UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-2875

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JEREMY THOMAS TROGDON,

Defendant-Appellant.

APPEAL FROM THE U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
HON. JAMES E. GRITZNER
(4:13-CR-00110-JEG-1)

APPELLANT'S BRIEF

Matthew C. McDermott
BELIN McCORMICK, P.C.
666 Walnut Street, Suite 2000
Des Moines, IA 50309
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
Email: mmcdermott@belinmccormick.com

ATTORNEYS FOR APPELLANT

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

On August 8, 2013, Defendant-Appellant Jeremy Trogdon was detained by three police officers on a residential street in Des Moines. One of the officers almost immediately attempted to frisk Mr. Trogdon, ultimately resulting in the discovery of a firearm on Mr. Trogdon's person. On August 27, 2013, Mr. Trogdon was indicted for being a felon in possession of a firearm. On January 10, 2014, Mr. Trogdon filed a motion to suppress evidence contending that the stop and search of his person violated his Fourth Amendment rights. Mr. Trogdon argued the police lacked reasonable suspicion to detain and frisk him.

On January 30, 2014, the district court held an evidentiary hearing. The police officers testified, among other things, the basis for their stop was a possible violation of a private trespass letter on property from which Mr. Trogdon and four others had already exited.

On March 6, 2014, the district court denied the motion to suppress. Mr. Trogdon thereafter entered a conditional plea of guilty that preserved the right to appeal the suppression issue to this Court. Following sentencing, Mr. Trogdon timely filed a notice of appeal. Mr. Trogdon requests twenty minutes of oral argument.

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JURISDICTIONAL STATEMENT

On August 27, 2013, the government obtained an indictment charging Mr. Trogdon with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), with a notice of forfeiture pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c). Mr. Trogdon conditionally pled guilty on April 22, 2014. Mr. Trogdon was sentenced on July 25, 2014. He noticed this appeal on August 5, 2014. This appeal is timely pursuant to Fed. R. App. P. 4(b)(1)(A).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is a final judgment of a U. S. District Court.

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT COMMITTED ERROR IN FAILING TO SUPPRESS EVIDENCE WHERE THE INVESTIGATIVE STOP WAS NOT SUPPORTED BY REASONABLE SUSPICION.

United States v. Jones, 606 F.3d 964 (8th Cir. 2010)

United States v. Hughes, 517 F.3d 1013 (8th Cir. 2008)

Minnesota v. Dickerson, 508 U.S. 366 (1993)

Terry v. Ohio, 392 U.S. 1 (1968)

II. WHETHER THE DISTRICT COURT COMMITTED ERROR IN FAILING TO SUPPRESS EVIDENCE WHERE THE POLICE LACKED A REASONABLE BASIS TO FRISK MR. TROGDON.

United States v. Hughes, 517 F.3d 1013 (8th Cir. 2008)

United States v. Jones, 606 F.3d 964 (8th Cir. 2010)

Sibron v. New York, 392 U.S. 40 (1968)

Ybarra v. Illinois, 444 U.S. 85 (1979)

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STATEMENT OF THE CASE

Around 1:00 a.m. on August 8, 2013, Jeremy Trogdon along with two women and two men were talking in the front parking lot of a commercial building that housed a grocery store, laundromat, cell phone store, and other businesses. (Suppression Hearing Transcript ("Tr.") 15, 27, 48.) The businesses were closed, and the building's wide open parking lot was otherwise empty. (Tr. 48, 49.) The group was not impeding the operation of any business or disturbing any potential customers or employees. (Tr. 16.)

Three Des Moines police officers on patrol that evening in a squad car, who were part of a "summer enforcement team" providing extra patrol in that area of the city, saw the group of women and men. (Tr. 26-27.) The officers were part of extra patrols in light of a recent shooting and other criminal activity in prior years. (Tr. 27.)

The officers observed the men and women were "just hanging out and talking" next the building, which sat on the northeast corner of University Avenue and 22nd Street in Des Moines. (Tr. 50.) The officers drove through the 22nd Street intersection heading east on University

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Avenue, then executed three right turns starting at the next street, 21st Street, to take them around the block until they were stopped on the south side of 22nd Street at its intersection with University Avenue, facing north. (Tr. 37.)

The officers decided to confront the women and men based on a form trespass letter with the Des Moines Police Department signed by the owner of the grocery store in the building. (Tr. 37.) Pursuant to the trespass letter, the owner of the grocery store gave the police permission to cite for trespassing people on "my property" who were "not actively engaged in or associated with productive activities." (Tr. 38-39, Add. 29.) There was no evidence that Mr. Trogdon was aware of the private trespass letter, nor was there any "no trespass" signs posted in the vicinity.

At the time the officers approached, they had not yet identified any members of the group, including Mr. Trogdon. (Tr. 15, 44, 51.) While still in the police cruiser one of the officers, Officer Chiodo, had already decided that he would be performing pat-down searches of the group. (Tr. 8.)

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According to the officers, who were watching from the stop sign, the men and women hanging out and talking "decided they were going to move on," and the group began walking west toward 22nd Street through the open parking lot and off the property. (Tr. 28, 50.) Once the group reached the east sidewalk of 22nd Street, they turned north, opposite the squad car. On the sidewalk they walked past a grass berm in the roadway separating the residential portion of 22nd Street from the businesses on University Avenue. (Tr. 28-29, 52.) One of the men in the group placed an item on the ground near the berm as he passed. (Tr. 29.)

The officers, who were stopped at the stop sign on the south intersection of 22nd Street and University, watched the group start walking to the north on 22nd Street. (Tr. 40.) The police cruiser drove north, crossing University Avenue and continuing on 22nd Street toward the group. (Tr. 29.) The police never pulled into the parking lot where the women and men had been hanging out and talking. (Tr. 40.)

The women and men were still walking north on 22nd Street's east sidewalk. (Tr. 28.) The officers, who were approaching the grass berm, drove off the road to the west and onto the pedestrian sidewalk.

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(Tr. 29.) They continued driving north on the sidewalk around the berm, and maneuvered east back onto 22nd Street. (Tr. 29.) There is no indication the police cruiser's lights or sirens were ever activated. (Tr. 14.)

The uniformed officers parked the cruiser and all three quickly exited. (Tr. 44.) Before exiting the cruiser, Officer Wilshusen recognized from past dealings one of the men in the group as Cornelius Brown, a suspect in a murder investigation and numerous narcotics investigations who was believed to be an armed and dangerous gang member. (Tr. 53.) After exiting the cruiser, Officer Fong and Officer Chiodo also recognized Brown—Officer Fong from past dealings and Officer Chiodo from a police bulletin. (Tr. 7, 34.) Even after exiting the cruiser, none of the officers recognized any of the other men or women in the group, including Mr. Trogdon. (Tr. 9, 44, 52.)

Officer Chiodo ordered the group to stop. (Tr. 20.) Mr. Trogdon and the other two men immediately stopped. (Tr. 20-21.) Each of the three uniformed police officers quickly confronted each of the three men, one officer per man. (Tr. 31.)

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Officer Chiodo approached Mr. Trogdon. (Tr. 10.) Officer Chiodo asked for an ID, and Mr. Trogdon answered that he did not have one. (Tr. 10.) As he was asking for the ID and Mr. Trogdon was answering, Officer Chiodo was already moving into his pat down, which he had been planning to conduct even while back in the police cruiser. (Tr. 8, 10.)

Officer Chiodo grabbed hold of Mr. Trogdon's arm and started bringing it behind Mr. Trogdon's back. (Tr. 10-11.) Mr. Trogdon tried to escape Officer Chiodo's grasp. (Tr. 31.) Officer Chiodo, who never lost hold of Mr. Trogdon's arm, jumped on Mr. Trogdon's back and tackled him to the ground with Officer Fong's assistance. (Tr. 11.)

Mr. Trogdon, now facedown on the ground and with Officer Chiodo handcuffing him with his arms to the back, yelled that he had a gun. (Tr. 12, 32.) The officers took possession of the gun, which was underneath Mr. Trogdon's body and tucked in his clothing near his front waistband. (Tr. 12.)

The police cited Mr. Trogdon with trespassing. (Tr. 64.) None of the other men and women with Mr. Trogdon were cited. (Tr. 64.) The police never stopped and never spoke to the two women who had

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accompanied Mr. Trogdon. (Tr. 42.) The names of the two other men appeared as witnesses on the police incident reports, but the names of the women were absent.[1] (Tr. 42.)

On August 27, 2013, the government obtained an indictment charging Mr. Trogdon with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), with a notice of forfeiture pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

On January 10, 2014, Mr. Trogdon filed a motion to suppress evidence contending that the stop and search of his person violated his Fourth Amendment rights. The government resisted. On January 30, 2014, the district court held an evidentiary hearing on the motion to suppress. On March 6, 2014, the district court denied the motion to suppress. (Doc. 45, p. 12.)

On April 22, 2014, Mr. Trogdon entered a conditional plea of guilty that preserved his right to appeal the suppression issue. (Doc. 53, p. 7.) On July 25, 2014, the district court sentenced Mr. Trogdon.

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[1] One of the officers in an earlier hearing relating to Mr. Trogdon's trespassing charge denied that any women had been present. (Tr. 59-60.) That officer ultimately acknowledged the presence of the women at Mr. Trogdon's suppression hearing in this case. (Tr. 58.)

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(Doc. 65.) On August 5, 2104, Mr. Trogdon timely filed a notice of appeal. (Doc. 67.)

SUMMARY OF THE ARGUMENT

The district court made three critical decisions in its ruling on Mr. Trogdon's motion to suppress. It first correctly held that the officers' actions constituted a detention implicating Mr. Trogon's Fourth Amendment rights. It then erroneously held that reasonable suspicion existed for the investigatory stop of Mr. Trogdon, and further erroneously held that Officer Chiodo possessed an objectively reasonable belief that Mr. Trogdon was armed and dangerous justifying his pat-down. Because the court erred on these latter two decisions, this court should reverse the district court's denial of the motion to suppress.

First, the alleged trespass here was not criminal activity as referenced in *Terry*, but instead merely a potential violation of a private property enforcement assistance letter through which only one of the many business owners on the premises sought the police's assistance to restrict potentially *legal* activity. Further, the record is wholly devoid of evidence that Mr. Trogdon or the others came onto, or remained on, the

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property after being notified they could not be there. Finally, there was no threat to public safety by virtue of the completed potential violation of the trespass letter, and certainly not one outweighing the strong interest to be free from an intrusive and embarrassing detention.

Second, the district court erred in finding the officers drove into the parking lot in which the group had been talking, which the district court found prompted the group's exit from the parking lot. The record shows the officers never drove into the parking lot to confront the group, making the group's walk off the parking lot while the squad car was stopped across an intersection from the parking lot simply not evasive action that would create reasonable supicion.

Third, the district court repeatedly describes the group as walking "briskly" or "swiftly" in finding evasive action creating reasonable suspicion. The weight of the testimony, however, strongly suggests the group merely "walked" off the premises without any hastened pace. More importantly, the evidence is clear that Mr. Trogdon, in particular, was *not* walking briskly, and does not establish evasive action.

Fourth, the district court erred in finding that, prior to the stop, the officers recognized Cornelius Brown and were aware of the

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likelihood he could be armed and dangerous. In fact, all the actions by the officers constituting the "stop" were well under way or completed by the time any of the officers actually recognized Brown. As a result, the district court improperly found Brown's identification served as a basis justifying the decision to perform the stop.

Finally, the frisk of Mr. Trogdon was unreasonable under the Fourth Amendment both because the frisk was not accompanied by reasonable suspicion that Mr. Trogdon was involved in criminal activity, and because the frisk was not based on objective facts that indicated Mr. Trogdon was armed and dangerous.

ARGUMENT

I. THE POLICE LACKED REASONABLE SUSPICION FOR THE STOP.

A district court's determination of reasonable suspicion is reviewed *de novo*, and its findings of historical fact are reviewed for clear error. *United States v. Jones*, 606 F.3d 964, 966 (8th Cir. 2010).

The Fourth Amendment protects against unreasonable searches and seizures by the government. *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008). The district court correctly found that the officers' actions were a detention and search to which Fourth

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Amendment protections apply. (Doc. 45, p. 5.) Specifically, the district court found that a non-consensual stop occurred based on "the manner in which the Officers approached Trogdon by driving the marked vehicle over a curb and onto a sidewalk, the presence of three uniformed officers, and the nearly immediate physical contact by Officer Chiodo." (Doc. 45, p. 5.) Officer Chiodo left no doubt that he ordered the group to stop:

Q.	So you're ordering them to stop, right?
Chiodo:	Yes.
Q.	They have to stop?
Chiodo:	Yes.
Q.	Okay. If they didn't stop, you're going to go get them, right?
Chiodo:	Yes.

(Tr. 20) *See also* Tr. 39 ("Q: So you guys went back to detain this group? Fong: Yes.")

The officers' stop of Mr. Trogdon thus must be supported by reasonable suspicion. *Jones*, 606 F.3d at 965-66. Reasonable suspicion is determined by "looking at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing based upon his own experience

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and specialized training to make inferences from and deductions about the cumulative information available." *Id.*

The district court relied upon four factors for the conclusion that reasonable suspicion existed to justify the stop of Mr. Trogdon: (1) his presence in a high-crime area; (2) his potential violation of the trespass form letter signed by the owner of one (but not all) of the businesses on the property; (3) that "upon entering the parking lot, Mr. Trogdon and the other individuals walked swiftly out of the lot and crossed a road barrier in an apparent attempt to evade the Officers;" and (4) that "[p]rior to stopping anyone, the officers recognized Brown and were aware of the likelihood he could be armed and dangerous." (Doc. 45, p. 8.)

A. <u>The potential violation of the trespass letter did not provide sufficient basis to warrant the stop of Mr. Trogdon.</u>

Where a police officer has reasonable suspicion that "criminal activity may be afoot," the officer may briefly stop an individual and make reasonable inquiries aimed at confirming or dispelling the suspicion. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (*quoting Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

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The police are permitted to conduct *Terry* stops to investigate previous felonies, but the Supreme Court has never decided whether *Terry* stops are justified by a need to investigate previous misdemeanors or lesser violations. *Hughes*, 517 F.3d at 1017 (*citing United States v. Hensley*, 469 U.S. 221, 229 (1985) ("We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted.")).

To determine whether a stop to investigate previous misdemeanors or lesser violations is constitutional, this court has adopted a test balancing the "nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Hughes*, 517 F.3d at 1017.

The purported "criminal activity" alleged by the police here involved the potential violation of the grocery store owner's trespass letter—a species of "misdemeanor or lesser violation." By leaving the parking lot and walking into the residential portion of 22nd Street, the group terminated any potential trespass violation. The government interest in investigating such completed misdemeanor violation is, at best, slight. *See United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir.

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2007) ("[E]xceedingly harmless past misdemeanor conduct...need not spur the police into instant action as might the opportunity to stop a reputedly armed felon, street fighter, or reckless driver.").

The trespass letter giving rise to the stop is merely a police form signed by an owner of just *one* of the several businesses sharing the premises.[2] (Add. 29.) The letter purports to target not necessarily criminal trespassing violations on the property, but a broader range of conduct that includes potentially legal activities against anyone "not actively engaged in or associated with productive activities." (Add. 29.) Officer Chiodo agreed the letter is "basically a private party property enforcement thing." (Tr. 19.)

The letter cannot create a criminal violation where one did not already exist in the law. *See State v. Lewis*, 675 N.W.2d 516, 525 (Iowa

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[2] Although multiple businesses reside on the property, the trespass letter is signed only by the grocery store's owner but none of the other businesses. (Add. 29.) The record does not indicate who owned the property, whether the grocery store owner was a lessee or owner of the grocery store space, or what authority the grocery store owner had to interfere with potential invitees of the other businesses sharing the premises. The record also does not indicate whether any other owner of a business on the premises approved of the letter or the request to the police to take action potentially arresting and charging members of the public with trespassing.

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2004) ("The no-trespass letter does not afford the police more authority to define 'trespass' than the Iowa Code."); *compare United States v. Bumpers*, 705 F.3d 168, 175 (4th Cir. 2013) (store owner's trespass letter requested the police "enforce *criminal* violations" on the premises) (emphasis added). As relevant here, Iowa law defines trespassing as "[e]ntering or remaining upon or in property without justification after being notified or requested to abstain from entering or to remove or vacate therefrom." Iowa Code § 716.7(2). As a result, the alleged trespass here was not *criminal* activity as referenced in *Terry*, but instead conduct that one of the several business owners on the premises sought the police's assistance to curtail.[3]

There is no evidence that Mr. Trogdon or the others came onto, or remained on, the property after being notified to keep off or leave. Although the letter states the owner has posted a sign prohibiting trespassing, the record does not contain any evidence that such signage had, in fact, been posted. There is no evidence the group knew of the

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[3] Indeed, the group's conduct did not even amount to loitering, much less criminal trespass. *See* Des Moines Municipal Code § 70-37 (2013) (requiring some impairment or hindrance of the use of, or access to, the property to constitute a violation).

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grocery store owner's letter agreement with the police. And there is no evidence any owner of any of the businesses, or anyone else, told them not to come onto or remain on the premises. "[T]he government's argument is really that [the defendant] *might* have been trespassing because he was with other people who *might* have been trespassing. This sort of guesswork is not remotely enough for reasonable suspicion." *United States v. Williams*, 615 F.3d 657, 668 (6th Cir. 2010) (emphasis in original).

Furthermore, under the court's test "the nature of the misdemeanor and potential threats to citizens' safety are important factors." *Hughes*, 517 F.3d at 1017 (the governmental interest is particularly strong when the criminal activity involves a threat to public safety). While this court has noted that a criminal trespass "inherently involves some risk of confrontation with a property owner or lessee, implicating public safety concerns," *Id.* at 1018, no such risk was present here.[4] There is nothing to suggest that this group, while on the premises or after departing, created any risk of confrontation with the

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[4] Indeed, as described above, this was not a "criminal" trespass at all. *See* Iowa Code § 617.7.

