa Supreme Court precedent and the plain language of the ICRA and find the DCRC can confer original jurisdiction on state courts for claims arising under the DCRO. In doing so, Petro ignores Iowa Code sections 216.19(7) & (8)—the ICRA sections that address judicial review and bringing direct actions in district court *under local laws*—and fails to address the ICRA's plain meaning. Iowa Code section 216.19(8) is the only provision in the ICRA referring to an administrative release

under local laws. Iowa Code section 216.19(8) explicitly states a complainant in a local commission can "commence an action *under Chapter 216.16*," thereby limiting actions to violations of the ICRA. IOWA CODE § 216.19(8) (emphasis added). Rather than interpret section 216.19(8) or case law interpreting this provision, Petro relies on "isolated words or phrases" in the ICRA and the Act's remedial purpose to support his interpretation. *See In re Alessio*, 803 N.W.2d 656, 661 (Iowa 2011).

Petro's strained interpretation of the ICRA is flawed. Precedent and the plain language of the ICRA dictate that Petro cannot initiate a direct action in district court against Palmer for alleged violations of DCRO.

1. Municipal power over local and internal affairs does not include authority to confer original jurisdiction upon a state court.

Petro makes a bold statement—unsupported by legal authority—that a local civil rights commission can confer original jurisdiction on a state court whenever the legislature does not expressly prohibit the local commission from doing so.

(Petro Proof Brief, pp. 26-27). Petro cannot determine jurisdiction and rights solely on his say-so. In fact, Iowa law directly contradicts Petro's pronouncement.

In *Cedar Rapids Human Rights Comm'n v. Cedar Rapids Cmty. Sch. Dist.*, 222 N.W.2d 391, 399 (Iowa 1974), the Iowa Supreme Court recognized a municipality is authorized to create a local human rights commission. This authority comes from a city's home rule power and from Iowa Code section 216.19. *See City of Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978). A local commission, however, acts under the authority and subject to the limitations of the ICRA. *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 515 (Iowa 2004) (holding that local commission could not award punitive damages under federal law because its power to act arose under the Iowa Civil Rights Act, which does not provide for punitive damages). A local commission does not replace the state commission, and local law must be consistent with state statutes. *Gray v. Kinseth Corp.*, 636 N.W.2d 100, 103 (Iowa 2001).

In *Molitor v. City of Cedar Rapids*, 360 N.W.2d 568 (Iowa 1985), the Supreme Court of Iowa discussed the limits of municipal "home rule" power to affect state court jurisdiction:

> The Iowa district court is a state court. Its jurisdiction is conferred by the constitution and by legislation.…The constitutional and statutory framework **makes jurisdiction of state courts "a state affair rather than a municipal affair."** 2 E. McQuillan, The Law of Municipal Corporations § 4.95 at 165 (1979). If municipal corporations had the power to confer jurisdiction on the district court, the jurisdiction of the court potentially could be fragmented into as many components as there are municipalities.
>
> Home rule does not give municipal corporations power to legislate for the state. The constitution gives them certain power only "to determine their local affairs and government" when "not inconsistent with the laws of the General Assembly." Iowa Const. art. III, § 38A. **Municipal power over local and internal affairs does not include authority to determine the jurisdiction of a state court.** We find no basis in the constitution or statutes for holding otherwise.

360 N.W.2d 568, 569 (Iowa 1985) (emphasis added).

In *Molitor*, the Supreme Court determined that a city does not have "power to confer jurisdiction in the district court by city ordinance" and invalidated a municipal ordinance conferring jurisdiction upon the district court to consider

appeals from decisions of the city housing board because state law did not authorize the district court to exercise judicial review. *Id.* at 568. The court held the city could not confer jurisdiction because its powers derive from the state, and although the state housing code gives municipalities the authority to enact certain enforcement procedures, it does not provide authority for judicial review. *Id.*

In *Molitor* the Supreme Court also noted that its prior decision in *Cedar Rapids Human Rights Comm'n* "exemplifies how municipal authority to provide for judicial review must derive from and accord with state law." *Molitor*, 360 N.W.2d at 569. "In *Cedar Rapids Human Rights Commission*, the court invalidated an ordinance 1) for not doing what the Iowa Civil Rights Act ("ICRA") said the city must do: provide judicial review and 2) for doing more than the ICRA said it could do: create a city human rights commission with the power of a court." *Toppert v. Northwest Mechanical, Inc.*, 968 F.Supp.2d 1001, 1009 (S.D. Iowa 2013) (citing *Molitor*, 360 N.W.2d at 569 and *Cedar Rapids Human Rights Comm'n*, 222 N.W.2d at 393-98, 402). Under *Molitor*, a municipality's authority to confer original

jurisdiction on a state court "**must derive from and accord with state law**." *Id.* at 569 (emphasis added).

Here, state law does provide for judicial review of a final decision from a local commission. IOWA CODE § 216.19(7) ("A final decision by a referral agency shall be subject to judicial review provided in Iowa Code section 216.17 in the same manner and to the same extent as a final decision of the Iowa civil rights commission."); IOWA CODE § 216.17 (providing judicial review under the terms of the Iowa Administrative Procedure Act, Code § 17A). Of importance, however, Petro did not seek judicial review of a final decision from the DCRC. Instead, Petro sought to bring a direct action against Palmer for allegedly violating the DCRO. The Act, however, does not confer authority on a local commission to issue a right to sue letter to a complainant to bring a direct suit in state court for claims arising under a local civil rights ordinance. Any other conclusion would transform municipalities into mini-legislatures and overlook the *ultra vires* doctrine.

Petro's reliance on *Baker v. City of Iowa City*, 750 N.W.2d 93 (Iowa 2008) for the proposition that "the legislature must

have intended to prohibit complainants from bringing suit in district court based on local ordinances" is misplaced. (Petro Proof Brief, p. 26). Palmer agrees "Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine **their local affairs**." *Id.* at 99 (emphasis added). However, "**jurisdiction of state courts [is] 'a state affair** rather than a municipal affair.'" *Molitor*, 360 N.W.2d at 569 (emphasis added (citation omitted)). Accordingly, the legislature or constitution *must authorize* a local civil rights commission to confer original jurisdiction on a state court. Simply put, an *ipse dixit* pronouncement under the guise of home rule authority is insufficient to authorize the DCRC to confer original jurisdiction on a state court. *Id.*

Conspicuously absent from Petro's briefing is a single statute or constitutional provision that authorizes the DCRC to confer original jurisdiction on a state court. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. *State v. Mandicino*, 509 N.W.2d 481, 483 (Iowa 1993). Once a court determines that it lacks subject matter jurisdiction over a

claim, it must dismiss the action. *Lloyd v. State*, 251 N.W.2d 551, 556-57 (Iowa 1977).