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businesses' owners, employees, or customers. *See United States v. Moran*, 503 F.3d 1135, 1143 (10th Cir. 2007) (finding it important that the risk of confrontation threatening public safety was not hypothetical). No threat to public safety existed by virtue of the completed potential violation of the trespass letter, and certainly not one outweighing the strong interest to be free from an intrusive and embarrassing detention on a public street. *See Hughes*, 517 F.3d at 1018.

While the police "have a manifest interest in identifying the perpetrators of crime, whether the offense be minor or major," the "alternatives available to the police also factor in the balance of interests." *Hughes*, 517 F.3d at 1018. As in *Hughes*, the officers here had two less invasive options: (1) the officers could have "observed the suspect for a considerable length of time, watching for other indications of incipient criminality that would give reasonable suspicion to make an investigatory stop," or (2) "initiated a simple consensual encounter, for which no articulable suspicion is required." *Id.* (quotation omitted). The governmental interest in investigating the suspected completed violation of the trespass letter does not surmount the personal interests

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of Mr. Trogdon and the other women and men to be free from such intrusion.

B. The district court erred in finding the officers' entered the parking lot thus prompting the group to flee.

In holding reasonable suspicion existed for the stop, the district court made the following finding: "[U]pon entering the parking lot, Mr. Trogdon and the other individuals walked swiftly out of the lot and crossed a road barrier in an apparent attempt to evade the Officers." (Doc. 45, p. 8.) The most reliable assessment of the officers' testimony, however, makes clear the officers *never entered the parking lot at all*, much less in a manner that might have instigated a departure from such close and obvious proximity.

Officer Chiodo is the only officer that testified the police entered the parking lot, and it is apparently only Officer Chiodo's testimony that the district court considered in its findings. (Tr. 5.) The officer actually driving the police cruiser squarely contradicted Officer Chiodo on whether the police entered the parking lot and thus, importantly, where the officers were when Mr. Trogdon and the other women and men walked off the premises. (Tr. 40.)

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As one might expect from a passenger as opposed to a driver, Officer Chiodo's description of where the police cruiser traveled lacked or misstated certain details. *See* Tr. 7 (Chiodo stating the cruiser traveled "roughly four to six" blocks before turning around), Tr. 13 (Chiodo having no recollection of whether he was in the front or back seat of the squad car), Tr. 17 (Chiodo getting the streets confused and stating "[w]e followed them as they walked to 21st and University" when the events actually happened on 22nd Street). Officer Chido even misidentified the driver as Officer Wilshusen. (Tr. 14.)

Officer Fong was the driver. Tr. 27 (Fong identifies himself as driver); Tr. 50 (Wilshusen identifies Fong as driver). Officer Fong provided turn-by-turn details of where the police cruiser traveled at all relevant times. (Tr. 27-29.) After seeing the group in the parking lot while driving on University Avenue, Officer Fong testified the police turned southbound on 2lst Street, then westbound on Drake Park Avenue, and then back north on 22nd Street to University Avenue. (Tr. 27.) The police cruiser stopped at the stop sign facing north on the south intersection of 22nd Street and University. (Tr. 39-40.) From

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there, the police "watched the group start walking to the north" on 22nd Street. (Tr. 40.)

At that point, the police cruiser crossed University Avenue and continued north on 22nd Street, directly toward the grass berm in the road. (Tr. 29.) Officer Fong testified the police "drove around the west side of the berm on an area where a sidewalk would be," continued north on the west sidewalk past the berm, and maneuvered east back onto 22nd Street.[5] (Tr. 29.)

Officer Fong was clear and unequivocal that the officers never drove into the parking lot:

> Q: Okay. So did you ever pull into the parking lot of the grocery/laundry store area?
>
> Fong: No. When we observed the individuals for the second time, they began walking off the property at that point. So if we would have drove onto the property, I'm sure they probably would have taken off running and we probably wouldn't have caught any of them.

---

[5] If the police really were coming from the parking lot on the *east* side of the street where Mr. Trogdon and the others had been, it would have made little sense for the officers to cross 22nd Street and take the squad car over the *west* sidewalk around the berm as opposed to the east sidewalk. (*See* Tr. 29.) Coming from the south on 22nd Street, as Officer Fong describes, makes driving *west* over the sidewalk—as he also clearly stated—a more logical action.

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(Tr. 40.)[6]

Officer Wilshusen, while never directly asked about pulling into the parking lot, gave a description of events consistent with Officer Fong's, testifying the group's walk to the north was "[a]way from us," which makes sense if the officers were driving from the south on 22nd Street. (Tr. 52.)

This court reviews the district court's findings of historical fact for clear error "giving *due weight* to inferences drawn from those facts" by resident judges and law enforcement officers. *See Jones,* 606 F.3d at 966 (emphasis added). Because the record convincingly shows the police never actually entered the parking lot—indeed, Officer Fong specifically explained *why* they did not enter the parking lot—the district court's finding that the group attempted to evade the officers when the police drove "into the parking lot" is clearly erroneous.[7]

---

[6] Officer Fong's testimony also contradicted Officer Chiodo's concerning the purpose for coming back to the premises after driving past the first time. Officer Fong stated the officers returned because of the group (Tr. 28), while Officer Chiodo said they did *not* return because of the group (Tr. 13-14).

[7] Officer Chiodo has been subject to multiple suspensions from the Des Moines Police Department for failing to tell the truth. (Tr. 24.) Officer Chiodo conceded his own captain wrote a report stating that, in

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Once this finding of fact is corrected, the nature of the group's departure from the parking lot begins to look very different. The police charging into a parking lot next to someone who then takes flight is a species of evasive behavior exceedingly more suspicious than someone who sees a squad car stopped at a stop sign across the far side of an intersection without any police lights or other indicia of pursuit and simply moves on in the other direction. (Tr. 28) (Wilshusen stating it appeared the group "decided they were going to move on.") A person has the "right to ignore the police and go about his business," and peaceably avoiding interaction by walking away does not furnish the minimal level of objective justification needed for a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

Based on the location of the squad car at the far side of the intersection and the timing of the group's exit, there is nothing in the record to suggest that, when the group started to walk away, the police had begun any pursuit or otherwise indicated to the group it intended to confront them. That the group walked the other direction from the

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his experience with Officer Chiodo over a period of many months, Officer Chiodo "is not a believable person." (Tr. 24-25.)

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intersection where the squad car was stopped at a stop sign is simply not evasive action that would create reasonable suspicion.

C. The officers' collective descriptions of the group's walking pace, and Mr. Trogdon's pace in particular, does not establish evasive action.

The district court repeatedly describes the group as walking "briskly" or "swiftly" in finding evasive action creating reasonable suspicion. (Doc. 45, pp. 2, 8.) The record about the pace at which the group walked away is far from conclusive and, crucially as it relates to Mr. Trogdon in particular, shows he was *not* walking briskly.

Officers Chiodo, Fong, and Wilshusen, who testified in that order, collectively make only *one* reference to walking pace—that occurring only when the last of the three to testify, Officer Wilshusen, is directly asked by the prosecutor about the group's pace as they walked toward the berm on 22nd Street and (conveniently) responds, "I would describe it as brisk, like they didn't want to have any contact with us." (Tr. 52.)

Every other reference by every officer, including every *unprompted* reference by Officer Wilshusen himself, made *no reference* to a brisk or swift pace. *See* Tr. 9, ln 8-9 ("they began to leave and *walk*"); Tr. 17, ln 16 ("started to *walk*"); Tr. 17, ln 21 ("we followed them

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as they *walked*"); Tr. 28, ln 16-18 ("then they walked west towards 22nd Street, and once they got to the east side, they began *walking* northbound"); Tr. 28 ln 22-23 ("they began *walking*"); Tr. 29 ln 5-6 ("the group continued to *walk* northbound"); Tr. 29 ln 22-23 ("individuals who were *walking* north"); Tr. 40 ln 3-4 ("We stopped at the stop sign, watched the group start *walking* to the north"); Tr. 40 ln 11 ("they began *walking* off the property"); Tr. 40 ln 15-16 (Q. "But they were *walking*, right?" A. "They were *walking* at that point, right."); Tr. 40 ln 20-22 (Q. "Okay. So they were *just walking* north on 22nd on the sidewalk, right?" A. "Yes."); Tr. 41 ln 14-15 ("they continued *walking*"); Tr. 52 ln 1 ("began *walking* to the west"); Tr. 52 ln 3-4 ("start *walking* north"); Tr. 53 ln 24 ("just kept on *walking*") (emphasis added). The words "swiftly" or "swift" do not appear anywhere in the record.

Even if others in the group were walking "briskly," the record indicates that Mr. Trogdon, specifically, was *not* walking as fast as the others. Officer Fong testified Mr. Trogdon was "kind of lagging behind the rest of the group." (Tr. 41.) He was "several steps to the south of the rest of the group" as the group walked north. (Tr. 41.) When Officer Wilshusen responds to the prosecutor's question and references the

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"brisk" pace, he does not refer specifically to Mr. Trogdon's pace, but instead uses the unspecific pronoun "they." (Tr. 52.)

Whether walking away—briskly or otherwise—from a police car stopped on the other side of an intersection without its lights on could be characterized as evasive, such conduct certainly falls far short of headlong flight—the "consummate act of evasion"—found in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). *See United States v. Patterson*, 340 F.3d 368, 372 (6th Cir. 2003) (finding that "walking away from the police when they got out of their unmarked car constitutes a factor" so innocent as "to be outrightly dismissed" in assessing whether police had reasonable suspicion); *United States v. House*, 463 F. App'x 783, 788 (10th Cir. 2012) (defendant turning around and walking in the opposite direction upon seeing the police did not constitute flight justifying a frisk). Such action, and particularly Mr. Trogdon's pace that left him "lagging behind," is simply not evasive conduct justifying a detention. *See United States v. Dell*, 487 F. App'x 440, 443 (10th Cir. 2012) (holding that a man looking into the windows of a parked car in a high-crime area and walking away with his female companion after seeing a police officer approaching did not under the totality of the

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circumstances amount to reasonable suspicion). In considering the totality of the circumstances in this case, Mr. Trogdon's laggardly pace did not give Officer Chiodo a particularized and objective basis for suspecting legal wrongdoing to justify his seizure.

D. The district court committed plain error in finding that, prior to stopping anyone, the officers recognized Cornelius Brown and were aware of the likelihood he could be armed and dangerous.

In holding reasonable suspicion existed for the stop, the district court also cited the following finding: "Prior to stopping anyone, the officers recognized Brown and were aware of the likelihood he could be armed and dangerous." (Doc. 45, p. 8.)

The record, however, makes clear that the stop was well underway by the time any officer actually recognized Brown:

> Q: Okay. So the car -- in the squad car you went around the berm and you went onto 22nd Street, is that correct?
>
> Wilshusen: Yes. There's a little place where you can drive around the berm and then get onto the other side of the 22nd Street road.
>
> Q: Okay. So what did you do next after you were on 22nd Street in the squad car?

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Wilshusen: At that time identified one of the subjects as Cornelius Brown who I've had multiple interactions with over the summer....

Q: So before you exited the vehicle, you identified Cornelius Brown through your personal interactions with him related to narcotics and drug trade?

Wilshusen: Correct.

(Tr. 52-53.) Officer Wilshusen testified he recognized Brown what would have been only *seconds before exiting the squad car*—after the unusual maneuvering of the squad car onto the sidewalk and around the grass berm to overtake the group. Both Officers Fong and Chiodo testified they did not recognize Brown until after exiting the cruiser as they confronted the men. (Tr. 7, 34.)

Thus, all the actions by the officers constituting the "stop" were well under way or completed by the time any of the officers actually recognized Brown. *See* Doc. 45 at 5 (finding that a detention occurred based on "the manner in which the Officers approached Trogdon by driving the marked vehicle over a curb and onto a sidewalk, the presence of three uniformed officers, and the nearly immediate physical contact by Officer Chiodo.") By the time the officers recognized Brown, they had already overtaken the group by the aggressive maneuvering of

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the squad car onto the sidewalk and around the berm so each officer could "jump out of the car" and confront the men. (Tr. 40-41.) The recognition of Brown by that point, with the "stop" all but complete, cannot be found as a basis justifying the officers' decision to make the stop. The district court thus committed plain error in finding that recognizing Brown constituted support for the *decision* to stop Mr. Trogdon. *See Hughes*, 517 F.3d at 1019 (holding that "information can support reasonable suspicion to frisk only if it were received *before* the frisk") (emphasis in original).

Both individually and taken together, the four factors the district court cited in support of its reasonable suspicion holding do not withstand scrutiny. *See United States v. Townsend*, 305 F.3d 537, 545 (6th Cir. 2002) ("Although the government has pointed to several factors...which we have recognized as valid considerations in forming reasonable suspicion, they are all relatively minor[,] and...this case lacks any of the stronger indicators of criminal conduct that have accompanied these minor factors in other cases.") Accordingly, the district court's holding that reasonable suspicion existed for the stop should be overturned.

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E. The district court's reliance on *U.S. v. Bumpers* is misplaced.

The district court heavily invokes *United States v. Bumpers*, 705 F.3d 168 (4th Cir. 2013), to suggest the officers had reasonable suspicion to stop Mr. Trogdon. (Doc. 45, p. 7.) In *Bumpers*, a convenience store had posted "no trespassing" signs outside and filed a written request for the police to "enforce criminal violations" on the premises. *Id.* at 170, 175. Around 7:30 p.m. on a December night, a police officer observed two men standing in the dark toward the back of the open convenience store's parking lot next to a pair of garbage dumpsters. *Id.* The officer pulled his car into the parking lot. *Id.* The two men began to walk "at a fast pace" away from the officer, and past the front door of the convenience store. *Id.* In a 2-1 ruling, the court found reasonable suspicion existed for a stop based on (1) the high-crime nature of the area, (2) that the particular "location and manner" in which the defendant and the other man were standing suggested they may have been trespassing, (3) that the defendant and the other man reacted to the police car pulling in the parking lot by walking away "at a fast pace," and (4) that the defendant's lack of bags and his path in leaving the premises without entering the convenience store suggested

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he was on the premises as neither a past nor future customer. *Id.* at 175.

The *Bumpers* majority spent considerable attention articulating the need to enforce the trespassing restriction at the open convenience store because "[t]he proprietor has a vital interest in ensuring that his store is a safe place for himself, his employees, and his customers because, quite simply, his business, and the well-being of those who work and shop there, depend on it." *Id.* at 172 ("Convenience stores often serve as a hub for local neighborhoods, a place where many residents—some who may be elderly and others who may be minors—need to shop in order to pick up some aspirin or a decongestant, purchase a quart of milk, or buy a can of soup or box of cereal").

Except for the "high-crime neighborhood" setting, *Bumpers* is inapposite. Mr. Trogdon was not in the dark, near dumpsters, in the back of an open convenience store's parking lot, with another man. He was accompanied by a group of both women and men. They were standing in the "wide open lot" in front of the building. They were "just hanging out and talking," and doing so in view of the general public—including the police—driving or walking past on University Avenue.

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Observing Mr. Trogdon's presence and actions did not require anyone to drive into the back portion of a darkened parking lot near the garbage. If anything, Mr. Trogdon's open and exposed presence while in the parking lot, after the police had already driven past, would suggest a belief he had a right to be there.

Unlike *Bumpers*, there is nothing to suggest the group's path when walking away from the building indicates they had been trespassing. The record does not indicate when the businesses closed and, as such, whether the group might have shortly before exited one of the closed businesses. Unlike *Bumpers*, where the convenience store owner's trespass letter requested the police "enforce *criminal* violations" on the premises, the trespass letter here goes beyond criminal violations and seeks enforcement of otherwise lawful behavior. (Add. 29) (emphasis added). Unlike *Bumpers*, the direction of the exit from the property is not suspicious, since in walking toward the residential portion of 22nd Street, the group could have been walking homeward or to one of their cars parked on the other side of the berm on 22nd Street. (Tr. 45) (indicating cars were parked to the north on 22nd Street).

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Finally, the public safety concerns associated with Bumper's location in the dark behind the open neighborhood convenience store at 7:30 p.m. are not present here. The businesses in whose parking lot the officers saw Mr. Trogdon and the others were closed. The record here nowhere references any safety concerns specific to patrons or employees of any open businesses.

Bumpers is so different in nearly every material way that little of value can be gleaned from it. Setting the bar to establish reasonable suspicion so low in Mr. Trogdon's case fails to require the detaining officer to present a "particularized and objective basis for suspecting legal wrongdoing" sufficient to protect Mr. Trogdon's Fourth Amendment rights. *Jones*, 606 F.3d at 965-66.

II. BECAUSE OFFICER CHIODO LACKED A REASONABLE BELIEF THAT MR. TROGDON WAS ARMED OR DANGEROUS, THE FRISK OF HIS PERSON VIOLATED HIS FOURTH AMENDMENT RIGHTS.

The court reviews the factual findings underlying the denial of a motion to suppress for clear error, and the determination that the Fourth Amendment was not violated *de novo*. *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008).

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In determining whether the frisk was justified, the court must look to the totality of the circumstances. *See United States v. Hanlon*, 401 F.3d 926, 929 (8th Cir. 2005). The frisk of Mr. Trogdon was unreasonable under the Fourth Amendment for two reasons. First, as noted above, the frisk was not accompanied by reasonable suspicion that Mr. Trogdon was involved in criminal activity. Second, the frisk was not based on objective facts that indicated Mr. Trogdon was armed and dangerous.

At the time Officer Chiodo confronted Mr. Trogdon, Officer Chiodo was, at best, investigating a completed violation of the form trespass letter submitted by the grocery store's owner. Such a potential violation puts in play a balancing test between the "nature and quality of the intrusion on [Mr. Trogdon's] personal security" and "the importance of the governmental interests alleged to justify the intrusion." *Hughes*, 517 F.3d at 1017.

Even if the stop had been lawful (and it was not), reasonable suspicion to make an investigative stop of a person does not automatically confer the legal authority to also conduct a protective frisk of that person. *United States v. Davis*, 202 F.3d 1060, 1062-63 (8th

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Cir. 2000) (explaining differences between legal bases for investigative stops and protective frisks). An officer may frisk a suspect that he "reasonably believes may be armed and presently dangerous." *Id.* at 1062. The government must present articulable and specific facts as to dangerousness. *Sibron v. New York*, 392 U.S. 40, 64 (1968). Officer Chiodo had no specific information that Mr. Trogdon was armed or dangerous.

The potential threats to safety from the completed trespass letter violation in question are an important consideration. Here, the record shows the potential trespass inhibited the operation of no business and threatened the safety of no business owners, employees, or customers. Thus, the "government interest" in investigating the completed potential violation of the trespass letter is minimal since it is accompanied by no threat to any person's safety.

The imposition on Mr. Trogdon from the frisk, however, is considerable. Being stopped and frisked on the street "is a substantial invasion of an individual's interest to be free from arbitrary interference by police." *Hughes*, 517 F.3d at 1018 (*citing Florida v. J.L.*, 529 U.S. 266, 272 (2000) (describing a stop and frisk at a bus stop as intrusive

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and embarrassing) *and United States v. Wheat*, 278 F.3d 722, 737 (8th Cir. 2001) (*Terry* stops of vehicles along public roads are intrusions on an individual's liberty interest, but are considerably less invasive than a "frisk on a public corner").

Officer Chiodo made up his mind that he would perform a frisk of everyone he encountered, including Mr. Trogdon, as a matter of *routine* based only on the time and location, without any other articulable and specific facts as to dangerousness as required:

> Q. Okay. And in that neighborhood is there kind of a routine with relation to approaching these people late in the evening like that in a high crime area?
>
> Chiodo: Because of -- yes, because of the tensions and the recent shooting that we had specifically, we're sure to pat people down when we have contact with them for our safety.
>
> Q: Okay. So you knew that before you even walked up to them?
>
> Chiodo: That's correct.
>
> Q: And before you even identified one of them?
>
> Chiodo: Yes.
>
> Q: Okay. So that was something you would have routinely done based in this area under these circumstances?
>
> Chiodo: Yes.

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(Tr. 8.)

This predetermined frisk decision is consistent with Officer Chiodo's own description of his encounter with Mr. Trogdon, in which he started his patdown almost immediately. Tr. 10 ("I would say that as I was asking for an ID and he said he didn't have one, I moved right into my pat down."); Tr. 57 (Officer Wilshusen confirming the officers "patted everyone down before we began identifying and speaking with them.") Officier Chiodo testified his liberal frisking policy is based on his feeling that he has a "right" to pat people down for weapons. (Tr. 16-17.) *See United States v. Urrieta*, 520 F.3d 569, 578 (6th Cir. 2008) ("The Fourth Amendment simply does not allow a detention based on an officer's 'gut feeling' that a suspect is up to no good."); *Sibron*, 392 U.S. at 64 ("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.")

Such a frisking policy, unconcerned with specific and articulable facts to warrant the frisk of a particular individual, is directly contrary to the United States Supreme Court's requirements in *Sibron v. New York*: "In the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which [the officer]

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reasonably inferred that the individual was armed and dangerous." 392 U.S. 40, 64 (1968). *See Hughes*, 517 F.3d at 1019 (citing *Sibron* for the proposition: "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.").

The basis for Officer Chiodo's search is both subjectively and objectively unreasonable. Violation of a private trespass letter, unlike certain felonies, is not a crime typically associated with arming oneself with some sort of weapon. *United States v. McKoy*, 428 F.3d 38 (1st Cir. 2005) (parking and license violations did not justify pat-down). There is no suggestion that, prior to the search, Mr. Trogdon was uncooperative or otherwise not heeding the officers' demands; indeed, each officer testified to the opposite. *See United States v. Gilliam*, 520 F.3d 844, 848 (8th Cir. 2008) (finding basis for frisk where person was not heeding the officer's commands). Likewise, there is nothing in the record indicating Mr. Trogdon's clothing or appearance suggested the possible hiding of weapons. *See id.* (finding basis for frisk where person was wearing multiple layers of clothing and baggy pants that could conceal dangerous items); *United States v. Roggeman*, 279 F.3d 573, 578 (8th Cir. 2002) (finding basis for frisk where bulge was observed in the

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person's front pocket that may have been a weapon). Further, there is no claim that Mr. Trogdon was acting nervous or jittery. *See United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir.1992) (defendant's nervous behavior a factor justifying a frisk). Being in a high-crime neighborhood, while a potential factor to consider, is itself an insufficient basis to warrant an embarrassing and intrusive patdown. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (presence in a high crime area does not alone create reasonable suspicion).

That Officer Chiodo identified Cornelius Brown from police bulletins as a known armed and dangerous member of a gang did not give him a basis to frisk Mr. Trogdon. Although Officer Chiodo allegedly had knowledge that Brown belonged to a gang, he had no knowledge of any similar gang affiliation by Mr. Trogdon. Merely being in the presence of a gang member known to carry weapons does not provide the police with free rein to frisk anyone in the presence of that person. The Supreme Court firmly rejected such a theory of "guilt by association" in *Ybarra v. Illinois*, 444 U.S. 85 (1979), holding that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search

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that person." *Id.* at 91. Moreover, any claim the frisk was necessary since those with Brown should be considered armed and dangerous rings hollow in light of the fact all three officers let the two women, who were present and involved in these events from the very beginning, simply walk away *without even a word*, much less a pat down for safety purposes.

The district court's citation to *United States v. Flett*, 806 F.2d 823, 824-25 (8th Cir. 1986), to support the search of a fellow gang member is misplaced. Unlike in *Flett*, where the defendant presented and dressed in attire associated with a motorcycle gang having other dangerous members, the record suggests no such connection tying Mr. Trogdon to any street gang of Cornelius Brown's. While certain street gangs are known to wear certain types or colors of clothing, *see, e.g., United States v. Garcia*, 459 F.3d 1059, 1061 (10th Cir. 2006), the record here contains no such information about Mr. Trogdon's clothing connecting him to any gangs. Likewise, being a black male cannot form the basis of a reasonable belief that Mr. Trogdon is connected to a street gang associated with Brown. *See Walker v. Gomez*, 370 F.3d 969, 976 (9th

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Cir. 2004) ("[B]eing black does not necessarily mean you are a member of a black gang."); Tr. 55 (identifying Mr. Trogdon as a black man).

The district court's finding that "Officer Chiodo could reasonably infer from Trogdon's *close association* with Brown...that Trogdon may also be armed and dangerous" simply has no support in this record whatsoever, and is clearly erroneous. (Doc. 45, p. 10) (emphasis added). To think Officer Chiodo could merely witness from a distance *five* people talking in a group in a parking lot, and somehow conclude without any other information that *two of the five* have a "close association," is beyond incredible. By the breathtaking scope of that logic, we all could be considered to have "close associations" with scores of mere acquaintances or strangers with whom we constantly find ourselves in brief group discussions as part of routine work-related duties or social gatherings. Such sheer conjecture by Officer Chiodo that Mr. Trogdon's mere presence in a group discussion with Brown—and three others, including two women—cannot create an objectively reasonable belief that Mr. Trogdon in fact had a "close association" with Brown reasonably suggesting that he, too, was likely to be armed and dangerous. *See Ybarra*, 444 U.S. at 91 (holding frisk unlawful where

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the police officers "knew nothing in particular about" the defendant prior to frisking him "except that he was present, along with several other customers, in a public tavern" where the police believed criminal acts were occurring). Yet that is exactly what the district court found in holding as reasonable the search of Mr. Trogdon in this case.

Because the frisk was not accompanied by reasonable suspicion that Mr. Trogdon was involved in criminal activity, and because the frisk was not based on objective facts that indicated Mr. Trogdon was armed and dangerous, the frisk of Mr. Trogdon was unreasonable and the gun discovered as a result of that improper frisk should be suppressed.

CONCLUSION

The seizure and frisk of Mr. Trogdon was not based on any objective facts that he was involved in criminal activity or was armed and dangerous. The gun discovered and seized thus should have been suppressed from evidence under the exclusionary rule to the Fourth Amendment. In light of these independent violations of the Fourth Amendment, Mr. Trogdon requests this Court to reverse the district court's denial of the motion to suppress.

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BELIN McCORMICK, P.C.

By: Matthew C. McDermott

Matthew C. McDermott

666 Walnut Street, Suite 2000
Des Moines, IA 50309
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
Email: mmcdermott@belinmccormick.com

ATTORNEYS FOR APPELLANT

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that Appellant's brief, which was prepared using Microsoft Word 2007, contains 8,148 words in 14 point Century type with serifs.

Matthew C. McDermott

CERTIFICATE OF FILING

I hereby certify that on December 22, 2014, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.

Matthew C. McDermott

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, the following party was served through CM/ECF:

Clifford D. Wendel
United States Attorney's Office
110 E. Court Ave., Suite 286
Des Moines, IA 50309
cliff.wendel@usdoj.gov

Matthew C. McDermott

T0504\0001\(01993272-6)

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ELECTRONICALLY FILED AUG 18, 2017 CLERK OF SUPREME COURT

BEFORE THE IOWA SUPREME COURT

No. 17-0324

WILLIAM VAN HORN and JUNE LINDNER,

Plaintiffs-Appellants,

v.

R.H. VAN HORN FARMS, INC.,
ROBERT H. VAN HORN a/k/a ROBERT VAN HORN
a/k/a R.H. VAN HORN, and JOHN VAN HORN,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF CARROLL COUNTY
HON. MICHAEL D. HUPPERT
(THROUGH ASSIGNMENT IN THE IOWA SPECIALTY BUSINESS COURT)

APPELLEE'S BRIEF

Matthew C. McDermott, AT0005085
BELIN McCORMICK, P.C.
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
E-Mail: mmcdermott@belinmccormick.com

David L. Charles, AT0001440
CROWLEY FLECK PLLP
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4666
Or
500 Transwestern Plaza II
P.O. Box 2529
Billings, MT 59103-2529
Telephone: 406-252-3441
E-mail: dcharles@crowleyfleck.com

ATTORNEYS FOR DEFENDANTS-APPELLEESJOHN VAN HORN,
R. H. VAN HORN FARMS, INC. and ROBERT H. VAN HORN

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS REQUEST TO DECLARE ALL CORPORATE STOCK VOTING.

Iowa Code § 496A.55(7) (1985)

Iowa Code § 496A.56 (1985)

Iowa Code §§ 490.732(1)(d), (2)(a)(1)-(2) (2003)

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE APPLICABLE STATUTE OF LIMITATIONS TO PLAINTIFFS' CLAIMS.

Iowa Code § 614.1(4)

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III. THE TRIAL COURT DID NOT ERR IN ITS HOLDING THAT PLAINTIFFS DID NOT PROVE THEIR OPPRESSION CLAIM.

Iowa Code § 490.1430

Iowa Code § 490.1430(1)(b)(2)

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ROUTING STATEMENT

This case involves application of existing legal principles. The case is appropriate for transfer to the court of appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Plaintiffs William Van Horn ("William") and June Lindner ("June") brought consolidated actions against R.H. Van Horn Farms, Inc. ("the farm corporation"), Robert H. Van Horn ("Robert"), and John Van Horn ("John") seeking dissolution of the farm corporation under Iowa Code § 490.1430 and declaratory relief concerning the voting nature of the farm corporation's stock. (App. v. I pp. 19-30, 123-35.)

A six-day trial before Judge Michael D. Huppert, sitting by assignment through the Iowa Business Specialty Court, commenced December 5 and concluded December 13, 2016. (App. v. I p. 631.) The parties submitted post-trial briefs on January 3, 2017. (App. v. I p. 628.) The trial court on February 8, 2017 entered its findings of fact and conclusions of law. (*Id.*) The court held Plaintiffs failed to prove their claim of oppression by a preponderance of the evidence and denied their request for a declaration that all shares of the farm corporation are voting. (App. v. I p. 669.) The court ordered Plaintiffs' petition

dismissed with prejudice at their cost. (*Id.*) This appeal followed. (App. v. I pp. 671-74.)

STATEMENT OF THE FACTS

Plaintiffs' statement of facts is largely an argument rather than a statement of facts.[1] It does not fairly or accurately characterize the record.[2]

Robert began acquiring farmland in the 1950s. (App. v. I p. 415.) At the time, he worked at his family's bank in Glidden, but desired the farm life he had known as a child. (App. v. I p. 482.) In the early 1960s, Robert and his wife Phyllis moved the family from Glidden to a farm Robert had purchased. (App. v. I p. 542.) Over time he acquired more farm properties and used those properties and other assets to capitalize the family farm into a family farm

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[1] *See, e.g.*, Appellant's Statement of Facts at 14 ("Their fabricated rationale was based upon several contrived propositions. The first of these late developed rationales . . ."), 18 ("The evidence pointed to only one logical conclusion–Defendants operated the Farm Corporation for their own benefit.")

[2] Plaintiffs' brief frequently purports to recite "facts" not in the record. Some "facts" recited by Plaintiffs are not in the record because they are not true. One such example involves Plaintiffs repeated attempt to slight John Van Horn. Plaintiffs twice state John returned to the farm after he had "lost employment." (Appellants' Brief at 15, 49.) The transcript citation Plaintiffs provide for this "fact" does not support the statement. (*Id.*) In fact, and as is uncontroverted in the record, John was gainfully employed as a consultant at Manpower Technical Services in Des Moines when he returned to the farm. (App. v. I p. 535.) Numerous other examples exist; no effort will be made here to address each instance.

corporation, R.H. Van Horn Farms, Inc. (App. v. I pp. 483-86, v. II p. 30.) Articles of Incorporation were filed with the Iowa Secretary of State on December 13, 1976. (App. v. II pp. 17-19.)

Robert's primary motivation in forming the farm corporation was to facilitate a tax-advantaged transfer of his assets on his death to succeeding generations through the gifting of the corporation's stock. (App. v. I p. 416.) Robert had personal experience seeing farmers work their entire lives to pay for their farms, only to have heirs forced to sell the farms after the farmers' deaths to pay inheritance taxes. (App. v. I pp. 488-89.) Robert testified about his continued anguish, even at the age of 90, concerning the loss of his parents' farm after his father's death because of inheritance tax issues. (App. v. I. pp. 481, 488-89.)

Robert and Phyllis had four children: William, June, John, and Jane. (App. v. I p. 417.) Robert and Phyllis pursued a strategy to gift shares of farm corporation stock to their children in small enough increments over time such that any annual gift tax liability and any estate taxes payable at death could be avoided. (App. v. I pp. 490-91.) In so doing, Robert sought to preserve as much of the corpus of his assets as possible for the eventual benefit of his children when he died. (App. v. I pp. 488-91.) Robert, Phyllis, and their

children were designated as directors of the farm corporation in the Articles. (App. v. II pp. 17-19.)

Robert's children knew and understood Robert created the farm corporation for estate planning and tax avoidance purposes. (App. v. I pp. 169, 522, 543.) Robert's intention is evidenced, among other ways, by a restriction in place from the entity's inception limiting ownership of the farm corporation's stock only to Robert's natural descendants. (App. v. II p. 19 at § IV(2)(E).) The By-Laws restricted stock ownership "to R.H. Van Horn and his direct lineal descendants and NO ONE ELSE." (App. v. II p. 26 at § 16(A) (emphasis in original).)

Robert nevertheless sought to preserve control over the farm corporation during his lifetime by creating two classes of stock, Class A voting and Class B nonvoting. (App. v. II pp. 17-19.) The Articles authorized 500 shares of Class A voting stock and 20,000 shares of Class B nonvoting stock. (App. v. II pp. 18-19 §IV.) When he formed the entity, Robert primarily took voting stock and the other shareholders primarily received nonvoting stock. (App. v. II p. 30.) At the initial issuance, 846 total shares were issued, with 350 voting and 496 non-voting. Of the 350 voting shares, Robert received 260 voting shares and the remaining shareholders received 90 voting shares combined. (*Id*.) No additional shares of stock were ever thereafter issued.

(App. v. II pp. 1109-15.) Robert's children knew Robert planned to live, work on, and run the farm for the remainder of his life. (App. v. I pp. 181, 409, 522.)

At the initial meeting of shareholders on January 1, 1977, the shareholders unanimously elected operation as a subchapter S corporation using cash basis accounting as opposed to accrual basis accounting. (App. v. II pp. 1029-30.) In the initial directors' meeting held that same day, in recognition that an S-corporation can only have one class of stock, the directors voted unanimously that the corporation would have only one class of stock but maintain the same character of voting rights previously established. (*Id*.) The directors further authorized Robert, as president of the farm corporation and farm manager, to hire employees necessary for the operation of the corporation, to negotiate and establish salaries and other conditions of employment with employees, and "to enter into agreements therefor on behalf of the corporation as are appropriate under the circumstances." (*Id*.) The directors also voted at this meeting to require that Robert live on the farm and to take his meals there "because of the responsibilities in connection with the livestock operation and the management in general which requires his presence on the farm." (*Id*.)

The By-Laws adopted and approved that day provided, consistent with the Articles, that class A shares were entitled to one vote per share, and class

B shares had no voting rights. (App. v. II p. 20 § 8.) The By-Laws also set the number of directors of the farm corporation at three or more and permitted amendment of the By-Laws by a majority vote of the shareholders at any legally called shareholders' meeting. (*Id*. App. v. II p. 21, 27 §§ 11B, 17.)

At inception, assets totaling $423,500 in value were transferred into the farm corporation, including 640 acres of land, livestock, grain, and $30,000 in cash. (App. v. II p. 30.) The beginning balance sheet references 40 acres of land transferred by William. (*Id*.) The deed to the referenced parcel, however, shows Robert and Phyllis owned it. (App. v. II pp. 1186-94.) Robert in his trial testimony denied any such contribution by William, stating among other things that William was young at the time and that there was no way William had the cash for such a purchase. (App. v. I pp. 457-58.) Robert testified that he provided William more stock than his siblings not because he contributed assets, but because was the oldest child and Robert wanted to encourage him to take more of an interest in the farm corporation. (App. v. I p. 458.)

Initially, under Robert's direction as farm manager, the farm corporation entered into crop-share arrangements with tenant farmers, while Robert maintained a stock cow herd. (App. v. I pp. 430, 503.) Consistent with the plan and purpose of the corporation, Robert and Phyllis began gifting shares in quantities intended to avoid gift tax liability. (App. v. I p. 490.)