The district court correctly dismissed Petro's claims arising under the DCRO because Iowa law does not authorize the DCRC to confer original jurisdiction on a state court for a cause of action arising under a local civil rights ordinance.

2. The ICRA does not authorize a local commission to confer original jurisdiction on a state court.

In interpreting a statute, Iowa courts look to its language, and if the language is clear, Iowa courts are not permitted to search beyond its express terms. *State v. Nelson*, 329 N.W.2d 643, 646 (Iowa 1983). "Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute." *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016). The goal of statutory construction is to determine legislative intent. *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006). Iowa courts "do not speculate as to the probable legislative intent apart from the words used in the statute." *State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996). It

is an established rule of statutory construction that "legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). When interpreting a statute, Iowa courts give a plain, ordinary meaning to words, phrases, and punctuation and presumes that no part of a statute is intended to be superfluous. *Thompson v. Kaczinski*, 774 N.W.2d 829, 833 (Iowa 2009).

Iowa courts also rely on selective placement and omission of certain phrases in related statutes to determine meaning. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 512 (Iowa 2014) (determining legislative intent by noting "closely related chapters demonstrate that when the legislature 'wished to provide a private damage remedy, it knew how to do so and did so expressly'" acknowledging that the legislature did not do so in the provision at issue (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979))); *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011) ("The legislature

selectively incorporated the prefatory clause, 'Except as provided in section 570A.2, subsection 3,' into section 570A.5 subsection (2) but not subsection (3). We presume this clause was located in subsection (2) for a reason—to apply the affirmative defense *solely* to the equal priority lien recognized in that subsection." (emphasis added)).

The clear and unambiguous language of the ICRA does not authorize a local commission to confer jurisdiction on a state court for alleged violations of a local civil rights ordinance. Iowa Code section 216.19 provides:

> 7. A final decision by a referral agency shall be subject to judicial review as provided in section 216.17 in the same manner and to the same extent as a final decision of the Iowa civil rights commission.
>
> 8. The referral of a complaint by the Iowa civil rights commission to a referral agency or by a referral agency to the Iowa civil rights commission shall not affect the right of a complainant to commence an action in the district court **under section 216.16**.

Iowa Code §§ 216.19(7) & (8) (emphasis added).

Thus only claims brought under the ICRA may be filed in district court. Iowa Code section 216.19(8) cannot be reasonably read to allow a local commission to issue a right-to-

sue letter for claims under a local civil rights ordinance because the ICRA specifically identifies only actions "under Chapter 216.16" to commence direct actions.

Iowa Code section 216.16 is a statute that applies to persons "claiming to be aggrieved by an unfair or discriminatory practice." IOWA CODE §§ 216.16(1), 216.2(15). According to sections 216.6, 216.6A, 216.7, 216.8, 216.8A, 216.9, 216.10, 216.11, and 216.11A, the ICRA does not provide a cause of action under a local civil rights ordinance. "Under Iowa Code section 216.4, the Iowa Civil Rights Commission is given the power to determine complaints alleging an unfair or discriminatory practice *under Iowa Code chapter 216*." *Van Meter Indus.*, 675 N.W.2d at 515-16 (Iowa 2004) (emphasis in original (citing IOWA CODE § 216.2(13), now codified at IOWA CODE § 216.2(15), (defining "[u]nfair practice" and "discriminatory practice"))). Accordingly, Iowa law does not allow Petro to initiate a direct action against Palmer for allegedly violating the DCRO.

Petro cannot expand or alter the language of Iowa Code section 216.19(8), which expressly limits complainants to

commence an action in state court "under section 216.16." Petro's interpretation of Iowa Code section 216.19(8) would render the phrase "under section 216.16" superfluous and require the Court to read something into the law that is not apparent from the words chosen by the legislature. In effect, Petro requests the Court to delete the phrase "under section 216.16" from Iowa Code section 216.19(8), and to ignore the plain meaning of Chapter 216. This would require the Court to disregard the rule that Iowa courts give a plain, ordinary meaning to words, phrases, and punctuation when interpreting a statute. *Thompson*, 774 N.W.2d at 833. The plain and unambiguous language of the ICRA bars Petro's claims under the DCRO.

In a factually similar case, an Iowa District Court held, under the ICRA, a city lacks authority to confer original jurisdiction on a state court for a cause of action arising under a local ordinance, which was upheld on appeal. *Quick v. Emco Enters., Inc.*, No. CL 103108, 2009 WL 7230815, at *4 (Iowa Dist. Jan. 16, 2009), *aff'd without opinion by* No. 09-0311, 2009 WL 5126144, at *4 (Iowa Ct. App. Dec. 30, 2009). In *Quick*, an

employee alleged that his employer discriminated against him on the basis of sexual orientation in violation of the Des Moines Human Rights Ordinance. The employee filed a complaint with the Des Moines Human Rights Commission ("DMHRC"), but he did not let the DMHRC reach a final decision on the matter. *Id.* at *1. Instead, the employee requested a right to sue letter from the DMHRC, which the Des Moines Human Rights Ordinance authorized. *Id.* at *1, *4. The DMHRC issued a right-to-sue letter, and the employee filed suit. *Id.* at *1-2.

The *Quick* court, after analyzing the ICRA and prior municipal authority decisions, including *Molitor* and *Cedar Rapids Human Rights Comm'n*, concluded it did not have jurisdiction. *Id.* at *3-4. Specifically, the court held that "[t]he Iowa Civil Rights Act does not provide for a cause of action under the city ordinance, and the City of Des Moines does not possess the authority to confer such jurisdiction upon the district court." *Id.* at *4-5. In reaching this conclusion, the court noted the ICRA allows a city to address civil rights matters through its local commission and for judicial review from a final local commission action, but the plaintiff abandoned this route

when he requested the city commission to issue administrative releases on his claims. *Id.*

The Southern District of Iowa court reached the same conclusion in *Toppert v. Northwest Mechanical, Inc.*, 968 F.Supp.2d 1001 (S.D. Iowa 2013). In *Toppert*, the plaintiff, after being terminated, filed a complaint with the Davenport Civil Rights Commission ("DCRC"), which proceeded to investigate the complaint and concluded there was probable cause for discrimination. *Id.* at 1005. The plaintiff requested and received a "Notice of Decision-Notice of Right to Sue" from the DCRC. *Id.* Thereafter, the plaintiff filed a complaint in the Southern District of Iowa setting forth claims under the Davenport Civil Rights Ordinance ("DCRO"). *Id.* at 1005. With respect to the plaintiff's claims under the DCRO, the *Toppert* court, relying on the above cited authorities, held "Iowa law does not authorize Plaintiff to initiate a direct action in district court against Defendants for violating the DCRO[.]" *Id.* at 1011. Specifically, the *Toppert* court held "[b]ased upon a plain reading of the ICRA, the statute does not confer jurisdiction on a local commission to issue a right to sue letter to a complainant

for her to bring suit against her employer in state court for violating a local civil rights ordinance." *Id.* at 1010.

In reaching this conclusion, the *Toppert* court analyzed and interpreted the ICRA as follows:

> Iowa Code § 216.19(7) states: "A final decision by a referral agency shall be subject to judicial review as provided in section 216.17 in the same manner and to the same extent as a final decision of the Iowa civil rights commission." Reading this provision in conjunction with § 216.19(1)(c), which states that the ICRA does not prevent a municipality from protecting broader or different categories of discrimination, makes it clear that judicial review is available for violations of not only the ICRA, but also violations of local ordinances. *See Quick,* 2009 WL 7230815, at *4. This is in contrast to the only subsection in Iowa Code § 216.19 that refers to an administrative release, right to sue letter or ability to commence an action in district court; that subsection is Iowa Code § 216.19(8).
>
> Iowa Code § 216.19(8) states: "The referral of a complaint by the Iowa civil rights commission to a referral agency or by a referral agency shall not affect the right of a complainant to commence an action in the district court under section 216.16." The Iowa Supreme Court has not clearly spoken, but a natural interpretation is that a complainant does not lose her right to sue in district court under the ICRA when a referral or a deferral agency handles her investigation and/or resolution of the case. *See supra* pp. 6–9 (discussing *Gray,* 636 N.W.2d at 102). The provision cannot reasonably be read to empower a local commission with authority to issue its own right to

> sue letters under its local ordinance because the provision explicitly says "commence an action *under Chapter 216.16,*" indicating that the action is for a violation of the ICRA. Iowa Code § 216.19(8) (emphasis added).

Id. at 1010–11. This interpretation is reinforced by Iowa precedent on municipal authority, and any other interpretation "would be inconsistent with the ICRA." *Id.* at 1011.

The ICRA provides for a local commission to address civil rights matters and for judicial review of final commission actions, but does not authorize the DCRC to confer original jurisdiction upon state courts for claims arising under the DCRO. Because the DCRC lacks authority to confer original jurisdiction on state courts for claims arising under the DCRO, the district court lacked subject matter jurisdiction on Petro's claims arising under the DCRO, and properly dismissed those claims.

3. There is no legislative intent to allow enforcement of local civil rights laws in state court.

Petro asserts language in Iowa Code section 216.19(1) evinces legislative intent to allow local civil rights commissions

to confer original jurisdiction on state courts. Specifically, Petro relies on the following language:

> Nothing **in this chapter** shall be construed as indicating any of the following:
>
> a. An intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter….
>
> c. Limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.

IOWA CODE § 216.19(1)(a)-(c) (emphasis added). As noted above, jurisdiction of state courts is a state affair, and jurisdiction must derive from the legislature or constitution. Moreover, jurisdiction is not a category of unfair or discriminatory practices, and the DCRC conferring jurisdiction on the state court is inconsistent with Iowa Code section 216.19(8).

Setting aside Petro's misreading of the ICRA and misunderstanding of home rule authority, Petro runs into the brick wall of legislative history. 2017 Iowa Legis. Serv. H.F. 295 § 4, enacted March 30, 2017 and codified at Iowa Code section 364.3(12), restricts counties and cities from establishing

regulations in employment matters that exceed or conflict with federal or state employment law requirements.[5] Iowa Code section 364.3(12) provides:

> a. A city shall not adopt, enforce, or otherwise administer an ordinance, motion resolution, or amendment providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment.
>
> b. An ordinance, motion, resolution, or amendment adopted prior to March 30, 2017, that violates this subsection is void and unenforceable on and after March 30, 2017.

Iowa Code § 364.12 (2018) (The Iowa Code Editor for Code 2018 substituted "March 30, 2017" for "the effective date of this Act" in Iowa Code section 364.3(12)(b)).

The Explanation included with the "Introduced" version of the bill[6] that ultimately resulted in the 2017 amendment to Iowa Code section 364.3 provides in relevant part:

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[5] Iowa Code section 364.3 imposes limitations on the powers of counties and cities.

[6] Introduced bills carry an "Explanation" of the bill, enrolled bills do not.

> The bill strikes language providing that nothing in Code chapter 216, the Iowa civil rights Act of 1965, shall be construed as an intent on the part of the general assembly to occupy the field in which Code chapter 216 operates to the exclusion of local laws not inconsistent with Code chapter 216 that deal with the same subject matter. The bill also strikes language providing that nothing in Code chapter 216 shall be construed as limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices than are provided in Code chapter 216.

Iowa Legis. Serv. H.F. 295, 87th G.A., explanation (Iowa 2017). The Iowa legislature maintains no record of floor debates as does the U.S. Congress. Absent something similar to the Congressional Record, in interpreting amendments to statutes, Iowa courts have referred to the "Explanation" found on the introduced bill. *Homan*, 887 N.W.2d at 169 ("The explanation in the bill which the 1951 act was derived from included the following: 'This bill is suggested by the Board of Control. It is felt that the change in the official names of the state insane hospitals would be helpful to the mental welfare of the patients therein.' H.F. 592 GA, explanation (Iowa 1951)."). Iowa courts "give weight to explanations attached to bills as indications of legislative intent." *Id.* at 166 (citing *City of Cedar Rapids v.*

James Props., Inc., 701 N.W.2d 673, 677 (Iowa 2005)). "Additionally, an amendment to a statute raises a presumption that the legislature intended a change in the law." *James Props.*, 701 N.W.2d at 677 (citation omitted).

The legislative history of section 364.3 reveals the General Assembly intended to restrict the enforcement of local civil rights laws in state court *and* in local commissions. A plain reading of the ICRA reveals that the DCRC cannot confer original jurisdiction on a state court for violations arising under the DCRO, and this conclusion is bolstered by legislative intent.

4. The ICRA's "remedial" purpose provides no basis to depart from the statutory text because the Court interprets the ICRA as enacted.

Petro also relies on the ICRA's remedial purpose to support his interpretation. But the "rule of liberal construction…does not provide reviewing courts a license to rewrite the terms of the statute." *Furnald v. Hughes*, 804 N.W.2d 273, 276 (Iowa 2011). Even when a statute has a remedial purpose, "construction should not be carried beyond the limits of its plain legislative intent." *Moulton v. Iowa Empl. Sec. Comm'n*, 34 N.W.2d 211,

216 (Iowa 1948). The Iowa Supreme Court interprets the ICRA based on the statutory text's plain meaning—even when the plain meaning may be less favorable to a complainant.