Robert and Phyllis divorced in 1986. (App. v. II pp. 31-7.) A stipulation in their dissolution case dated December 15, 1986, provided that each was to receive his or her respective stock in the farm corporation, and that all of the farm corporation's stock "is to be made voting on or prior to December 31, 1986." (*Id*.)

Robert testified he had no intention of performing this part of the stipulation. (App. v. I pp. 425-26.) No formal corporate action ever took place after the stipulation was entered to convert all corporate stock to voting stock. (App. v. I p. 411.) In April 1988, Robert and Phyllis amended their 1986 stipulation such that Phyllis agreed to transfer all of her stock in the corporation to her children or grandchildren prior to March 15, 1991 without reference to the prior language concerning the change in voting rights. (App. v. II p. 32 at 4-7.)

Phyllis thereafter sold all 138 of her remaining shares, most of which were non-voting shares, to John. (App. v. I p. 412.) Phyllis loaned the funds for the purchase to John. (App. v. I. p. 605.) Robert disapproved of the imbalance in share ownership among the children this created, and directed John to distribute Phyllis's shares and redeem other shares such that all four children would have equal stock ownership. (App. v. I pp. 412, 509.) John

complied. (App. v. I pp. 412, 526.) Neither William nor June paid John anything for the shares received as a result. (App. v. I pp. 526-27.)

When William graduated from high school in 1970, and June graduated from high school in 1973, each left the state for post-secondary education and have never resided in Iowa since. (App. v. I pp. 166, 168, 506.) In approximately 1990, following the death of one of the corporation's tenant farmers, Robert asked William to return to Iowa to farm the land. (App. v. I pp. 535-36.) William, who by then was working as a practicing attorney in Colorado, declined. (App. v. I pp. 165, 535-36.) John, who graduated from high school in 1977 and likewise left the state for his post-secondary education, had returned to Iowa and was living and working in Des Moines at that time. (App. v. I pp. 191, 535.) Robert thereafter asked John to return home to farm. (App. v. I pp. 535-36.) John, with William's encouragement, did so. (App. v. I pp. 535-37.)

At the start, John farmed parts of the farm corporation's land and also land owned by others in a crop-share arrangement. (App. v. I p. 537.) He moved into a tenant house, built in 1900, on the farm. (App. v. I p. 570; v. II p. 1124.) With a bank loan he bought used machinery owned by the deceased tenant. (App. v. I pp. 537-38.) By 1994, John was farming almost all of the

farm corporation's land as a tenant, but found himself in financial straits due to poor yields and excessive debt. (App. v. I pp. 738-39.)

In an agreement dated January 20, 1995, Robert agreed to pay off John's bank loan and purchase John's machinery, grain, hay, and cattle, with the understanding that Robert would then pay John a salary to farm the land. (App. v. I p. 171.) The loan from Robert would be secured by John's stock in both the farm corporation and in Glidden First National Holding Company. (*Id*.) Glidden First National Holding Company held the bank Robert had owned and still operated, First Bank & Trust in Glidden, which Robert had in part gifted to his children. (App. v. I pp. 170, 490.) At that time, John began work as a full-time employee of the farm corporation at an annual salary of $21,000. (App. v. I p. 540.)

With few exceptions, the farm corporation held annual meetings of the shareholders and directors annually, often scheduled and occurring back-to-back around the holidays. (App. v. II pp. 1029-48, 1057-1108.) Phyllis, as corporate secretary from inception until the divorce, and John, as corporate secretary thereafter, have prepared detailed minutes of all director and shareholder meetings. (App. v. I pp. 625-26, v. II pp. 129-48, 1057-1108.)

The minutes from the directors' meeting on January 20, 1995 showed the farm corporation owed Robert just under $1 million for loans he provided

over the years. (App. v. II pp. 1050-51.) The board minutes state the debt to Robert "is to be repaid to him after other outstanding debts are paid, but before any dividends." (*Id.*)

The minutes from the annual meeting of shareholders from February 20, 1996, shows a motion by Jane, seconded by June, that "no dividends be paid by the Farm Corporation until all outstanding debts are paid." (App. v. II pp. 1052-54.) Minutes from the directors' meeting that same day showed the farm corporation owed Robert now just over $1.1 million, again requiring repayment of Robert's and other outstanding debts before any dividends are paid to shareholders.[3] (*Id*.)

The minutes from meetings show that, from its inception in 1977 until 2002, the farm corporation operated under Robert's direction and management (with John's assistance after he returned to the farm) without disagreement among the shareholders or directors at any time, with one minor exception. (App. v. II pp. 1029-48, 1057-1108.) At shareholder meetings all shareholders were permitted to vote their shares whether or not such shares

[3] In November 1996, Jane entered into an agreement to sell the interests in both the farm corporation and the bank holding company that she'd previously been gifted by Robert back to those respective entities. (App. v. II p. 1049.) Jane thereafter did not participate in any farm corporation activities until acquiring three shares each from June, Robert, and John in February 2015. (App. v. II pp. 1116-23.)

were actually voting shares, as virtually all votes were unanimous. (App. v. I pp. 524-25.) The minutes also show a consistent pattern of operation in which Robert (or Robert and John) would take action as they determined appropriate, with subsequent reporting of such action at the next directors' meeting. (App. v. I pp. 547-59.) This method of operation occurred in particular with the farm corporation's purchase of major assets, including farmland. For example:

- In March 1981, Robert caused the farm corporation to purchase 240 acres of adjoining farmland for $600,000, and to borrow $500,000 to finance the purchase. (App. v. I pp. 551-52, v. II pp. 1037-40.) These actions were reported at the directors' meeting in December 1981, without objection or request for pre-approval of similar action in the future. (*Id*.)

- In November 1995, Robert sold the 323-acre Lohrville farm in which the farm corporation held a one-third interest. (App. v. I pp. 555-57, v. II pp. 1052-54.) This action was reported at the directors' meeting in February 1996, without objection or request for pre-approval of similar action in the future. (*Id*.)

- In January 1998, Robert and John caused the farm corporation to purchase a 151-acre parcel for $375,000, and to take out additional loans from Farm Credit Services for the entire purchase. (App. v. I pp. 557-59, v. II pp. 1055-56, 1233.) These actions were reported at the next directors' meeting, without objection or request for pre-approval of similar actions in the future. (*Id*.)

At the January 16, 1998 shareholders' meeting, the minutes show that following the corporation's redemption and cancellation of all 164 shares owned by Jane in 1997, Robert transferred and redeemed other shares such that 680 shares remained outstanding. (App. v. II p. 1077.) The minutes show

Robert, William, June, and John each owned 170 shares. (*Id.*) The stock ownership, with its associated voting share allocation as reflected in later shareholder meeting minutes, remained unchanged until 2015, when Robert, June, and John each sold three voting shares to Jane.[4] (App. v. I pp. 545-46, v. II pp. 1077, 1106-08.)

John, who has a master's degree in accounting, has since its inception served as the farm corporation's bookkeeper and tax preparer. (App. v. I pp. 191, 538.) John annually provided to all shareholders various financial records, such as the corporation's profit and loss statements, balance sheets, and income tax returns. (App. v. I pp. 172, 195-96; Tr. 123.)

In a letter to William and June accompanying a packet of financial information concerning both the farm corporation and the bank holding company on January 4, 2000, John informed William and June that the bank would pay a "large dividend" to the holding company, which would in turn make a "sizeable distribution" to Robert and the children, which in turn would be used to pay taxes and inject capital into the farm corporation to pay down

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[4] Despite June's voluntary agreement to sell three of her shares to Jane, June thereafter attempted to rescind the agreement. (App. v. I pp. 517-21.) William made no objection to the transfer when made, but later objected on other grounds. (App. v. I p. 518.) The effectiveness of June's transfer to Jane is not before the Court in this lawsuit.

debt, with about $10,000 available to each shareholder for personal use. (App. v. II p. 174.) John informed them additional distributions would be made each quarter to cover estimated taxes. (*Id*.)

There is no evidence of any response or discussion between Plaintiffs and John or Robert concerning this planned distribution and associated transfer to the farm corporation. The contributions to the farm corporation from this and related bank holding company distributions totaled $922,129.58. (App. v. II p. 129.) These funds do not include any personal contributions by William, June, or John to the farm corporation (no personal contributions were ever made), as these contributions were transferred from the bank at Robert's direction through the bank holding company to the farm corporation. (App. v. I pp. 560-61, v. II pp. 129, 186-87.)

In January 2002, a brewing dispute among the family members concerning the future of the bank came to a head. At a bank shareholders' meeting, William and June, who together held 62.6% of the bank's stock, voted to sell the bank over Robert's strong objection. (App. v. I pp. 182, 294.) John, who owned 31.8% of the bank holding company's stock, was unaware of William and June's plan to force the sale of the bank and abstained from the vote. (App. v. I pp. 182, 393.)

At the farm corporation's directors' meeting the next day, the disagreements continued with the meeting ultimately "collaps[ing] into disarray" and breaking up without a formal motion to adjourn. (App. v. I p. 392, v. II p. 144.) Spurring the disagreement at this meeting was a proposal by William and June to have the farm corporation pay Phyllis for the farm corporation stock she'd sold to John following the divorce. (App. v. I p. 173.) As mentioned, when John purchased Phyllis's stock, Robert subsequently directed John to split it equally with William and June, but John individually remained liable to Phyllis pursuant to their agreement. (App. v. I p. 509.)

The minutes from the contemporaneous shareholders' meeting reflected not just the total shares owned by each shareholder, but the voting or non-voting nature of the stock as well. (App. v. II pp. 1091-93.) Specifically, the minutes showed all of Robert's 170 shares were voting shares, with John, William, and June each owning 46 voting shares and the remainder non-voting. (*Id.*) At all meetings thereafter, the minutes reflect the delineation of voting and non-voting shares. (*E.g.*, App. v. II pp. 1089-1108.)

At the next shareholders' meeting on December 17, 2002, a motion was made to amend the By-Laws to change the minimum number of directors from three to two. (App. v. II pp. 1089-90.) The motion passed based on Robert and John's collective voting shares. (*Id.*) The number of directors was set at two,

with Robert and John elected as directors. (*Id*.) During the meeting, William (who was participating by telephone) lodged numerous objections, including objections to the delineation of voting and non-voting shares. (*Id*.)

On February 24, 2003, William and June sent a letter to Robert and John stating their intention to seek a determination of the bank holding company stock ownership and "dissolve the R.H. Van Horn Farms, Inc. and partition the remaining the assets." (App. v. II p. 1198.)

The following year, Robert filed a federal court action to block the sale of the bank holding company, asserting William and June did not own the shares they claimed. (App. v. II pp. 972-1027.) The bank issues were referred to arbitration. (*Id.*) In 2005, the arbitrator ruled in favor of William and June. (*Id.*) The bank was thereafter sold. (App. v. II p. 1197.) In September 2006, William, June, and John each received payments from the sale totaling $2,117,500. (App. v. II pp. 1195-96.) By 2008, William, June, and John had each received between $3.6 and $3.9 million from the bank stock their father gifted to them. (App. v. II pp. 606-07.)

On December 14, 2004, William and June participated by telephone in the corporation's shareholders' meeting. (App. v. II pp. 1095-96.) Because William and June were not directors at that time, John reported on the farm's finances and operations at the shareholders' meeting. (*Id*.) A motion was made

to increase the number of directors from two to four, which passed. (*Id*.) William and June re-joined the board. (*Id*.)

On December 15, 2005, William and June again participated by telephone in the corporation's shareholders' meeting. (App. v. II p. 1097.) Again, John reported on the farm's finances and operations at the shareholders' meeting. (*Id*.) The same four directors were re-appointed. (*Id*.) William inquired when a directors' meeting would be held and requested one be called in March 2006. (*Id*.) The next directors' meeting occurred a little over one year later, in January 2007. (App. v. II pp. 1057-60.)

On December 1, 2006, John made identical offers to William and June to purchase their shares of the farm corporation for $100,000 each. (App. v. II pp. 189-91 at 1-3.) John stated the farm corporation's outstanding debts would need to be paid before any distributions to stockholders could be made. (*Id.* at 3.) Neither William nor June made any response to John's offer. (App. v. I p. 400.)

On January 5, 2007, William and June again participated by telephone in the corporation's shareholders' meeting. (App. v. II pp. 1099-1102.) Again, John reported on the farm's finances and operations at the shareholders' meeting. (*Id*.) During the meeting John made a motion to change the farm corporation from an S-corporation to a C-corporation. (*Id*.) John's reasoning

for the proposed change was based on the fact the farm corporation had debt of approximately $1.5 million, and that it would take a very long time to pay off the debt. (*Id*.) John stated no distributions would be made until the debt was paid off. (*Id*.) However, John expressed his belief that the farm corporation would show income (albeit low) in the future, creating tax issues for the individual shareholders because of the S-corporation election. (*Id*.) John asserted converting to a C-corporation would help alleviate these tax issues. (*Id*.) The motion failed, 340-340, with John and Robert in favor and William and June opposed, as all shares were required to vote on the motion regardless of voting rights. (*Id*.)

At this shareholders' meeting, John discussed his recent purchase of two life estates previously granted to Sally, Robert's second wife, and John's subsequent sale of the life estate back to the farm corporation at the same price he paid for them. (*Id*.) John also discussed other loans he had made to the farm corporation, including $450,000 to pay off debt to Farm Credit Services, and $100,000 for machinery and other capital expenses. (*Id*.) William questioned the propriety of the loans by John. (*Id*. at App. v. II pp. 1100-02.) The ensuing directors' meeting held the same day detailed the main actions that had taken place since the last directors' meeting in December 2002. (App. v. II pp. 1057-

60.) It also noted the debts still owed to Robert from prior loans, which at the time totaled over $439,000. (*Id*.)

On May 13, 2010, John again submitted separate but identical offers to William and June to purchase their farm corporation shares on virtually the same terms as the December 2006 offer. (App. v. II pp. 189-210, 970-71.) John again stated the farm corporation's outstanding debts would need to be paid before any distributions to stockholders could be made. (App. v. II pp. 970-71.) Because of the corporation's high debt load and low profits, John expressed his belief there would be no distributions "for a very long time." (*Id*.) John stated that in accepting his offer, each would "gain a significant immediate windfall where otherwise you receive nothing." (*Id*.) John testified that, read in context, he was referring to "immediate" in reference to "receiving nothing" in light of the farm's low profits and thus slow path to payoff of its debts. (App. v. I pp. 401-02.) William and June again did not respond in any manner to John's offer. (App. v. I p. 400.)

The parties the following year entered into a series of tolling agreements to facilitate potential settlement discussions involving William and June's claims of oppression. The initial tolling agreement was dated April 14, 2011. (App. v. II pp. 1199-1204.)

As part of these negotiations, in 2011, counsel for the parties jointly agreed to retain BCC Advisors as a neutral appraiser to determine the fair market value of the voting and non-voting stock. (App. v. I p. 627.) The parties agreed the cost of the appraisal would be paid by the farm corporation. (*Id*.) The parties' attorneys jointly met with BCC Advisors to discuss the assignment and background facts. (*Id*.) Plaintiffs' attorney told Defendants' attorney in a conference on March 9, 2011 that William wanted land for his share of the corporation, but that June may take cash for hers. (*Id*.) BCC Advisors provided its appraisal report on May 29, 2012. (App. v. II pp. 1125-68.) BCC Advisors, consistent with the requests of the parties, determined the fair market values of the non-controlling, non-marketable interests in the stock, differentiating between voting and non-voting shares. (App. v. I p. 627, v. II pp. 1125-58.)

The parties exchanged settlement offers between April and July 2013 through their attorneys. (App. v. II pp. 1179-85.) The trial court accurately summarized Plaintiffs' proposal as follows:

> 1) new stock be issued for the corporation, with all four family members receiving an equal amount of voting stock; 2) any contemplated legal action be postponed until at least 9 months after R.H.'s death; 3) R.H. be paid a monthly salary of $5,000 (with other compensation, including John's wages as an employee, to be set annually by the board); 4) life estates be extended to R.H. and Mary in the house where they resided; 5) the board to be expanded to four members, with each shareholder

> allowed to elect one director, and that there be quarterly board meetings; 6) all material financial transactions were to be approved by the board; 7) the corporation would "pay dividends annually sufficient to pay income taxes related to income passed through to the shareholders by the Farm Corporation;" and 8) that all parties' attorney fees be paid by the corporation.

(App. v. I p. 649.)

Robert and John rejected Plaintiffs proposal, and made a counter-proposal, which the trial court accurately summarized as follows:

> 1) R.H.'s stock be placed in an irrevocable trust, to be received by John upon R.H.'s death; 2) upon R.H.'s death, updated appraisals be obtained for the corporation's assets and shares, all at the cost of the corporation; 3) William and June's shares would be redeemed for cash, payable within one year of receipt of the updated appraisals; 4) until the death of R.H., the corporation be allowed "to continue to function as it has in the past," with no litigation at any time; and 5) distributions paid to cover taxes incurred as a result of any pass-through income.

(App. v. I pp. 649-50 (footnotes omitted).) William and June made no response. (App. v. I p. 339.) At no point during these negotiations did William or June offer their shares for sale at any price or demand the purchase of their shares. (App. v. I pp. 403-04.)

In October 2013, June independently contacted John about his purchase of some portion of her stock before Robert's death. (App. v. I pp. 402-04.) June did not mention or demand any particular price. (*Id.*) In response, on October 13, 2013, John made another written offer to June through which John would initially purchase five of June's non-voting shares at the BCC Advisors

appraised price. (App. v. II p. 207.) John would purchase additional shares at the same price over time based on his ability to purchase and June's desire to sell. (*Id*.) Upon Robert's death, John would then purchase all of June's shares not previously purchased at updated appraised values using the same methodology as BCC Advisors' prior appraisal. (*Id*.) June turned down this offer without a counteroffer. (App. v. I pp. 402-04.)

Meetings of the directors and shareholders continued during the period BCC Advisors performed its work. At the December 15, 2011 directors' meeting, John agreed to reduce the interest rate on his loans to the farm corporation from six percent to three percent. (App. v. I p. 395, v. II pp. 1061-62.) For 2013, in response to a request from William, John also began providing accrual method accounting statements for the farm corporation in addition to the cash method accounting statements provided to shareholders since the farm corporation's inception. (App. v. I pp. 212-13, v. II pp. 1063-66.)

William filed his lawsuit on November 27, 2013, three days before the expiration of what turned out to be his last tolling agreement. (App. v. I pp. 19-30, v. II pp. 1209-11.) June on that same day entered into another tolling agreement extending the expiration date to May 31, 2014. (App. v. II pp. 1212-17.)

On January 1, 2014, John made another written offer to June through which John would purchase seventeen non-voting shares from June for $200,000, a price about ten percent higher than the BCC Advisors' appraised fair market value. (App. v. II p. 209.) The offer suggested additional shares could be purchased or sold in the future upon mutual agreement. (*Id*.) June again turned down this offer without a counteroffer. (App. v. I pp. 402-04.)

At the February 22, 2014 shareholders' meeting, William made a motion to fire John as the farm operator. (App. v. II pp. 1103-05.) The motion failed, with June joining John and Robert in voting against it. (*Id*.)

At the July 17, 2014 directors' meeting, the directors voted unanimously to permit Robert's wife, Mary, to live in her home rent-free for the rest of her life should Robert predecease her. (App. v. II pp. 1063-66.) Also at this meeting, William made a motion to further reduce the three percent interest rate on John's loans to the farm corporation. (*Id*.) The motion failed for lack of a second. (*Id.*) William at this meeting also proposed that all the farm corporation's land be cash rented. (*Id.*) This was the first time any minutes reflect William proposing cash renting of the farm corporation's land. (*E.g.*, App. v. II pp. 1029-48, 1057-1108.) The meeting minutes do not show any actual motion made, and no action was taken on William's proposal to cash rent the land. (App. v. II pp. 1063-66.) At that same meeting, the directors

approved the farm corporation's payment of legal fees to defend against William's lawsuit, with John and Robert voting for, William against, and June abstaining. (*Id*.)

On December 1, 2014, John made yet another written offer to June through which John would purchase three non-voting shares from June for $32,000. (App. v. II p. 210.) The offer stated neither party would thereafter be obligated to purchase or sell any additional shares. (*Id*.) June also turned this offer down telling John, after communicating with William, that selling her shares could hamper William in his pending lawsuit. (App. v. I pp. 515, 528.)

More than two years after William filed his lawsuit, and more than eighteen months after the expiration of her last tolling agreement, June on December 2, 2015 filed a separate but nearly identical lawsuit against Defendants. (App. v. I pp. 123-35, v. II pp. 1212-17.) William's and June's lawsuits ultimately were consolidated. (App. v. I pp. 84-86.)[5]

At the February 27, 2016 directors' meeting, the directors approved a $60 per share distribution. (App. v. II pp. 1067-71.) Robert and William voted

[5] Based on June's filing date, the five-year statute of limitations on June's claims was December 2, 2010. (App. v. I pp. 123-35, v. II pp. 1212-17.) Because any relief for William on his oppression claim would apply to June as well, the trial court analyzed the statute of limitations for all claims in the consolidated case based on William's five-year lookback period, i.e., April 14, 2006. (App. v. I p. 665.)

against the proposed distribution from opposite sides—Robert because the farm corporation had just experienced an operating loss, William because he did not believe the distribution large enough. (App. v. I p. 609, v. II pp. 1067-71.) Robert, John, and Jane did not accept the distribution and donated it back to the corporation as a shareholder contribution. (*Id*.) It was the third distribution made since 2012; the corporation paid distributions totaling approximately $50,000 for 2012 and approximately $3,000 to $4,000 per shareholder for 2013. (App. v. I p. 207.)

ARGUMENT

This case was tried in equity. Review is therefore de novo. *Baur v. Baur Farms, Inc.*, 832 N.W.2d at 668. Plaintiffs preserved error on their contention that the trial court erred in ruling against them on their declaratory and oppression claims.

I. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS REQUEST TO DECLARE ALL CORPORATE STOCK VOTING.

Both the Articles of Incorporation and By-Laws establish voting and non-voting stock. (App. v. II pp. 17-29.) At the initial issuance, 846 total shares were issued, with 350 voting and 496 non-voting. (App. v. II p. 30.) Of the 350 voting shares, Robert received 260 voting shares and the remaining shareholders received 90 voting shares combined. (*Id*.) No additional shares of stock were ever thereafter issued. (App. v. II pp. 1109-15.)

Over time, 166 of the 846 total shares issued were redeemed and cancelled. (App. v. II p. 1077.) Of these 166 cancelled shares, 42 were voting shares, leaving a total of 308 voting shares existing, 167 of which are still held by Robert. (App. v. I pp. 544-45, v. II pp. 1077, 1106-08.)

Plaintiffs point to the statement in Phyllis and Robert's divorce stipulation to argue all the farm corporation's stock should now be declared voting stock. The evidence, however, showed the farm corporation never at any time actually converted any non-voting stock to voting stock. No one attended a meeting at which a motion was made or a vote was taken to change the voting rights of any stock. There are no stockholders' or directors' minutes amending the Articles or By-Laws, or otherwise changing the voting rights of any issued or unissued stock. No amendment to the Articles was ever filed with the Secretary of State changing the two types of stock. To the contrary, filings with the Iowa Secretary of State show the continued use of voting and non-voting stock after the divorce stipulation. *See* Exs. A7 (1993 Corporate Annual Report); A8 (1995 Corporate Annual Report); A9 (2003 Secretary of State website printout). The 1994 stockholder meeting minutes likewise show Robert owned 190 shares—with 190 voting, 0 non-voting—and each of the four children owned 164 shares—with 40 voting, 124 non-voting. (App. v. II p. 1073.)

Plaintiffs argue Robert's majority control of the voting shares at the time of the 1986 divorce stipulation, was sufficient to transform the non-voting shares to voting. More than mere intent and power, however, is required for this type of corporate action. Plaintiffs' argument that Robert's mere possession a majority of the voting stock when he entered into the divorce stipulation conflates *authority* to take action and the *actual taking* of action. Plaintiffs' trial brief cited no cases or statutes supporting the stock voting conversion theory they assert here.

Without formal corporate action to convert the non-voting stock to voting stock, the voting or non-voting character of a corporation's stock does not change, and it did not change here. *See* Iowa Code § 496A.55(7) (1985) (requiring amendment to the articles of incorporation to effectuate changes to the preferences and relative rights of shares). As the district court found, the statutory procedure for amendment then in effect was neither attempted nor completed. (App. v. I pp. 660-61 *citing* Iowa Code § 496A.56 (1985).)

The trial testimony made clear Robert, notwithstanding the decree, never intended to convert the non-voting stock, and never followed through on his agreement to convert the stock, instead settling with Phyllis thereafter. (App. v. I pp. 425-26, v. II pp. 34-37.) The proposed conversion set forth in the decree was for Phyllis's benefit and, as the district court found, when

Robert and Phyllis amended their divorce stipulation the conversion issue associated with Phyllis's shares in the divorce was mooted. (App. v. I p. 660.)

Robert's practice of permitting his children to vote in the corporation's decisions did not change non-voting shares to voting shares. As the district court found, all the corporation's decisions during its first twenty-five years were, with one exception, noncontroversial. Robert's decision not to dictate votes by simple exercise of his majority voting shares was his right, but it had no practical impact since virtually every vote had been unanimous. Robert's permissiveness or forgetfulness did not, however, change the character of the non-voting shares. *See* Iowa Code §§ 490.732(1)(d), (2)(a)(1)-(2) (2003) (an agreement among shareholders of a corporation governing "the exercise or division of voting power by or between the shareholders" must set forth such agreement in the articles of incorporation, by-laws, or "a written agreement that is signed by all . . . shareholders at the time of the agreement and is made known to the corporation.").

Plaintiffs ultimately concede the required corporate action never took place, instead urging the court should not "insist[] on a corporate formality when R.H. seldom observed a corporate formality." (Appellant's Brief at 30.) This contention is neither legally nor factually correct. To the contrary, and as expert witness Ted Lodden testified, the farm corporation's detailed minutes

of corporate activity and financial record-keeping evidence an exceptional level of adherence to corporate formalities not typically seen in family farm operations. (App. v. I p. 568.) The trial court followed the law in refusing to grant Plaintiffs the requested declaratory relief.

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE APPLICABLE STATUTE OF LIMITATIONS TO PLAINTIFFS' CLAIMS.

A five-year statute of limitations applies to Plaintiffs' oppression claims. Iowa Code § 614.1(4); *see Baur v. Baur Farms, Inc.*, 2010 WL 447063 at *6 (Iowa Ct. App., Feb. 20, 2010) ("*Baur I*") *rev'd and remanded on other grounds in Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 673 (Iowa 2013) ("*Baur II*"). The discovery rule defines a cause of action as accruing when a plaintiff has discovered the injury or when she should have discovered it through the exercise of reasonable diligence. *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 231 (Iowa 2006). A claimant "is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation" once a party learns information that would inform a reasonable person of the need to investigate. *Id.* (citing *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 116 (Iowa 2006)).

Unable to claim they lacked knowledge of the alleged bad acts occurring before April 14, 2006, Plaintiffs instead assert *no* time limitation

should apply to their claims based on the "continuing wrong" doctrine. The continuing wrong doctrine provides that where an alleged wrongful act "is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series." *Hegg v. Hawkeye Tri-Cty. REC*, 512 N.W.2d 558, 559 (Iowa 1994).

However, in cases presenting actions that are "separate, distinct, and could have been challenged by a plaintiff when they occurred," the continuous wrong doctrine does not apply. *Roemmich v. Eagle Eye Development, L.L.C.*, 526 F.3d 343, 348 (8th Cir. 2007) (citations omitted) (cited with approval in *Baur I*) (limitations period not tolled by continuing wrong doctrine where alleged oppressive acts were separate and distinct); *see, e.g., Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 801 (7th Cir. 2008) ("Like too many legal doctrines, the 'continuing violation' doctrine is misnamed. Suppose that year after year, for ten years, your employer pays you less than the minimum wage. That is a continuing violation. But it does not entitle you to wait until year 15 (assuming for the sake of illustration that the statute of limitations is five years) and then sue not only for the wages you should have received in year 10 but also for the wages you should have received in years 1 through 9.") (Posner, J). In analyzing a "continuing wrong" claim, "the key

inquiry is whether [the alleged violation] . . . is a fresh act each day, or whether it was a discrete act that took place upon the first [occurrence] that merely had lingering consequences." *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006).

The trial court correctly held the continuous wrong doctrine did not apply to the facts and circumstances of this case allowing for acts outside the limitations period to be considered. Plaintiffs pretend there is no way to determine which acts are discrete as opposed to continuing in analyzing their oppression claims. They do not, however, cite to any particular evidence they claim should have been considered a continuous rather than discrete wrongful act. Review of the alleged wrongful acts that occurred outside the limitations period shows the trial court appropriately did not consider such evidence.

For example, Plaintiffs reference Robert's granting of two life estates to his wife Sally as evidence of oppression or waste. The granting of the life estates were discrete acts that occurred in 1988 and 1993. (App. v. II pp. 39, 681, 1175-76.) In any event, the record shows the life estates were granted by the farm corporation with the directors' consent. (App. v. II pp. 1175-76.) William testified in another proceeding that both he and June knew about the corporation's granting of the life estates when they occurred and even "encouraged [Robert] in what he did." (App. v. I pp. 184-86.)

Plaintiffs further reference a trophy room connected to Robert's house that contains primarily mounted animals from hunting trips family members (including William) went on as evidence of waste. (Tr. 125.) The record shows the trophy room was constructed over a period of years and ultimately completed in 1999. (App. v. II p. 1219.) Construction of the trophy room constitutes a discrete act beyond the statute of limitations in this case. Even if construction of the trophy room were within the limitations period, the record shows it was built with each shareholders' knowledge and, at minimum, acquiescence, if not approval. (App. v. I p. 389, Tr. 125.) Moreover, the trophy room is a corporate asset from which the corporation would derive value when the property is sold. (App. v. I p. 583.) There is no evidence of corporate waste.

Likewise, Plaintiffs point to alleged wrongful acts at corporation meetings in 2002 concerning ownership of voting stock and their related removal as directors. Robert's decision to enforce the distinction between voting and non-voting shares in 2002 was immediately known to Plaintiffs, and immediately challenged by Plaintiffs. Such acts are plainly beyond the tolled limitations period. In any event, these acts do not constitute oppression. Again, Robert did not change voting stock to non-voting stock. And although no directors' meetings took place from 2003 to 2006, Robert and John

nevertheless provided information about financial matters and corporation activities in the shareholders' meetings, effectively substituting the shareholders' meetings as the medium for such information in place of the directors' meetings. (App. v. I pp. 352-57, v. II pp. 1094-1102.) Minutes from the shareholders' meetings during these years reflect William and June's participation in January 2002, December 2002, December 2004, December 2005, and January 2007. (*Id.*) Plaintiffs' claim of oppression based on lack of information because they were not directors places form over substance.

Further, Plaintiffs further allege improprieties in the farm corporation's 2004 purchase and sale of the Van Horn Insurance Agency. These actions too are beyond the tolled limitations period. Plaintiffs are demonstrably mistaken on this claim in any event. Although the farm corporation purchased the insurance agency from Robert at an *initial* price set at $150,000, the price paid to Robert was later reduced to $100,000. (App. v. II pp. 152-54.) The farm corporation's records make clear it thereafter sold the insurance agency to two former employees of the agency for that same $100,000 price. (App. v. I pp. 397-99, v. II pp. 152-54.) The farm corporation received the full payment in this transaction, and thus suffered no loss. (*Id.*) Plaintiffs' own CPA expert made no criticism of the insurance agency transaction. (App. v. I p. 384.) As the trial court suggested, and as CPA expert Ted Lodden testified, the fact the

amount received appeared as $150,000 on Robert's tax returns likely resulted from Robert's failure to update his tax preparer on the new number after the price reduction. (App. v. I pp. 600-01, 648 at fn 19.)

The evidence supports the trial court's decision not to consider the alleged wrongful acts occurring outside the limitations period since Plaintiffs were time-barred from raising them. *See Bartlett v. Overslaugh*, 169 F. Supp. 3d 99, 108 (D.D.C. 2016) (holding breach of fiduciary duty claims not tolled by continuing wrong defense where each instance constituted a "discrete act" outside the limitations period); *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 802 (7th Cir. 2008) (holding claims not tolled by continuing wrong defense where plaintiff "knew from at least 1993 that it was being injured by the defendants, and from 2000 at the very latest that it was being injured by a pattern of racketeering activity. It had no excuse for waiting six years after that to sue.")

Plaintiffs argue that oppression claims by definition involve continuous behavior through which discrete acts cannot be analyzed. Not so. Whether alleged wrongful acts constitute oppressive conduct is a question of law for the court. *Baur I*, 2010 WL 447063 at *10 (citing *Davis v. Sheerin*, 754 S.W.2d 375, 380 (Tex. Ct. App. 1988) ("Although whether certain acts were performed is a question of fact, the determination of whether these acts

constitute oppressive conduct is usually a question of law for the court."); *accord Reget v. Paige*, 626 N.W.2d 302, 308 (Wis. Ct. App. 2001) (finding "the determination of whether the historic facts as found by the circuit court, or as agreed to by the parties, constitute oppression is a question of law" for the court).

William, who graduated from law school in 1987, has been a practicing lawyer for decades. (App. v. I pp. 165, 167, 179.) June received an MBA from Gonzaga University. (App. v. I p. 516.) William and June have been represented by the same lawyers almost from the inception of this dispute nearly fifteen years ago. (App. v. II pp. 972-1027.) The alleged wrongful acts Plaintiffs cite in this lawsuit were known to Plaintiffs' at the time of their occurrence or very nearly so. Both William and his lawyers would be expected to know the applicable statute of limitations issues associated with redressing the alleged wrongful acts. *See Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975) (lawyers expected to know statute of limitations); Robert Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinable Offense?*, 29 W. St. U. L. Rev. 235, 244 (2002) ("There are certain things lawyers are expected to know. The most obvious example is the statute of limitations . . .") (citing cases).

Plaintiffs in their brief fail to disclose they first announced their intention to seek dissolution of the farm corporation in *February 2003*. (App. v. II p. 1198.) They knew and understood the statute of limitations was running on acts for which they might seek relief, evidenced by the fact they proposed and entered into a series tolling agreements related to their oppression claims. (App. v. II pp. 1199-1217.) There would have been no reason to enter into serial tolling agreements as the parties did if no statute of limitations applied to Plaintiffs' claims.

As the trial court made clear, the distinction between the present case, with its fully-developed record, and *Baur I*, which had no such record, provided the trial court full opportunity to consider whether actions were discrete or continuing in nature. (App. v. I p. 665 at fn 35.) The trial court was not making "[a] review of the facts *asserted* in this action," *Baur I*, 2010 WL 447063 at *9 (emphasis added), but rather the actual evidence the minority shareholders here presented in a six-day trial.

After analyzing the evidence presented in this case, the trial court correctly held only those alleged acts of oppression occurring within the applicable limitations period—five years prior to the execution of the first tolling agreement on April 14, 2011—should be considered in analyzing the oppression claim. (App. v. I p. 665.)

III. THE TRIAL COURT DID NOT ERR IN ITS HOLDING THAT PLAINTIFFS DID NOT PROVE THEIR OPPRESSION CLAIM.

A. The trial court correctly applied the "reasonable expectations" standard.

Plaintiffs seek judicial dissolution of the farm corporation pursuant to Iowa Code § 490.1430. Plaintiffs thus bore the burden of proving "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent." Iowa Code § 490.1430(1)(b)(2).

In *Baur II*, the Iowa Supreme Court held that a minority shareholder's action for dissolution "focuses on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances." 832 N.W.2d at 674. The reasonable expectations standard is discussed comprehensively in 2 F. Hodge O'Neal & Robert B. Thompson, *Oppression of Minority Shareholders and LLC Members*, §712 at 7-113 – 7-127 (rev. ed. 2014) ("O'Neal & Thompson"), cited with approval in *Baur II*, 832 N.W.2d at 670.