In *State ex rel. Claypool v. Evans*, 757 N.W.2d 166 (Iowa 2008), the Supreme Court interpreted the ICRA's statutory text establishing a limitations period in a manner that barred untimely claims for discriminatory housing practices. *Id.* at 171-172. The Court explained: "Had the legislature wanted developers and designers of the unit to be liable after the sale, it could have expressly provided for continuing liability in the Iowa Civil Rights Act." *Id.*

In *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894 (Iowa 1996), the Court rejected the complainant's argument that she was entitled to damages based on the ICRA's text. The Court reasoned that "[o]nly those damages 'caused by the discriminatory or unfair practice' are compensable." *Id.*

The Supreme Court has also applied the statutory text to impose constraints on the ICRC's ability to reopen a closed investigation. *Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, 389 (Iowa 1992). In the Supreme Court's view, "a

reopening [of a Commission investigation] cannot be granted if the specific time for finality as determined by the legislature (thirty days) has been surpassed." *Id.*

Based on the statutory text, the Supreme Court also declined to rewrite the ICRA to extend it to disabled family members. *Monson v. Iowa Civil Rights Comm'n*, 467 N.W.2d 230, 233 (Iowa 1991). Again, the Court reasoned that it is the General Assembly's prerogative to rewrite the statute: "we discern no legislative intent, expressed or implied, that would extend the benefits of [the ICRA] to employees with disabled family members. The extension of the law…must come from the legislature, not this court." *Id.*

In *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983), the Court interpreted the statutory text and concluded that a prior version of the ICRA did not regulate discrimination against transsexuals. *Sommers,* 337 N.W.2d at 474-75. The Court reasoned that the ICRA "does not expressly include transsexuals as a protected class. Thus, even if transsexuals possess the same characteristics as the protected

classes, it is for the legislature by statute and not for this court by judicial fiat to provide relief." *Id.*

Because the General Assembly explicitly limits a complainant's right to commence action in state court "under Chapter 216.16," the Court should interpret the statutory language to mean what it says. The ICRA does not authorize a complainant to commence action in state court under a local civil rights ordinance. There are no errors in the district court's ruling; therefore, the Court should apply existing legal precedent and affirm the district court's ruling dismissing Petro's claims under the DCRO.

II. THE DISTRICT COURT CORRECTLY INTERPRETED IOWA CODE SECTION 216.19(6) AND THE STEWART MEMO HAS NO BEARING ON THE DISTRICT COURT'S RULING

A. Error Preservation.

Petro states error was preserved "by timely filing a notice of appeal." (Petro Proof Brief, p. 24). Palmer agrees the district court considered Palmer's arguments under Iowa Code section 216.19(6) and entered a judgment on the merits. However, as discussed below, Petro's failure to argue against or cite any

authority in opposition to the application of Iowa Code section 216.19(6) waives the issue for appeal. *Davison v. State*, 671 N.W.2d 519, 521 (Iowa Ct. App. 2003) ("The Davison's failure to argue the court erred in dismissing their failure to warn claim results in waiver of the issue.") (citing Iowa R. App. P. 6.14(1)(c)). Moreover, the district court expressly rejected Petro's Chapter 17A arguments when it denied Palmer's Petition for Judicial Review. Petro's failure to timely appeal the district court's Ruling on Palmer's Petition for Judicial Review results in waiver of Petro's Chapter 17A arguments.

B. Scope and standard of review.

Palmer agrees the standard of review is for correction of errors at law.

C. Argument.

Petro's failure to address Iowa Code section 216.19(6) waives the issue for appeal. In addition, Petro's persistent, lingering argument that the Stewart Memo prohibited the district court from reaching the merits of Palmer's argument under Iowa Code section 216.19(6) ignores the district court's

prior Ruling on Palmer's Petition for Judicial Review and demonstrates a fundamental misunderstanding of Chapter 17A.

1. Petro waived any error regarding the district court's application of Iowa Code section 216.19(6).

First, Petro's Proof Brief does not mention Iowa Code section 216.19(6), which results in waiver of the issue. Section 216.19(6) prohibits complainants from filing a subsequent civil rights complaint "based upon the same acts or practices cited in the original complaint." IOWA CODE § 216.19(6). Based on the plain and unambiguous language of section 216.19(6), the district court held:

> Petro alleged the "same acts or practices" constituted unlawful discrimination and retaliation by Palmer in both his first and second ICRC complaints, as well as his DCRC complaint….Counts II and III are therefore barred by operation of section 216.19(6) because each alleges the same discriminatory "acts or practices"

App. 360 (Ruling on Palmer's Motion for Summary Judgment).

Petro's failure to address Palmer's argument relating to Iowa Code section 216.19(6) waives any assignment of error to

the above-cited holding. *See* Iowa R. App. P. 6.903(2)(g)(3) (requiring the argument section of an appellant's brief to contain the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record); *see also Parsons v. Brewer*, 202 N.W.2d 49, 53 (Iowa 1972) (holding a claim, absent supportive argument or authority, is deemed waived). The Court should not construct Petro's arguments regarding the operation of Iowa Code section 216.19(6) for him. *Schreiber v. State*, 666 N.W.2d 127, 128 (Iowa 2003) (holding the mention of an issue, without elaboration or supportive authority, is not sufficient to raise an issue for review). By failing to brief this issue, Petro concedes the merits of Palmer's arguments relating to Iowa Code section 216.19(6).

Indeed, at the district court level Petro conceded ICRC I and ICRC 2 are identical (along with the DCRC Complaint). *See* App. 360 (Ruling on Palmer's Motion for Summary Judgment ("Petro concedes each complaint is based on the same allegedly discriminatory 'acts.' *See* Pl.'s Resistance, at 14.")). Claims based on "the same acts or practices" are barred by Iowa Code

section 216.19(6). IOWA CODE § 216.19(6) (prohibiting filing subsequent complaints with the ICRC or a referral agency "alleging violations based upon the same acts or practices"); *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 145 (Iowa 2018) (finding that a complainant must bring a claim under the ICRA based on a "discrete" act). To deem otherwise would circumvent the intent of Chapter 216 and allow claimants to repeatedly file duplicitous civil rights complaints based on the same acts but alleging different violations in a piecemeal fashion.

2. Petro waived his Chapter 17A arguments and the Stewart Memo has no bearing on the district court's summary judgment ruling.