The O'Neal & Thompson treatise cites *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983), a case cited by the supreme court, for the concept that expectations may be established outside of formal written agreements, but the minority shareholder has the burden of proving the expectations.

O'Neal & Thompson also relied on and quoted *Meiselman* for the North Carolina court's statement that "in order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not known to the other participants are not 'reasonable.'" *O'Neal & Thompson* at 7-222, (quoting *Meiselman*, 307 S.E.2d at 563). The full statement in *Meiselman* is as follows:

> These "reasonable expectations" are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations" created at the inception of the participants' relationship; those "reasonable expectations" as altered over time; and the "reasonable expectations" which develop as the participants engage in a course of dealing in conducting the affairs of the corporation. The interests and views of the other participants must be considered in determining "reasonable expectations." The key is "reasonable." In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not "reasonable." Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.

307 S.E.2d at 563.

Also relied on by the supreme court and cited by the trial court here is *Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173 (N.Y. Ct. App. 1984). O'Neal & Thompson quotes from the case, 473 N.E.2d at 1179, for a rule that "oppression should be deemed to arise only when the majority conduct

substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture . . . [M]uch will depend on the circumstances in the individual cases." *O'Neal & Thompson* at 7-121 – 7-122.

The O'Neal & Thompson treatise, cited by the Court in *Baur II*, provides that when the shareholder's interest is acquired by gift, the donor's wishes may shape reasonable expectations. *O'Neal & Thompson* at 7-124–125 (*citing Ferber v. American Lamp Corp*., 469 A.2d 1046 (Pa. 1983)). *See also Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 63 (S.D. 2002) (expectations must be both reasonable and central to the decision to join the venture); *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1019 (N.Y. Sup. Ct. 1984) (lower standard of expectations applies when shares are acquired by gift). In the present case, because Robert as founder of the farm corporation made his wishes known to Plaintiffs at the outset, this factor is entitled to consideration.

Plaintiffs' assertion that the trial court imposed some improper "new burden" on them in requiring Plaintiffs to prove violation of their reasonable expectations is a complete misreading of the trial court's ruling. The trial court first noted that some courts, when considering the reasonable expectations of minority shareholders who receive stock by gifting, analyze reasonable expectations in terms of the known expectations at the time the minority

shareholders entered the enterprise, known as the "time of investment" model. (App. v. I pp. 663-64.) The trial court noted that a shareholder receiving stock through gifting, under such analysis, might have no specific reasonable expectations associated with stock ownership at all beyond the expectation to share proportionally in the corporation's gains. (App. v. I p. 664.) *See also Baur II*, 832 N.W.2d at 673.

The trial court, however, effectively disagreed with a pure "time of investment" approach and instead held a minority shareholder should be allowed to prove "any specific reasonable expectation" in a "fact intensive inquiry requiring examination of the objectively reasonable expectations of the complaining shareholder and the actions of the defendants measured in terms of their fiduciary duties in light of the totality of the circumstances." (App. v. I pp. 664-65 (citations omitted).) In other words, the trial court permitted analysis of evidence *beyond* what many courts have fashioned in analyzing reasonable expectations—to Plaintiffs' benefit here.

The trial court, under this broader analysis, considered evidence of any "mutual understanding" between majority and minority shareholders about the minority shareholders' entitlements associated with their stock ownership, even though the minority shareholders received stock through gifting. (App. v. I pp. 664.) Contrary to Plaintiffs' argument, the trial court's lengthy opinion

makes clear it analyzed the shareholders' reasonable expectations looking at both the relevant expectations existing at the inception of the enterprise and as they developed thereafter.

Plaintiffs center their argument on a claim their reasonable expectations about the farm corporation changed following the contribution of bank dividends by William, June, and John in the 1999-2001 period, and that payment of substantial distributions by the farm corporation was thereafter required. The record evidence does not support such a claim. No contemporaneous records show the contributions changed Plaintiffs' own expectations. More importantly, there is no evidence in the record that any "changed expectation" was conveyed to the other shareholders. (App. v. I pp. 560-61.)

Despite repeated reference to their purported capital injections, Plaintiffs in their brief never disclose that the contributions credited to each of them were simply distributions from their father's bank in amounts and for purposes *determined by their father*. Plaintiffs' trial brief acknowledges this point: "From 1999 to 2001, all of the distributions from the Bank Holding Company were not paid to them, but on order from R.H., paid into the Farm Corporation as cash contributions." (App. v. I p. 95.) Neither William nor June contributed any personal funds to the farm corporation; what was contributed

was simply transferred from Robert's bank at Robert's direction through the bank holding company to the farm corporation. (App. v. II pp. 129, 186-87.) The record contains no evidence—and Plaintiffs in their brief cite to no evidence—that transfer of the bank holding company distributions were conditioned on some agreement or understanding for payment of distributions by the farm corporation in the future. (App. v. I pp. 560-61.)

As the trial court correctly articulated, Plaintiffs' expectation of distributions "does not exist in a vacuum; it must be considered along with the legitimate goals of the defendants as the persons tasked with the day-to-day operations of the corporation's farming activities." (App. v. I p. 669.) The trial court correctly found the farm corporation implemented a policy to forego distributions until it had paid off debt. That the farm corporation incurred debt, and then opted to pay down debts and forego distributions, is noted throughout the record. (App. v. I pp. 433-34, 436, v. II pp. 1050-54.)

Plaintiffs make inconsistent attacks on the farm corporation's distribution and loan repayment practices, claiming oppression in Robert and John's failure to liquidate (or at least nearly liquidate) the cash balances to pay a "significant" distribution, while claiming mismanagement in failing to pay down the farm corporation's loan balances. In fact, the record shows the corporation focused on paying down its substantial loan balance to Robert,

which by the time of trial was nearly paid off, before either paying John's loan balance or making significant distributions to shareholders. (App. v. I pp. 564-65.) As the trial court found, there is no oppression in Robert and John's rational exercise of business judgment in choosing to pay down Robert's loans first. In any event, the farm corporation could not have both paid significant distributions and aggressively paid down debt. Plaintiffs never explain how these competing demands could be reconciled.

There is also no link, as Plaintiffs claim, between their contributions and a reduction of the farm corporation's debts. The contributions from the bank holding company were never intended to pay down the farm corporation's debts. As Plaintiffs conceded, these contributions were instead intended to help purchase additional farmland. (App. v. I p. 95) ("With this cash infusion, the Farm Corporation completed a number of additional transactions between 1998 and 2000 to acquire additional land.")

Use of funds for farmland purchases not only failed to reduce the farm corporation's debt, but to the contrary, substantially *increased* it, as the land purchases from 1998-2000 far outstripped the bank holding company distributions that had been ordered. *Compare* Ex. X15 (App. v. II p. 1233) (showing land purchases between January 1998 and December 2000 of $1,423,172.50) *with* Ex. 46 (App. v. II p. 129) (showing contributions from

bank holding company distributions totaling $922,129.58). If anything, the expectations of the shareholders during this period should have been that distributions in the foreseeable future were *less* likely in light of the significant land acquisitions and associated borrowing taking place. *See* Ex. C7 (App. v. II pp. 1055-56) (January 1998 directors' minutes authorizing Robert and John to purchase "other land that might come up for acquisition, and to arrange appropriate financing for their purchase") *and* Ex. X15 (App. v. II p. 1233) (showing borrowing for the purchase of land).

There is no oppression enunciated in *Baur II* to be found here. "[M]ajority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value." *Baur II*, 832 N.W.2d at 674. The Court cautioned courts "must be careful when determining relief to avoid giving the minority a foothold that is oppressive to the majority." *Id.* at 678.

Neither William nor June ever offered to sell their stock for fair value. (App. v. I pp. 402-04.) Similarly, neither William nor June ever stated what they contended the fair value of their stock to be:

> Q: All right. So there's never a time when John has put a dollar number on the table for your stock that

you've responded and said I will sell my stock for any number, is there?

William: That is correct. I have explained many time that I prefer farmland.

Q: Okay. You have always said you wanted farmland. You have never given a value -- money value that you would take for your stock, correct?

William: Correct.

Q: You've never said I will sell my stock for fair value, have you, sir?

William: No. I was never asked that. No.

Q: You don't have to be asked it. You've never offered it, have you?

William: Correct.

(App. v. I pp. 179-80.) June, likewise, has never, even after filing suit, provided any number at which she would sell her shares. (App. v. I p. 404.)

To the contrary, they have a long history—dating back to February 2003—of threatening dissolution and liquidating the corporation's assets. (App. v. II p. 1198.) William's first offer of any sort concerning a potential separation from the corporation did not occur until after he filed the pending lawsuit, and even then did not involve a demand to have the corporation buy his shares for any number. (App. v. I pp. 178-79.) Rather, William has demanded an inequitable carving up of the corporation and changing all the stock to voting stock.

Plaintiffs can make no claim to oppression under *Baur II* for refusal of any offer to sell any shares for fair value, let alone any refusal of "repeated offers to sell shares for fair value" as the court referenced. *See Baur II*, 832 N.W.2d at 674. Plaintiffs never offered any calculation as to their contention of what "fair value" for their stock amounted to in this case. Lodden testified that, if it were based on a liquidation value of the farm corporation's assets, it must include not only a reduction for any taxes that would be required on the liquidation of assets, but also real estate commissions, legal fees, and other costs associated with the liquidation for which Plaintiffs offered no evidence whatsoever. (App. v. I pp. 581-83.) William and June have failed, on numerous levels, to establish the basic elements of their oppression claim.

B. The trial court correctly found the farm corporation's use of cash basis accounting did not evidence oppressive conduct.

The trial court correctly found no evidence of oppressive conduct in the farm corporation's use of cash basis accounting for the farm corporation's books. As an initial matter, and as the trial court noted, that the farm corporation would use cash basis accounting was memorialized in the minutes of the first shareholders' meeting in 1977. (App. v. II pp. 1029-30.)

In using the cash method, the farm corporation is in good, and crowded, company. The trial court cited to CPA Lodden's testimony that in his experience virtually all family farming operations use cash basis accounting.

(App. v. I pp. 571-72.) Indeed, Plaintiffs' own CPA expert, David Hove, testified to the same thing. (App. v. I p. 381.)

Nevertheless, at William's request, for tax year 2013 to the present, John has prepared both cash method and accrual method financial reports for the shareholders. (App. v. I pp. 212-13, v. II pp. 1063-66.) These reports show what the parties always knew: John was not "manipulating" the finances of the corporation, but simply availing the corporation of perfectly lawful tax advantages through strategic decisions about when to sell grain, purchase inputs, or take other action impacting the corporation's tax liability. (App. v. I pp. 386-88.) Plaintiffs' own CPA expert, who has recommended the cash basis method to his own farm clients because it is "a very effective tax planning tool," testified he would use the term "tax management" as opposed to "manipulate" in describing decisions about income and expenses under the cash basis method. (App. v. I pp. 381-82.)

As the trial court noted, Lodden testified to the clarity and completeness of John's financial recordkeeping—indeed, it was so good as to be an outlier in Lodden's longstanding experience in working with farm corporations. (App. v. I pp. 568, 580.) Plaintiffs' CPA expert testified that he had no criticism of the manner in which John put together his cash accounting statements. (App. v. I p. 383.) The trial court correctly held there was no

evidence of improper conduct associated with the corporation's use of cash basis accounting.

Plaintiffs' argue the farm corporation's end-of-year cash balances showed amounts sufficient to pay the "significant" distributions to shareholders that Plaintiffs seek. The trial court analyzed this issue in detail. Plaintiffs' reliance on a snapshot of only the end-of-year balance in making this argument, as Lodden explained, fails to provide the full picture. (App. v. I pp. 577-79, v. II p. 1170.) Lodden's mid-year balance calculations after purchase of inputs and other expenses are factored showed significantly smaller balances available. (App. v. I pp. 577-79, v. II p. 1069.)

Faced with these facts, Plaintiffs assert even these mid-year balances are sufficient to enable the "significant" distributions they seek.[6] But with only around $100,000 for a mid-year balance showing every year, even a one-time "significant" distribution would threaten bringing the farm corporation's cash balance down to precarious levels. John testified wanting to maintain reasonably sufficient balances in the event of liquidity needs to operate the farm, which is a prudent business decision. (App. v. I pp. 389-91.) Robert and

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[6] As the record shows, the farm corporation has paid distributions several times in recent years, but not at the level of the "significant" distributions Plaintiffs seek. (App. v. I p. 207, v. II pp. 1067-71.)

John do not oppress minority shareholders in refusing to cut the farm corporation's cash balance to the razor's edge by making a potentially risky "significant" distribution to shareholders to appease Plaintiffs.

C. The trial court correctly found Robert and John did not receive excessive compensation or otherwise waste assets of the farm corporation.

Plaintiffs contend Robert and John have taken all the benefits of the corporation for themselves, and provided no benefit to Plaintiffs. The record shows otherwise. John *earns* a $50,000 salary—one that increased through *June's* urging in 2000, and one that has not increased since.[7] (App. v. I pp. 540-41.) Robert receives no salary from the farm corporation, and never has. (App. v. I p. 487.) The corporation provides no retirement or other deferred compensation benefits whatsoever. (App. v. I pp. 487, 540.) The housing provided on the farm and medical insurance Robert and John receive likewise are *earned* benefits for their labor, are reported on the Form W-2s each receives, and are reasonable. (App. v. I pp. 573-74.) Lodden testified John's compensation is, based on his considerable experience as a CPA working with

[7] Notwithstanding possessing full knowledge of what they now allege is John's improper "manipulation" of the financial records through use of cash basis accounting (which, as discussed previously, was not improper at all), June advocated to Robert on John's behalf to raise John's annual salary from $30,000 to $50,000. (App. v. I pp. 540-41.)

family farming operations, on the low side. (App. v. I pp. 576-77.) Robert and John receive no other financial benefits from the corporation that Plaintiffs do not receive. As the trial court correctly found, the record presents no basis to conclude Robert or John have positioned themselves to lead extravagant lifestyles at the expense of the Plaintiffs.

The trial court correctly found that the farm corporation's expenditures do not evidence improper siphoning of corporate income by Robert and John. Like many farmers engaged in a farming operation, Robert and John live on the farm in houses owned by the corporation. (App. v. I p. 570.) The record shows John's house was renovated in 2010. (App. v. I p. 316.) John's house was constructed in 1900, and thus was 110 years old when renovated. (App. v. I p. 570, v. II p. 1124.) The trial court cited testimony that the renovations made to John's house were neither extravagant nor unnecessary. (App. v. I p. 570.) Moreover, because these properties are owned by the corporation, any increases in their values ultimately inure to the benefit of all shareholders. If anything, failing to properly maintain one of the corporation's houses would be evidence of waste. These improvements do not constitute corporate waste.

The trial court also correctly found no evidence of waste in the buyout of the two life estates in farm corporation land previously given to Sally. (App. v. II p. 681.) The record shows the life estates were granted by the farm

corporation in 1988 and 1993 with the directors' consent. (App. v. I pp. 184-86, v. II pp. 39, 1175-76.) William testified in a prior dispute between Robert and Sally that he knew about the corporation's granting of the life estates when they occurred and that the shareholders and directors approved of them. (App. v. I pp. 184-86.)

The district court in Robert and Sally's divorce proceeding determined the life estates were validly granted by the corporation and created a corporate obligation. (App. v. I pp. 681, 686.) John's subsequent purchase of the life estates from Sally in 2006 was for fair value. (App. v. I pp. 1177-78.) As the trial court found, the corporation's associated incurrence of debt to buy the life estates from John for the amount he paid for them allowed for a merger of title for the farm corporation's properties and resolved the corporate obligation identified in Robert and Sally's divorce decree.[8]

The trial court likewise correctly found no evidence of oppression in either the corporation's prior payment of household utilities or similar personal expenses or in the fact housing previously did not appear as compensation on Robert and John's Form W-2s from the farm corporation.

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[8] Although Plaintiffs now assert granting the life estates to Sally as evidence of corporate waste, they admit to having granted Robert's current wife, Mary, a similar right—*within the last two years* and after William filed suit. (App. v. II pp. 1063-66.)

As the trial court found, Robert as president was authorized to negotiate appropriate terms of employment in connection with his (and later John's) operation and management of the farm corporation. (App. v. II pp. 1029-30.) The record indicates any personal expenses paid on John's behalf were minor and occurred many years ago, and the farm corporation's prior payment of personal expenses on Robert's behalf was known to Plaintiffs long ago and to which they made no objection. (App. v. I pp. 463-64, v. II pp. 186-87.) The record shows no ongoing practice of the farm corporation paying either Robert's or John's personal expenses. (App. v. I pp. 463-65.) Any payments for personal expenses within the last five years that should have been included as compensation have been included on amended Form W-2s issued to Robert and John. (App. v. I pp. 573-74, 607-08.)

Lodden testified the failure to account for these types of personal expenses as compensation, such as the provision of housing on farm properties, is a common issue with family farming operations. (App. v. I pp. 572-73.) Contrary to Plaintiffs' assertion, Lodden offered his opinion that it was highly unlikely these issues would cause the Internal Revenue Service to take the rare action of rescinding the farm corporation's status as an S-corporation based on a finding such benefits created two classes of stock. (App. v. I pp. 573-74.) That small likelihood is further diminished by virtue

of the corrective actions that have occurred, including particularly the amending of the farm corporation's tax returns and Form W-2s. (*Id*.) Lodden noted treatment of these types of personal expenses in the manner in which John as tax preparer previously handled them was proper earlier in the corporation's history, but needed to be changed following a subsequent amendment to the tax code. (*Id*.) As the trial court noted, to the degree these arrangements have not always satisfied the requirements of the tax code, appropriate remedial measures have been implemented.