Second, Petro overlooks the fact that the district court expressly rejected his Chapter 17A arguments when it denied Palmer's Petition for Judicial Review. App. 269-270 (Order on Palmer's Petition for Judicial Review). Specifically, the Ruling on Palmer's Petition for Judicial Review held:

> Petro's second argument that Palmer cannot raise its Iowa Code § 216.19(6) duplicative argument in the district court case, Scott County Case No. CVCV297911, because the Stewart memo constituted final agency action is also flawed….Because Palmer was authorized to request

> the ICRC to reopen and reconsider its administrative closure of Petro's second complaint, Stewart's memo was intermediate agency action and does not bar Palmer from raising its duplicative arguments under Iowa Code § 216.19(6) in Petro's district court case, Scott County Case No. CVCV297911.

App. 269-270 (Order denying Palmer's Petition for Judicial Review). Notwithstanding, Petro raised the same Chapter 17A arguments in resistance to Palmer's Motion for Summary Judgment. The district court rejected Petro's attempt to rehash his Chapter 17A arguments, noting the issue was previously raised and litigated in the judicial review proceedings:

> At the outset, the Court agrees with Palmer that its section 216.19(6) argument is procedurally proper. The issue has been raised and litigated in the judicial review action prior to this motion, and this Court fully agrees with the reasoning of that ruling....The district court's previous ruling regarding the procedural posture of Palmer's objection to Petro's discrimination and retaliation claims as duplicitous and its ability to challenge the propriety of those claims under section 216.19(6) in the present civil action will not be disturbed by this Court.

App. 358 (Ruling on Palmer's Motion for Summary Judgment).

The district court entered its Ruling on Palmer's Petition for Judicial Review on August 14, 2018. App. 262-270. If Petro disagreed with that decision, his remedy was to file a timely

notice of appeal and file a motion under Rule 1.904(2) to preserve the issue for appeal. The district court's Ruling on Palmer's Petition for Judicial Review was a final judgment that terminated the proceedings in Scott County Case No. CVCV298255. Having failed to appeal within the time permitted by Iowa R. App. P. 6.101 Petro has waived his Chapter 17A arguments. *See Jensen v. State*, 312 N.W.2d 581, 582 (Iowa 1981) ("Failure to appeal on time is a jurisdictional defect."). Petro's attempt to rehash his Chapter 17A arguments in resistance to Palmer's Motion for Summary Judgment is not a bootstrap that may be used to extend the thirty-day time limitation to perfect an appeal. *See Jensen v. State*, 312 N.W.2d 581, 582 (Iowa 1981) (finding the defendant's appeal from his "final judgment and sentence" was "not saved by the fact that it was filed within sixty days after trial court's denial of his motion to correct sentence and his application for postconviction relief.").

Likewise, the district court correctly refused to reconsider Petro's Chapter 17A arguments in the summary judgment proceedings. Collateral estoppel, or issue preclusion, "prevents

parties from relitigating in a subsequent action issues raised and resolved in a previous action." *Winger v. CM Holdings, L.L.C*, 881 N.W.2d 443, 449-50 (Iowa 2016) (cleaned up). "The doctrine serves several purposes: protecting parties from the vexation of relitigating identical issues, further judicial economy by reducing unnecessary litigation, and avoiding the problem of two authoritative but conflicting rulings on the same question." *Id.* The Iowa Supreme Court has recognized that when claims involving the same parties are closely related preclusion applies because it is unfair to the winning party and an unnecessary burden on the courts to allow relitigation of a legal issue. *Hunter v. City of Des Moines Mun. Housing Auth.*, 742 N.W.2d 578, 586 (Iowa 2007) (citation omitted). The Chapter 17A arguments Petro asserts in his various pleadings are not simply "closely related", which triggers the doctrine of issue preclusion, *Hunter*, 742 N.W.2d at 586, they are *identical*.

In sum, Palmer anticipated a Chapter 17A argument from Petro, and exhausted its administrative remedies with respect to the issuance of the right-to-sue letter under ICRC 2. Palmer challenged the ICRC's decision to issue a right-to-sue letter

under ICRC 2 by filing a Motion to Reconsider with the ICRC; Palmer then challenged the ICRC's denial of that motion in its Petition for Judicial Review. App. 245-255; 258-261 (Palmer's Motion to Reconsider; Palmer's Petition for Judicial Review). The district court denied Palmer's Petition for Judicial Review because "Iowa Code § 216.19(6) is a provision that applies to all suits brought under it and any arguments under it are not arguments that a respondent needs to make before the ICRC, but should be addressed directly to the court in which the discrimination action is filed." App. 268 (Ruling on Palmer's Petition for Judicial Review). In other words, judicial review was improper because Palmer was required to raise its jurisdictional and timeliness arguments in Petro's discrimination case. *See Ritz v. Wapello County Bd. Of Sup'rs*, 595 N.W.2d 786, 791 (Iowa 1999) ("The function of the right-to-sue letter is to certify to the district court that the conditions precedent stated in [Iowa Admin. Code r. 161-]3.10(2) have been met and none of the exceptions in rule 3.10 apply**. It does not certify any factual aspects of the case beyond the limitations of rule 3.10**." (emphasis added)). Petro's failure to appeal the district court's

Ruling on Palmer's Petition for Judicial Review results in waiver of this issue.

Setting aside waiver, Petro's interpretation of Chapter 17A is untenable. Palmer agrees the Stewart Memo constitutes "agency action." However, not all agency action is reviewable and ICRC Specialist Stewart authoring a memo in response to a letter from Palmer's counsel constitutes unreviewable intermediate agency action. Palmer was not able to challenge the Stewart Memo through judicial review, because the Memo was not final agency action and ICRC 2 remained pending with the ICRC.

Pursuant to Iowa Code § 17A.19, a party seeking judicial review of intermediate agency action must show that (1) adequate administrative remedies have been exhausted and (2) review of the final agency action would not provide an adequate remedy. IOWA CODE § 17A.19 (2017). Because "both requirements must be satisfied before intermediate judicial review is permitted, the failure to meet one requirement disposes of the issue." *Doe v. Iowa Bd. of Med.*, 815 N.W.2d 409 (Iowa Ct. App. 2012) (quoting *Richards v. Iowa State Commerce*

Comm'n, 270 N.W.2d 616, 620 (Iowa 1978)). If an agency "**is incapable** of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these remedies is not required." *Salsbury Laboratories v. Iowa Dept. of Environmental Quality*, 276 N.W.2d 830, 836 (Iowa 1979) (emphasis added). For a party to show that administrative proceedings cannot provide an adequate remedy, the party must make "a clear showing of an irreparable injury of substantial dimension." *Riley v. Boxa*, 542 N.W.2d 519, 522 (Iowa 1996) (citation omitted). "An administrative remedy is not inadequate simply because a party must pay an administrative fee or may not receive everything he or she wants." *Id.* at 521 (citations omitted).