The trial court also correctly found no oppression in John's various offers to purchase Plaintiffs' stock over the years. John's proposals merely evidence John's attempts to engage Plaintiffs in discussions for the sale of at least some portion of their shares for more than decade. Every one of John's offers since the appraisal by BCC Advisors—the valuation firm *jointly* selected by the parties to appraise the voting and non-voting stock—has included a price at, or above, BCC Advisors' appraised fair market value. As noted above, neither William nor June ever responded to these offers proposing different values.

The trial court further correctly found no merit to Plaintiffs' complaint that the farm corporation has incurred unreasonable loan debt to John. The record shows these loans were for farm equipment or expenses in amounts

reasonable for the purposes claimed. (App. v. I pp. 575-76, v. II p. 1225.) The loans from John, among other things, went toward the purchase of equipment, new grain bins, improvements to the corporation's houses on the property, and paying off loans from third-party lenders with higher interest rates. (*Id*.)

When John received funds from the sale of the bank in 2006, he used a significant portion of those funds attending to the needs of the farm corporation. (App. v. II p. 127.) Initially, John's loans accrued interest at six percent per annum, which was less than the third-party loans being paid off. (App. v. I pp. 322, 394-95, v. II pp. 1061-62.) John later reduced the interest rate on his loans to the farm corporation to three percent per annum. (*Id*.) Both rates are reasonable and below the rate available from third party lenders. (App. v. I pp. 322, 394, 576, v. II pp. 1063-66) (2014 directors' minutes showing June voting to keep unchanged the interest rate at three percent).) For their parts, William and June have never asked to participate in loans to the corporation. (App. v. I p. 622.)

Lodden testified it is common for small businesses and family farming corporations to look to loans from individual shareholders in this manner. (App. v. I p. 575.) Lodden further testified the detailed financial recordkeeping for the loans by Robert and John, and preparation of promissory notes, is uncommon. (App. v. I pp. 575-76, 580, v. II pp. 1220-

32.) The trial court correctly found John's loans to the farm corporation offered no evidence of waste.

Plaintiffs' related complaint about the lack of a formal repayment schedule for John's loans likewise fails. The record makes clear that the flexibility with not having a formal repayment schedule benefits the farm corporation. (App. v. I p. 581.) Despite the absence of amortization schedules, the farm corporation has nevertheless been paying off its loans over time. (App. v. I pp. 564-65.) Moreover, the record shows John could invest the funds currently loaned to the farm corporation in ventures earning higher returns. (App. v. I pp. 395-96.) He thus has no financial incentive to unnecessarily delay repayment of the loans if the farm corporation has available funds.

The trial court likewise correctly found no merit to Plaintiffs request to eject Robert and John as farm operators and instead cash rent the land to a third-party operator. Plaintiffs' expert Mark Gannon conceded he found nothing suggesting fraudulent or illegal conduct with the farm's operation. (App. v. I p. 265.) Plaintiffs' CPA expert David Hove, notwithstanding his extensive experience in forensic accounting, similarly made no findings of fraudulent conduct, and admitted he would have investigated such potential

activity had he spotted anything in his review. (App. v. I p. 385, v. II pp. 218-23.)

Plaintiffs' expert Gannon likewise testified that his in-person observation of the farm revealed no problems. (App. v. I pp. 265-67.) Gannon testified that he did not see anything that suggested John or Robert were intentionally doing anything not to farm the property well. (App. v. I pp. 267-68, 270.) To the contrary, that it appeared to be an average, fairly-typical farm. (*Id.*)

Gannon also testified about talent differences among farmers using a baseball analogy: some farmers are .200 hitters, while others are .300 or .400 hitters. (App. v. I pp. 269-70.) Even if one assumes Robert and John are below average farmers—certainly not established in this record, *see* Ex. B2 (App. v. II p. 1034) (noting 1978 corn yields by other farmers on their land "the lowest yield in Carroll County for corn"), Ex. B3 (App. v. II p. 1035) (noting 1979 bean yields by other farmers on their land "one of the lowest in the area"), (App. v. I p. 533) (veterinarian testifying Robert and John's percentage of weaned calves more than twenty percent higher than national average), Tr. 777 (noting Glidden-Ralston High School asked John to teach, and John did teach, the school's vocational agriculture classes)—such a finding without more does not evidence wasting of corporate assets.

As Lodden testified as cited by the trial court, Plaintiffs can only speculate that cash renting in the future will achieve larger profits for the corporation. (App. v. I. pp. 586-88.) Such speculation does not warrant ejection of the family members who have been farming the land and managing the finances for decades and replacing them with rent-paying operators. As Lodden testified, many owners of farmland for a variety of reasons choose to conduct farming operations themselves. (App. v. I p. 586.) Lodden testified he found no mismanagement of the farm corporation, let alone any acute mismanagement that would warrant the extraordinary remedy of appointing a receiver or other farm manager or operator. (App. v. I pp. 584-85.)

Robert made clear accumulating, conserving, and improving the farmland for future generations has been a higher priority than short-term maximization of profits or payment of distributions. (App. v. I pp. 238, 417, 428, 492-93.) Over the years the farm corporation has placed a substantial amount of land in the federal crop reserve program for conservation purposes. (App. v. I p. 405.) William has praised Robert and John's conservation practices. (App. v. II p. 45.)

In rejecting Plaintiffs' argument that the farm corporation should have been converted to cash renting (something never suggested by Plaintiffs until after William filed his lawsuit), the trial court correctly pointed to Robert's

strong desire to maintain control of the type and extent of the farming operation, with the ultimate goal being growth of the operation and improvement of the quality of the land and facilities over mere maximization of profit. (App. v. I pp. 238, 417, 428, 492-93.)

Contrary to Plaintiffs' repeated cries of waste, the record shows the value of the farm corporation has grown substantially over time under Robert and John's management. (App. v. II pp. 1125-59.) The robust increase in the value of the corporation is attributable, in significant part, to prudent business decisions to invest in capital additions by acquiring adjacent farmland at reasonable prices when it became available. (App. v. I pp. 431-32.) As Lodden explained, focus on accumulation of assets and passing on of a legacy in a farm, without a focus on payment of distributions, is common in first generation farm corporations created by a patriarch for transfer to the next generation. (App. v. I pp. 567-68.)

CONCLUSION

The decision of the trial court should be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellees R. H. Van Horn Farms, Inc., Robert H. Van Horn, and John Van Horn respectfully request to be heard orally upon the submission of this appeal.

BELIN McCORMICK, P.C.

By: _____
Matthew C. McDermott AT0005085

666 Walnut Street, Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4628
Facsimile: (515) 558-0643
E-mail: mmcdermott@belinmccormick.com

ATTORNEYS FOR DEFENDANT-
APPELLEE JOHN VAN HORN

CROWLEY FLECK PLLP

By: _____
David L. Charles AT0001440

666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4666
E-Mail: dcharles@crowleyfleck.com

Or

500 Transwestern Plaza II
P.O. Box 2529
Billings, MT 59103-2529
Telephone: 406-252-3441
Fax: 406-259-4159
E-mail: dcharles@crowleyfleck.com

ATTORNEYS FOR DEFENDANTS-
APPELLEES R. H. VAN HORN
FARMS, INC. and ROBERT H.
VAN HORN

PROOF OF SERVICE

I hereby certify that on the 18th day of August, 2017, I electronically filed the foregoing Appellees' Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

Thomas D. Hanson
Theodore W. Craig
DICKINSON MACKAMAN
TYLER & HAGEN, P.C.
699 Walnut Street, Suite 1600
Des Moines, IA 50309-3986
thanson@dickinsonlaw.com;
tcraig@dickinsonlaw.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

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Dated: August 18, 2017

V0208\0001\(2757583.1)

ELECTRONICALLY FILED MAY 22, 2018 CLERK OF SUPREME COURT

BEFORE THE IOWA SUPREME COURT

No. 17-1841

AFSCME IOWA COUNCIL 61,
JOHNATHAN GOOD, RYAN De VRIES,
TERRA KINNEY, and SUSAN BAKER,

Appellants,

vs.

STATE OF IOWA and IOWA PUBLIC
EMPLOYMENT RELATIONS BOARD,

Appellees.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. ARTHUR E. GAMBLE

APPELLEES' BRIEF

Michael R. Reck, AT0006573
Matthew C. McDermott, AT0005085
Kelsey J. Knowles, AT0004233
Espnola F. Cartmill, AT0010237

BELIN McCORMICK, P.C.
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
E-Mail: mrreck@belinmccormick.com;
mmcdermott@belinmccormick.com;
kjknowles@belinmccormick.com;
efcartmill@belinmccormick.com

ATTORNEYS FOR DEFENDANTS/
APPELLEES STATE OF IOWA and
IOWA PUBLIC EMPLOYMENT RE-
LATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Iowa's equal protection clause compels the Legislature to limit the statutory collective bargaining rights of Public Safety Employees because other state employees do not enjoy the same statutory rights.

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NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 45-46 (Iowa 2012).

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 259, 263 (Iowa 2007).

State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970).

Sanchez v. State, 692 N.W.2d 812, 817 (Iowa 2005).

Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994).

Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998).

Slifer v. Pub. Employee Relations Bd. of Kansas, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992).

King v. State, 818 N.W.2d 1, 27 (Iowa 2012).

Wisconsin Educ Ass'n Council v. Walker, 705 F.3d 640, 653, 655-56 (7th Cir. 2013).

Vorbeck v. McNeal, 407 F. Supp. 733, 739 (E.D. Mo. 1976).

Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 50 (Iowa 2016).

Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI), 675 N.W.2d 1, 7 (Iowa 2004).

In re Morrow, 616 N.W.2d 544, 548 (Iowa 2000).

Margiotta v. Kaye, 283 F. Supp. 2d 857, 865 (E.D.N.Y. 2003).

Beverlin v. Bd. of Police Comm'rs of Kansas City, Mo., 722 F.2d 395, 396 (8th Cir. 1983).

Confederation of Police v. City of Chicago, 481 F. Supp. 566, 568 (N.D. Ill. 1980).

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Record Head Corp. v. Sachen, 682 F.2d 672, 679 (7th Cir. 1982).

Williamson v. Lee Optical of Okla., 348 U.S. 483, 489 (1955)

McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969).

Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County, 473 N.W.2d 28, 31 (Iowa 1991).

U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980).

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315–16 (1993).

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Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc., 893 N.W.2d 579, 585 (Iowa 2017).

State v. Kinkead, 570 N.W.2d 97, 102 (Iowa 1997).

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Heller v. Doe by Doe, 509 U.S. 312, 319–21 (1993).

Adams v. Fort Madison Cmty. Sch. Dist. in Lee, Des Moines & Henry Ctys., 182 N.W.2d 132, 139 (Iowa 1970).

State ex rel. Cairy v. Iowa Co-op. Ass'n, 95 N.W.2d 441, 443 (Iowa 1959).

Dickinson v. Porter, 35 N.W.2d 66, 71 (Iowa 1948).

Des Moines Metro. Area Solid Waste Agency v. City of Grimes, 495 N.W.2d 746, 749 (Iowa 1993).

United States v. O'Brien, 391 U.S. 367, 384 (1968).

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810).

South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257 (4th Cir. 1989).

Madison Teachers, Inc. v. Walker, 851 N.W.2d 337 (Wis. 2014).

Harwell v. Leech, 672 S.W.2d 761, 764 (Tenn. 1984).

Adams v. Fort Madison Community School Dist. in Lee, Des Moines and Henry Counties, 182 N.W.2d 132, 141 (Iowa 1970).

Zaber v. City of Dubuque, 789 N.W.2d 634, 645-46 (Iowa 2010).

State v. Drake, 219 N.W.2d 492, 496 (Iowa 1974).

State v. Darling, 246 N.W. 390, 391–92 (1933).

Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

2. Whether strict scrutiny applies to Plaintiffs' claims where no fundamental right is at issue because Plaintiffs had, and retain, all the rights the First Amendment protects.

Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989).

State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970).

Slifer v. Pub. Employee Relations Bd. of Kansas, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992).

Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter, 526 U.S. 124, 127 (1999).

Sweeney v. Pence, 767 F.3d 654, 669 (7th Cir. 2014).

South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1256-57, 1263 (4th Cir. 1989).

Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 465 (1979).

Arkansas State Highway Employees, Local 1315 v. Kell, 628 F.2d 1099, 1102 (8th Cir. 1980).

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983).

Brown v. Alexander, 718 F.2d 1417, 1423 (6th Cir. 1983).

Afro-American Police League v. Fraternal Order of Police, Chicago Lodge No. 7, 553 F.Supp. 664, 670 (N.D. Ill. 1982).

Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc., 893 N.W.2d 579, 585 (Iowa 2017).

Munn v. Indep. Sch. Dist. of Jefferson, 176 N.W. 811, 817 (Iowa 1920).

U*nited States v. O'Brien,* 391 U.S. 367, 383 (1968).

Wisconsin Educ Ass'n Council v. Walker, 705 F.3d 640, 654 (7th Cir. 2013).

Flying J Inc. v. City of New Haven, 549 F.3d 538, 546 (7th Cir. 2008).

ROUTING STATEMENT

Defendants-Appellees State of Iowa and the Iowa Public Employment Relations Board (together, the "State") agree this case should properly be retained by the Iowa Supreme Court as it presents substantial constitutional questions as to the validity of a statute. *See* Iowa R. App. P. 6.1101(2)(a).

STATEMENT OF THE CASE

This is an appeal by Plaintiffs-Appellants AFSCME Iowa Council 61, Johnathan Good, Ryan DeVries, Terra Kinney, and Susan Baker (together, "Plaintiffs") from the final order of the district court granting summary judgment in favor of the State and against Plaintiffs. AFSCME is an employee organization representing public employees, and the individuals are employees of the State of Iowa.

Plaintiffs filed a Petition for Declaratory and Injunctive Relief on February 20, 2017 (App. 5-13), and a First Amended Petition for Declaratory and Injunctive Relief on March 15, 2017 (App. 14-95). In the Amended Petition, Plaintiffs' challenged recent amendments to Iowa Code Chapter 20, the Public Employment Relations Act. *See*

Acts 2017 (87th G.A.) ch. 2, H.F. 291, §§1, 6, 9, 12-14, 22 (eff. February 17, 2017) (the "Amendments"). The Amended Petition contained one count alleging the Amendments violated Plaintiffs' equal protection rights. (App. 19-20.)

The State filed its Answer and Affirmative Defense on March 17, 2017. (App. 96-100.) The State filed a motion for summary judgment the same day. (App. 101-02.) Plaintiffs filed a resistance on May 10, 2017 (App. 103), and then a notice that its resistance should be viewed as a cross-motion for summary judgment on May 23, 2017 (App. 104). The district court granted the State's motion for summary judgment and denied Plaintiffs' on October 30, 2017, dismissing the case with prejudice. (Ruling and Order on Motions for Summary Judgment ("Ruling") (App.105-27).) Plaintiffs filed a timely Notice of Appeal to the Iowa Supreme Court on November 20, 2017. (App.128-29.)

STATEMENT OF THE FACTS

Iowa's Legislature first enacted Iowa Code Chapter 20 in 1974. Chapter 20 statutorily granted certain bargaining rights, previously lacking, to public employees. Such rights never were

granted equally to all public employees, but instead granted as the Legislature saw fit through legislative balancing. For example, supervisors were excluded. Iowa Code § 20.4(2) (1974). Likewise, among other positions, most students working twenty or fewer hours a week, most Office of the Attorney General employees, Commission for the Blind employees, and various judicial branch employees were excluded. Iowa Code §§ 20.4(4), (7), (9) (10) (1974). Those granted bargaining rights have varied over time with, for example, Commission for the Blind employees dropped from the exclusions, and Department of Commerce banking division employees added. *Compare* Iowa Code § 20.4 (1983) *with* Iowa Code § 20.4 (1987).

As relevant to this appeal, the Amendments update the scope of collective bargaining for most employees while preserving certain bargaining topics for bargaining units with thirty percent or more "Public Safety Employees" as defined therein. H.F. 291 at §1; Iowa Code § 20.3(10A) (2017). Negotiation of wages and any other agreed upon non-prohibited topics remains available for all employees previously granted that ability, but bargaining units containing thirty

percent or more Public Safety Employees retain broader bargaining ability. H.F. 291 at §§ 6, 12; Iowa Code §§ 20.9(1), (3); 20.22(3), (7), (8)(b), (9)(b) (2017).

ARGUMENT

I. Plaintiffs' equal protection challenges are subject only to a rational basis review.

A. Preservation of Error

The State agrees that Plaintiffs have preserved error on their claims of equal protection violations based on the classifications alleged lack of a rational relationship to a legitimate state interest and alleged failure to further the legitimate purposes of the law. Plaintiffs have failed to preserve error, however, on their claim first made in this appeal that equal protection has been violated because the Court should be limited to analyzing only those rationales for the classification that were expressly stated in the legislative record, as that issue was never raised or decided in the district court.

B. Scope and Standard of Review

The Iowa Supreme Court reviews district court summary judgment rulings for correction of errors at law. *Baker v. City of*

Iowa City, 867 N.W.2d 44, 51 (Iowa 2015). The review of constitutional claims is de novo. *State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007).

Article I, section 6 of the Iowa Constitution guarantees that "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." This section has come to be known as the "equal protection clause" of the Iowa Constitution. *Qwest Corp. v. Iowa St. Bd. of Tax Review*, 829 N.W.2d 550, 557 n.4 (Iowa 2013). Like its federal counterpart, the Iowa equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *Id.* at 558 (quoting *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009)).

To prove an equal protection claim, Plaintiffs must first establish some disparate treatment of similarly situated persons. *McQuisition v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015). Stated differently, Plaintiffs must first show that the different bargaining units they seek to compare are similarly situated. Analyzing

whether classifications involve similarly situated persons, however, ultimately is intertwined with whether the identified classification has a rational basis. *See State v. Dudley*, 766 N.W.2d 606, 616 (Iowa 2009) (difficulty in this analysis "is attributable to the inescapable relationship between the threshold test and the ultimate scrutiny of the legislative basis for the classification"). Identifying the classifications' differences is thus unlikely to decide this case without also conducting the equal protection analysis.

Depending on the context, three different levels of scrutiny may apply to equal protection challenges—strict scrutiny, intermediate scrutiny, or rational basis review. *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45-46 (Iowa 2012).