Prior to the ICRC issuing the right-to-sue letter under ICRC 2, Palmer could not make "a clear showing of an irreparable injury of substantial dimension." *Riley*, 542 N.W.2d at 522 (citation omitted). Indeed, Petro initiated suit against Palmer pursuant to the right-to-sue letter the DCRC issued. Petro only obtained a right-to-sue letter under his second duplicative ICRC complaint and filed an Amended Petition after

Palmer filed its Motion to Dismiss For Lack of Subject Matter Jurisdiction. Unless and until the ICRC issued a right-to-sue under ICRC 2, Palmer was not "irreparably injur[ed] of substantial dimension" by the ICRC's refusal to dismiss Petro's duplicative complaint pursuant to Iowa Code section 216.19(6). *Id.* Further, Iowa Admin. Code r. 161-3.16(216)(c)(4) makes clear that Palmer was capable of obtaining the relief it previously sought by requesting the ICRC to reopen and reconsider its administrative closure of Petro's duplicative complaint on the ground that its administrative closure and issuance of a right-to-sue letter under the second complaint constituted "[g]ross and material error by the commission staff." Iowa Admin. Code r. 161-3.16(216)(c)(4). Therefore, the Stewart memo constitutes intermediate agency action and did not deprive the district court of jurisdiction. Accordingly, the district court correctly granted Palmer summary judgment on Petro's perceived disability and retaliation claims.

III. PETRO'S BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW

A. Error Preservation.

Palmer agrees the district court considered Palmer's arguments addressing Petro's breach of contract claim and entered a judgment on the merits. However, as discussed below, Petro's failure to argue against or cite any authority in opposition to the district court's conclusion that Petro's breach of contract claim is barred by the statute of limitations waives the issue for appeal.

B. Scope and standard of review.

Palmer agrees the standard of review is for correction of errors at law.

C. Argument.

The ICRA is a comprehensive and exclusive statutory scheme. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985). Iowa does not recognize an independent, common-law action for a discriminatory or unfair employment practice. *Hamilton v. First Baptist Elderly Hous. Found.*, 436

N.W.2d 336, 341-42 (Iowa 1989). The ICRA preempts common-law tort claims that are based on conduct the ICRA regulates. *Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005). Likewise, the ICRA preempts common-law **contract** claims that involve allegations of discrimination. *Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991). The ICRA preempts a claim when, "in light of the pleadings, discrimination is made an element of" the claim. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 857 (Iowa 2001).

The ICRA provides Petro's exclusive remedy and, to the extent the ICRA does not provide a remedy, Petro is attempting to create a new tort claim that is impermissible and barred by the statute limitations. Petro's failure to address Palmer's statute of limitations argument results in waiver of the issue, and The district court correctly granted Palmer summary judgment on Petro's breach of contract claim.

1. Contract principles are not "rigidly applied" in an academic setting and Iowa courts refuse to review the day-to-day administration of academic policies or the subjective judgments of educators.

Palmer acknowledges that under Iowa law, "a student at a private school should be able to rely upon the school to follow the established procedures it voluntarily promulgated" before a student can be dismissed for disciplinary reasons.[7] *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 444 (Iowa Ct. App. 1984). However, not every dispute between a student and a university is amenable to a breach of contract claim. *Id.* at 444 ("Courts are reluctant to intervene in cases involving dismissal for academic deficiencies since such decisions are within the expertise of the school; *but dismissals for disciplinary reasons* are more closely scrutinized by the courts.") (emphasis added). Only certain disputes with a university are amenable to a breach of contract claim because there is no cause of action

[7] Palmer has never asserted "it cannot breach its contract to perform services for students by violating its own policies, procedures, regulations, catalogue and/or handbook." (See Petro Proof Brief, p. 38).

for educational malpractice under Iowa law, and Iowa courts refuse to substitute their judgment for that of university officials or to review the day-to-day administration of academic policies. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121-22 (Iowa 2001); *Moore v. Vanderloo*, 386 N.W.2d 108, 113-15 (Iowa 1986).

Only specific or concrete promises in a college handbook or other official statement, which are quantifiable or objectively measureable, can give rise to valid breach of contract claims against universities. *See, e.g., Harvey*, 363 N.W.2d at 445-46 (finding a college has an obligation to conduct its expulsion hearings in a manner consistent with the terms of its written regulations and that a student has a cause of action if he or she can prove the college deviated from the established procedures); *Reynolds v. Sterling Coll., Inc.*, 170 Vt. 620, 750 A.2d 1020, 1022 (2000) (holding that provisions in college publications setting forth tuition required for registration and college's refund policy were "specific and concrete" and became enforceable once students commenced paying tuition); *Gally v. Columbia University*, 22 F.Supp.2d 199, 207 (S.D.N.Y. 1998) ("Plaintiff

does not point to a specific promise to, say, provide certain hours of instruction, state-of-the art facilities, one-on-one mentors, or particular courses. Unlike these obligations, SDOS's alleged promises about ethical conduct are subject to neither quantification nor objective evaluation.").

Language in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school's "ideals," "goals," or "mission," is not enforceable. *See Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 676-77 (6th Cir. 2001) (holding "a breach of contract claim will not arise from the failure to fulfill a statement of goals or ideals"); *Gally*, 22 F.Supp.2d at 207 (holding that "the mere allegation of mistreatment without the identification of a specific breached promise of obligation does not state a claim on which relief can be granted" and observing that "general promises about ethical standards" are unenforceable); *see also Sain*, 626 N.W.2d at 121-22 (noting Iowa courts universally reject students' claims of "educational malpractice" against schools, reflecting Iowa's determination that there is a lack of a

satisfactory standard of care by which to evaluate educators' professional judgments).

Even where a "specific and concrete" provision is found, courts remain cognizant of the academic setting in which the provision is to be enforced. *See Harvey*, 363 N.W.2d at 445-46 (noting contract principles "should not be rigidly applied" to the student-college relationship); *Fellheimer v. Middlebury Coll.*, 869 F.Supp. 238, 243 (D.Vt.1994) (analyzing cases where a "rigid application of contract law" to a college handbook's disciplinary procedures was rejected and noting these cases "do not completely reject the application of contract theory to the student-college relationship; they merely explain that [c]ourts should be wary of the wholesale application of commercial contract principles in the academic context."); *Gally*, 22 F.Supp.2d at 207 ("claims that sound in tort and ask the Court to involve itself in the subjective professional judgment of trained educators will not survive a motion to dismiss merely because the plaintiff couches her claims in terms of breach of contract….The application of contract principles to the student-

university relationship does not provide judicial recourse for every disgruntled student.").

Where the essence of a claim "is that the school breached its agreement by failing to provide an effective education, the [claim] must be dismissed as an impermissible attempt to avoid the rule that there is no claim in [Iowa] for 'educational malpractice.'" *Gally*, 22 F.Supp.2d at 206-07; *see Sain*, 626 N.W.2d at 121. Courts have been careful to disallow claims that would involve the judiciary reviewing the day-to-day judgments of educators. *See Harvey*, 363 N.W.2d at 444; *Sain*, 626 N.W.2d at 121-22.

Here, Petro does not claim Palmer breached a promise to provide certain specified services. Nor does Petro claim Palmer failed to provide procedural safeguards for a disciplinary hearing that were promised in its handbook or other official statement, which rendered a disciplinary hearing unfair, arbitrary or capricious. A breach of contract claim does not arise from Petro's disappointed expectations or frustration with Palmer's faculty. Petro cannot masquerade his dispute with the subjective professional judgments of Palmer's educators as a

contract claim to be resolved by the Court using Palmer's "policies, procedures, regulations, catalogue and/or handbook." App. 243 (Amended Petition ¶ 61); *see Sain*, 626 N.W.2d at 121. As such, Petro fails to state a viable breach of contract claim.

Contract principles do not grant Petro *carte blanche* to argue civil rights violations breached a promise or obligation. This is particularly true in an academic setting where contract principles are not "rigidly applied" and courts refuse to review the day-to-day administration of academic policies or the subjective judgments of educators. *Harvey*, 363 N.W.2d at 445-46; *Sain*, 626 N.W.2d at 121-22. Accordingly, Petro's breach of contract claim fails as a matter of law.

2. Palmer's general statement of adherence to state and federal law does not create a separate and independent contractual obligation.

Petro does not claim that Palmer breached a specific procedure related to his constructive expulsion, but alleges Palmer "breached the contract by violating the policies, procedures, regulations, catalogue and/or handbook in its treatment of Petro and constructively expelling him" and

"breached the implied covenant of good faith by harassing and discriminating against Petro in order to coerce Petro into withdrawing from school, thereby constructively expelling him." App. 243 (Amended Petition). Palmer's student handbook incorporates by reference the college's Equal Opportunity Institutional Policy, which provides that Palmer will not discriminate in educational practices based upon age and disability or other characteristic protected by law. App. 273-276 (Palmer's Student Handbook).

While Iowa courts have applied contract principles to the student-university relationship in the context of disciplinary processes and determinations, Iowa courts have not addressed whether a university's broad pronouncement of compliance with existing anti-discrimination laws creates a separate and independent contractual obligation. Courts in other jurisdictions, however, have uniformly found that a general statement of adherence to federal and state laws does not create a separate and independent contractual obligation. *Bustillos v. Bd. of Cty. Commissioners of Hidalgo Cty.*, No. CV 13-0971, 2015 WL 8014565, at *22 (D.N.M. Oct. 20, 2015), *aff'd sub nom.*

Jimenez v. Bd. of Cty. Commissioners of Hidalgo Cty., 697 F. App'x 597 (10th Cir. 2017) (finding "general statements of adherence to federal and state laws" relating to anti-discrimination cannot provide the basis for a breach of contract claim); *Gally*, 22 F.Supp.2d at 208 (finding that a provision of code of conduct that provides "[a]ll students should receive fair and equal treatment" was "merely a general statement of adherence…to existing anti-discrimination laws" and did "not create a separate and independent contractual obligation"); *Knelman v. Middlebury Coll.*, 898 F.Supp.2d 697, 709 (D. Vt. 2012), *aff'd*, 570 Fed.Appx. 66 (2d Cir. 2014) (holding that "[l]anguage in a college handbook or other official statement that is merely aspirational in nature or that articulates a general statement of a school's 'ideals,' 'goals,' or 'mission,' is not enforceable," including general promises about ethical standards).

The sentiment expressed in the above-cited decisions fits squarely with longstanding Iowa law that an agreement to do what one is already legally bound to do is insufficient to constitute consideration. *Lovlie v. Plumb*, 250 N.W.2d 56, 57-

58 (Iowa 1977) (a promise to do that which one is already obligated to do will not suffice as consideration); *Margeson v. Artis*, 776 N.W.2d 652, 656 (Iowa 2009) ("No consideration when the promisee has a preexisting duty to perform because a promisor is already entitled to receive the promise made by the promisee and the promisee has only made what amounts to a gratuitous promise."). Here, Palmer has merely made a broad pronouncement to perform a preexisting legal duty and to comply with existing anti-discrimination laws, which is insufficient to create a separate and independent contractual obligation. *Lovlie*, 250 N.W.2d at 57-58; *Margeson*, 776 N.W.2d at 656. Accordingly, in this context, Palmer's "policies, procedures, regulations, catalogue and/or handbook" fail to give rise to an enforceable contractual obligation.

Likewise, Petro's allegation that Palmer breached the implied covenant of good faith fails. The duty of good faith does not "give rise to new substantive terms that do not otherwise exist…." *Bagelmann v. First Nat. Bank*, 823 N.W.2d 18, 34 (Iowa 2012). Rather, the duty "operates upon an express condition of a contract, the occurrence of which is largely or exclusively

within the control of one of the parties." *Am. Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011) (citing Williston on Contracts § 38.15, at 435). In other words, the duty of good faith does not exist in the abstract, but comes into play when a party engages in a particular action contemplated under the contract, or as here, under Palmer's "policies, procedures, regulations, catalogue and/or handbook." *See Bagelmann*, 823 N.W.2d at 34 ("There was no promise to notify (let alone update) the Bagelmanns concerning their flood zone status, so any allegation of bad faith here lacks a contract term to which it can be attached."). Petro's implied covenant of good faith claim necessarily fails because Palmer's "policies, procedures, regulations, catalogue and/or handbook" do not create an enforceable contract term.

3. The ICRA preempts Petro's breach of contract claim.

Without an objective or quantifiable promise that gives rise to a valid contract claim, Petro's breach of contract claim is a disguised tort claim. This is made clear by *Grahek v. Voluntary Hosp. Co-op. Ass'n of Iowa, Inc.* In *Grahek*, the plaintiff brought

several claims against his former employer, including breach of contract, breach of implied covenant of good faith and fair dealing, and wrongful termination. *Grahek*, 473 N.W.2d at 33. There, the plaintiff had a written employment contract that provided he would be employed until age sixty-five unless terminated for specified reasons. *Id.* The plaintiff was terminated when he was sixty-one years old and filed suit alleging he was terminated because of his age. *Id.* The Supreme Court of Iowa held the breach of contract claim was not preempted by the Iowa Civil Rights Act ("ICRA") because the plaintiff could prove he was terminated prior to his sixty-fifth birthday without proving age discrimination. *Id.* at 34. With respect to the breach of contract claim, the court noted: "[a] breach of a contract of employment *for a specific period of time* exists independent of civil rights violations." *Id.* (emphasis added). However, the Supreme Court of Iowa found plaintiff's wrongful termination and breach of an implied covenant of good faith and fair dealing were preempted by the ICRA because the only wrongful, bad faith, or unfair act alleged was age discrimination which is supported by the same conduct plaintiff

alleged gave rise to his violation of civil rights. *Id.* at 34-35. In other words, the plaintiff could not succeed on his wrongful termination and breach of an implied covenant of good faith and fair dealing claims without proof of discrimination.

Here, the same rationale applies. The conduct Petro sets forth to support his breach of contract claim is the same conduct he alleges violated his civil rights—"Palmer made Petro's learning environment so intolerable that he was compelled to withdraw resulting in his constructive expulsion on February 14, 2014." App. 239 (Amended Petition, ¶41). Petro framing Count IV as a breach of contract claim is irrelevant—"the key is the nature of the action." *Grahek*, 473 N.W.2d at 34. To determine the nature of an action, courts analyze whether a civil rights violation must be established to prove an element of the claim alleged. *Grahek*, 473 N.W.2d at 33-35. If so, the plaintiff's exclusive remedy, if any, is under the ICRA.

Whichever way Petro's breach of contract claim is characterized on the facts alleged, the purported violations of Petro's civil rights are "part and parcel" of his breach of contract

claim. *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 39 (Iowa 1993) (finding claims for assault and battery were not preempted by the ICRA because the claims "are complete *without any reference to discrimination*.") (emphasis added). Tellingly, Petro concedes his breach of contract claim is predicated on alleged age discrimination. (Petro Proof Brief, p. 43 ("any breach of contract action based on age discrimination cannot be preempted by the ICRA.")). To that extent, the ICRA provides Petro's exclusive remedy and, to the extent the ICRA does not provide a remedy, Petro is attempting to create a new tort claim. Accordingly, Petro's "breach of contract" claim is a disguised tort claim that fails as a matter of law.

4. Petro waived any error on the district court's conclusion that his breach of contract claim, even if it were allowed to proceed under substantive law, is barred by the applicable statute of limitations.

Petro fails to address Palmer's argument that to the extent Palmer's Equal Opportunity Institutional Policy is interpreted as prohibiting age discrimination in education—a claim the ICRA does not recognize—Petro is attempting to

create a claim sounding in tort that is barred by the applicable statute of limitations. The district court considered this argument and agreed with Palmer:

> As a quasi-tort premised on "injuries to the person or reputation," Petro's claim was required to be brought within two years of actionable conduct. Iowa Code § 614.1(2) (2017). The alleged discrimination and retaliation that forms the basis of Petro's claim occurred on February 24, 2014. Petro filed his petition on January 16, 2018. Thus, Petro's "disguised tort" claim would be barred by the statute of limitations **even if allowed to proceed under substantive law**.

App. 366 (Ruling on Palmer's Motion for Summary Judgment, fn. 5 (emphasis added)).

Petro's failure to mention Palmer's statute of limitations argument waives any assignment of error to the above-cited holding. *See* Iowa R. App. P. 6.903(2)(g)(3); *see also Parsons*, 202 N.W.2d at 53. The Court should not construct Petro's arguments regarding the applicable statute of limitations for him. *Schreiber*, 666 N.W.2d at 128. By failing to brief this issue, Petro concedes the merits of Palmer's argument that his disguised tort claim is barred by the statute of limitations.

5. The statute of limitations has run on Petro's disguised tort claim.

Petro's claim is barred by the statute of limitations because, as discussed above, he must prove Palmer discriminated against him on the basis of his age to be successful on his contract claim. Iowa law does not recognize age discrimination in education. In an effort to sidestep the legislature, Petro cloaks his age discrimination claim with implied contract principles. However, a claim for breach of contract is identical to an age discrimination claim when the only wrongful, bad faith, or unfair act alleged is age discrimination. *Grahek*, 473 N.W.2d at 34. Thus, Petro's contract claim is "identical" to an age discrimination claim, and he is attempting to avoid the rule that age is not a protected class in education under Iowa law by means of artful pleading.

By the same token, Petro's breach of contract claim is an attempt to extend the limitations period on his disguised tort claim. *See Stahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, (Iowa 1994) (finding an insured's claim that his homeowner's insurer denied his claim in bad faith for alleged losses caused

by fire was a claim "on this policy" for purposes of applying the one-year contractual limitation provision where the plaintiff's bad faith pleading was "a disguised attempt to resolve a dispute as to the [insurance company's] liability for his loss"); *Ingrim v. State Farm Fire & Cas. Co.*, 249 F.3d 743, 746 (8th Cir. 2001) (finding the bad-faith claim contractually time barred and the plaintiff requesting types of damages in addition to policy proceeds was "an exercise in artful pleading, an attempt to avoid the rule in *Stahl*"); *Stumpf v. Albracht*, 982 F.2d 275, 278 (8th Cir. 1992) ("If parties were permitted to circumvent the statute of limitations via artful pleading, the statute of limitations would serve no purpose."). Accordingly, Petro's contract claim is tethered to the statute of limitations governing his disguised tort claim. *See* IOWA CODE § 614.1(2) ("[Actions] founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, [must be brought] within two years.").

Petro does not claim Palmer retaliated against him or that individuals discriminated against him based upon any protected status following the date of his withdrawal—February

24, 2014. App. 310 (Petro's Response to Palmer's Statement of Undisputed Material Facts, ¶ 30). Petro commenced this lawsuit on January 16, 2018. Petro's attempt to formulate a petition in contract based upon facts in tort is impermissible, and his "breach of contract" claim is barred by the statute of limitations. Because Petro's disguised tort claim falls outside of the limitations period, the district court correctly determined the Palmer is entitled to summary judgment under Count IV.

CONCLUSION

For the foregoing reasons, Defendant Palmer College of Chiropractic respectfully requests that the district court's rulings be affirmed, that Petro's appeal be denied in its entirety, and that the judgment in favor of Defendant be affirmed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.903(2)(i), oral argument is requested to assist the Court in resolution of this appeal.

Respectfully submitted,

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COST CERTIFICATE

The undersigned certifies the actual cost of printing Defendant-Appellee's Final Brief is the sum of $0.00.

/s/ Mikkie R. Schiltz

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/s/ Mikkie R. Schiltz — 5/10/19

Signature — Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this Final Brief was electronically filed and served on the 10th day of May, 2019, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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Pursuant to Iowa Rule 16.317(1)(a)(2), this constitutes service for purposes of the Iowa Court Rules.

/s/ Mikkie R. Schiltz