Strict scrutiny applies in equal protection analysis when fundamental rights or suspect classifications are involved. *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). Public sector collective bargaining is not a fundamental right, as such a right did not exist at all until our Legislature created it. *State Bd. of Regents v. United Packing House Food & Allied*

Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970) (granting collective bargaining rights to public employees "is a matter for the legislature, not the courts"). Likewise, nothing within a distinction between Public Safety Employees and other employees, or between trade associations and labor unions, implicates a suspect classification that Iowa law recognizes. *See Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (suspect classifications involve race, alienage, or national origin); *Kelly v. State*, 525 N.W.2d 409, 411 (Iowa 1994) ("no suspect classification is involved in union membership or nonmembership").

In equal protection analysis, intermediate scrutiny applies to what have been described as "quasi-suspect" classifications "based on gender, illegitimacy, or sexual orientation." *NextEra*, 815 N.W.2d at 46. No party has been subject to a history of invidious discrimination or anything else justifying heightened intermediate scrutiny. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998); *Slifer v. Pub. Employee Relations Bd. of Kansas*, No. 90-4026-

R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992) (collective bargaining groups do "not involve . . . quasi-suspect classes" and do not trigger intermediate scrutiny).

Social and economic legislation, such as the collective bargaining provisions at issue here, are reviewed under the rational basis test. *Qwest*, 829 N.W.2d at 558; *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012). Courts properly and uniformly analyze classifications like those at issue through rational basis review. *E.g.*, *Wisconsin Educ Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013); *Vorbeck v. McNeal*, 407 F. Supp. 733, 739 (E.D. Mo. 1976) ("since as we have stated, there is no constitutional right to collective bargaining, the issue is whether the classification has a rational relation to a legitimate governmental interest."), *aff'd*, 426 U.S. 943 (1976). Plaintiffs concede the rational basis test is the proper standard of review concerning their equal protection challenge in this appeal. (Plaintiffs' Brief at 26-27.) Plaintiffs contend strict scrutiny applies to their freedom of association challenge. (*Id.* at 52.)

Rational basis review under Iowa's equal protection clause, while "not toothless," presents "a very deferential standard." *Varnum*, 763 N.W.2d at 879. Under this lowest level of scrutiny, Plaintiffs bear "the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained." *NextEra*, 815 N.W.2d at 46. Iowa courts "will not declare something unconstitutional under the rational-basis test unless it clearly, palpably, and without doubt infringes upon the constitution.'" *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (internal quotation omitted).

Equal protection requirements are satisfied "as long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *NextEra*, 815 N.W.2d at 46 (quoting *Varnum*, 763 N.W.2d

at 879 and *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI)*, 675 N.W.2d 1, 7 (Iowa 2004)).

II. Allowing units with more Public Safety Employees more bargaining rights does not violate equal protection.

A. Preservation of public safety and protection of the public fisc are proper policy reasons supporting the challenged classifications.

A classification among similarly situated persons is reasonable "if it is based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." *NextEra*, 815 N.W.2d at 46 (quoting *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000)). A classification does not violate equal protection "simply because in practice it results in some inequality; practical problems of government permit rough accommodations." *Id.*

Several valid bases exist for the classification concerning Public Safety Employees. First, the Legislature could rationally conclude Public Safety Employees filled too critical a role to risk a work

stoppage if their statutorily-created bargaining rights were curtailed. *See Wisconsin Educ. Ass'n Council*, 705 F.3d at 655. Public Safety Employees provide such essential services that, if momentarily disrupted, would cause clear and present danger to public health and safety. *See Margiotta v. Kaye*, 283 F. Supp. 2d 857, 865 (E.D.N.Y. 2003). Accordingly, the Legislature rationally could conclude this risk of labor unrest by Public Safety Employees was greater than the risk from other employees.

As the district court noted, events in Wisconsin give rise to a reasonable fear of labor unrest by public employees following enactment of the Amendments:

> [E]xperience has borne out the state's fears: in the wake of Act 10 [Wisconsin's version of H.F.291]'s proposal and passage, thousands descended on the state capital in protest and numerous teachers organized a sick-out through their unions, forcing schools to close, while the state avoided the large societal cost of immediate labor unrest among public safety employees. Wisconsin was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety unions.

Wisconsin Educ. Ass'n Council, 705 F.3d at 655; *see* Ruling at 17-18.

Further, should State employees strike, it would fall upon Public Safety Employees to enforce Chapter 20's penalties. It is rational for our Legislature to seek to avoid the creation of such a conflict for Public Safety Employees who would, in that instance, be asked to enforce penalties against fellow members of their own collective bargaining units. The Legislature rationally could seek to avoid the potential morale and related problems facing Public Safety Employees in such a situation. The Legislature "was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety units." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 655.

Moreover, the Legislature likewise was free to conclude Public Safety Employees face different and unique safety issues that create different importance for bargaining on particular topics, including health insurance. *See, e.g., Beverlin v. Bd. of Police Comm'rs of Kansas City, Mo.*, 722 F.2d 395, 396 (8th Cir. 1983) (affirming "police can constitutionally be treated differently from any other type of government employee"); *Confederation of Police v. City of Chicago*, 481 F. Supp. 566, 568 (N.D. Ill. 1980) ("There is no question

that police officers occupy a unique position in society. The functional differences between police officers and other city employees may justify different treatment for the police officers."); *March v. Rupf*, No. C00-03360WHA, 2001 WL 1112110, at *2 (N.D. Cal. Sept. 17, 2001) (finding police officers "face unique dangers in the course of their jobs").

In arguing the State acted irrationally, Plaintiffs do not argue the State may not treat Public Safety Employees differently than other employees. Instead, Plaintiffs argue virtually everyone could, sometimes, affect public safety and, thus, many more employees should be deemed Public Safety Employees. (*See* Plaintiffs' Brief at 59.) The Seventh Circuit Court of Appeals heard and rejected this argument before Iowa's Legislature acted:

> We cannot, as the Unions request, determine precisely which occupations would jeopardize public safety with a strike. Even if we accept that Wisconsin imprudently characterized motor vehicle inspectors as public safety employees or the Capitol Police as general employees, invalidating the legislation on that ground would elevate the judiciary to the impermissible role of supra-legislature. . . . Distinguishing between public safety unions and general employee unions may have been a poor choice, but it is not unconstitutional.

Wisconsin Educ. Ass'n Council, 705 F.3d at 656.

In establishing classifications, the Legislature "can rely on actual or hypothetical facts, and can attack only certain aspects of a problem without having to justify its failure to fashion a comprehensive solution." *Record Head Corp. v. Sachen*, 682 F.2d 672, 679 (7th Cir. 1982); *see Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). Indeed, one can only imagine the ensuing paralysis if the Legislature was required to address an entire issue with all of its nuances or not act at all. As the law recognizes, such a demand cannot be reconciled with how the legislative process actually works. *Id.* For example, if the Legislature later deems it too disruptive to risk labor unrest among campus police, it can revisit its decision and grant them greater bargaining rights in subsequent legislative terms. This principle has been applied to uphold the very distinctions at issue here:

> Even if we agree with the Unions that Act 10 should have placed prison guards in the public safety category, "a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

Wisconsin Educ. Ass'n Council, 705 F.3d at 656 n.11 (quoting *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969)).

In trying to overcome deference due the Legislature when exercising its constitutionally delegated functions, Plaintiffs ask this Court to ignore that it accepts under rational basis review a legislature's generalizations. *Baker*, 867 N.W.2d at 57. Instead, they parse vigorously through various job titles trying to find positions that possess *some* similarities to those deemed favored while wholly *ignoring* differences. That analysis leads Plaintiffs down a road where in their view, for example, psychiatric aides are similar to state troopers. Why? Because they both face danger in their work. That might be true, but that is not how the constitutional analysis works. By focusing solely on one issue, Plaintiffs ignore numerous differences between troopers and psychiatric aides, such as that there would be private sector psychiatric aides who could fill in if public sector psychiatric aides struck,[1] psychiatric aides would not

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[1] *E.g.*, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, Occupational Employment and Wages, May 2016, https://www.bls.gov/oes/current/oes311013.htm (App. 185-93).

be called upon to enforce the law if there was labor unrest, and it is within the Legislature's prerogative to conclude it fears labor unrest among the State's 280 state troopers more than among the State's 72 psychiatric aides. Phipps Decl. at ¶¶ 3-4 (App. 195-96). Singling out individual similarities while ignoring differences improperly asks the Court to substitute its priorities for those of the elected representatives.

The district court correctly found Iowa's classification is not arbitrary, as Public Safety Employees will reasonably be called upon to preserve public safety in the event of labor unrest after enactment of the Amendments. "If the classification has some 'reasonable basis,' it does not offend the constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County,* 473 N.W.2d 28, 31 (Iowa 1991) (quoting *U.S. R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 175 (1980)). "Defining the class of persons subject to a regulatory requirement . . . requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . [and this]

is a matter for legislative, rather than judicial, consideration." *Wisconsin Educ. Ass'n Council,* 705 F.3d at 655 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315–16 (1993)); *see State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999).

B. The classification rationally may have been considered to be true by the Legislature, and there is no requirement that legislators set forth in the legislative record all their reasons for enacting the Amendments.

Plaintiffs' attempt to incorporate arguments made in a different pending case concerning the lack of a legislative record for the strike-avoidance rationale for the classification. Plaintiffs concede the record in the present case does not support their argument. (*See* Plaintiffs' Brief at 12 n.1: "Although not directly in the record, incorporated herein are legislative facts on which the Court should take judicial notice. The entire legislative record is also incorporated in the record of the *ISEA* case which is pending before the Iowa Supreme Court.") Plaintiffs thus do not cite to anything in the

record in this case on this argument, but rather, simply cite generally to the other pending lawsuit.[2] Courts generally do not take judicial notice of records in other cases. *Cunha v. City of Algona*, 334 N.W.2d 591, 594 (Iowa 1983); *Hawkeye-Security Insurance Co. v. Ford Motor Co.*, 174 N.W.2d 672, 685 (Iowa 1970) ("We do not take judicial notice of records in another case tried in the same court.") *Bales v. Iowa State Highway Comm'n,* 86 N.W.2d 244, 248 (Iowa 1957) ("It is fairly well settled that judicial notice will not be taken of the records of the same court in a different proceeding.")

In the district court Plaintiffs never argued, as they do throughout their appeal brief, that "a proper standard is one that holds the Legislature to its articulated rationales" and "that those rationales—and only those rationales—[should be] scrutinized" to determine the constitutionality of a law. (Plaintiffs' Brief at 50.) In fact, Plaintiffs in the district court argued the opposite:

> But, in challenging H.F. 291's classifications as unconstitutional under Iowa's Equal Protection Clause, Plaintiffs neither ask nor expect the courts to require proof of

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[2] Plaintiffs repeatedly cite to evidence beyond the district court record throughout their brief. *See* Plaintiffs' Brief at 20 n.2; 20 n.3; 35 n.4; 36 n.5; 45 n.6; 45 n.7; 55 n.9.

> legislative judgments, inquire into the motivations of particular legislators in search of animus, or to prevent the legislature from testing solutions to novel legal problems.

(Plaintiffs Summary Judgment Reply Brief at 6 (internal citations omitted).) A party must ordinarily raise an issue in the district court and the district court must decide that issue before this Court may decide it on appeal. *Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 585 (Iowa 2017). The rule prevents parties "from presenting one case at trial and another on appeal." *Id.* The fact that Plaintiffs' argument is constitutional in nature "matters not to our analysis of this issue. Our rule of error preservation applies with equal strength to constitutional issues." *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997). Accordingly, the Court should not reach Plaintiffs' argument that our courts may not consider "unstated Legislative rationales" in analyzing the constitutionality of the Amendments.

Even if the Court reached this argument, the Amendments still fail rational basis review. The record to which Plaintiffs attempt to cite in the ISEA case contains very few statements by legislative proponents of the Amendments speaking on the floors of the

Iowa Senate or House. Instead, the legislative transcript in that appeal record focuses on failed amendments proposed by opponents to the Amendments. It is undisputed the legislative transcript in that appeal record does not even contain the entire legislative debate surrounding the Amendments. We know this from, among other things, numerous references to statements made by other legislators that do not appear in the transcript in the other case's appeal record.

Even if the appeal record in the ISEA case contained a complete transcript of the entire legislative debate (which it does not), and even if the entire legislative debate only contained the few statements Plaintiffs cite as supporting the Amendments, Plaintiffs' argument would still fail. The Legislature "need not articulate its reasoning at the moment a particular decision is made." *State v. Mitchell*, 757 N.W.2d 431, 437 (Iowa 2008). Courts uphold legislative classifications "based on judgments the legislature *could* have made, without requiring evidence or 'proof' in either a traditional or a nontraditional sense." *King*, 818 N.W.2d at 30 (emphasis added); *see also LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 857-

58 (Iowa 2015) (finding "alternative rational bases" based on what the Legislature "*may* have wished," "*may* have had reasonable grounds for," and "*could have* believed")(emphasis added); *Qwest Corp.*, 829 N.W.2d at 563-64 (addressing what the Legislature "*might logically* conclude")(emphasis added).

In considering whether "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker," *NextEra,* 815 N.W.2d at 46, hypothetical bases for legislation not only may, but *must*, be considered under deferential rational basis review to determine if legislation survives constitutional scrutiny. *See Fritz,* 449 U.S. at 175 (cited in *Scott County,* 473 N.W.2d at 31) ("It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."); *Beach Commc'ns, Inc.,* 508 U.S. at 315 ("[T]he absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis.").

Under Plaintiffs' theory (advanced on appeal for the first time), the State must be limited to statements in the legislative record to establish the rational basis for the Amendments. (Plaintiffs' Brief at 47-50). Under this theory, avoid being limited in rational basis review to some other legislator's explanation of that legislator's reasons in supporting legislation, presumably every legislator would have to address every aspect of every piece of legislation to have their views considered in any subsequent challenge. Fortunately for the length of legislative debates (and the Legislature's ability to get anything done), this Court has made clear Plaintiffs' view is mistaken:

> A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Baker, 867 N.W.2d at 57–58 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319–21 (1993)).

Iowa's Supreme Court always recognized it is not the State's burden to support its action, but rather the challenger's to negate every conceivable basis that could support it. *Baker*, 867 N.W.2d at 57–58; *Adams v. Fort Madison Cmty. Sch. Dist. in Lee, Des Moines & Henry Ctys.*, 182 N.W.2d 132, 139 (Iowa 1970) (same); *State ex rel. Cairy v. Iowa Co-op. Ass'n*, 95 N.W.2d 441, 443 (Iowa 1959) (same); *Dickinson v. Porter*, 35 N.W.2d 66, 71 (Iowa 1948) (same). Because no legislator is required to state the reason for his or her vote, rational basis review does *not* require the reason stated to uphold legislative action be included in the legislative debate, or that it even be the real reason for a legislator's vote—just that it be rational. *See Des Moines Metro. Area Solid Waste Agency v. City of Grimes*, 495 N.W.2d 746, 749 (Iowa 1993) ("As long as a rational basis exists for passing an ordinance, it need not be the real reason for the government's action . . . ."); *see also United States v. O'Brien,* 391 U.S. 367, 384 (1968) (noting "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (Chief Justice John Marshall, in 1810, recognizing the

principle that the judiciary may not look to legislative motivation to invalidate state statutes); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("[T]here is no way of knowing why those, who did not speak, may have supported or opposed the legislation.")

Further, as the district court correctly found, the Legislature was not writing on a blank slate. Iowa's Amendments came on the heels of virtually identical legislation in Wisconsin. Wisconsin's Act 10 resulted in the same political debate now presented to this Court. (Def. App. p. 44.) Both the risks and rewards of such action were well documented before Iowa's Legislature acted.

Indeed, before Iowa's Legislature acted, two courts accepted the rational bases for the Amendments that Plaintiffs here insist *nobody* could deem rational. *See Wisconsin Educ. Ass'n Counsel*, 705 F.3d at 640; *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014). What Plaintiffs derisively described as the district court's "conjectured rationale" was identified by a state supreme court and a federal circuit court of appeals as rational bases for the

Amendments' distinctions *before* Iowa's Legislature drew them. *See id.*

Plaintiffs ignore all these facts. Indeed, the word "Wisconsin" never appears in Plaintiffs' brief. As the district court correctly found, an Iowa legislator could look at strikes in Wisconsin, or the fact strikes occurred before enactment of Chapter 20, and conclude strikes were possible in Iowa without acting unconstitutionally irrationally. (Ruling at 14: "While the likelihood of a public sector strike following the passage of Chapter 20 may be reduced by the continued statutory prohibitions and consequences, a strike by public employees including public safety employees is conceivable. The possibility of a strike by public employees, including employees charged with the protection of the public, is a credible and rational concern.")

It is not reasonable to say Iowa's attempt to duplicate a neighboring state's experience in this instance was so irrational the Court must intervene. Numerous examples of labor unrest among law enforcement can be found and, when it occurs, the results can

be catastrophic, just as a rational Legislature could fear.[3] As the district court found, a rational Iowa legislator reasonably could seek to limit the risk of a strike by those most critical to ensuring sufficient protection of the public. Legislators were free to conclude that, even if the risk was small, the effect would be so severe as to justify its decision. (*See* Ruling at 13-16.) Plaintiffs bear the burden to negate every conceivable basis that may support the Amendments—including those courts already recognized—and it is not the

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[3] *E.g.*, Michael Cooper, *Police Picket Traffic Courts, as Pact Protests Go On* N.Y. TIMES (Jan. 29, 1997) http://www.nytimes.com/1997/01/29/nyregion/police-picket-traffic-courts-as-pact-protests-go-on.html (App. 155-57); Taylor Wofford, *550 Memphis Cop Call In Sick 'Blue Flu' Epidemic* NEWSWEEK (July 8, 2014) http://www.newsweek.com/550-memphis-cops-call-sick-blue-flu-epidemic-union-pensions-healthcare-257805 (App. 158-61) ("We are in a crisis mode."); Marty Roney & Alvin Benn, *Alabama Officers Call In Sick In 'Blue Flu' Protest* MONTGOMERY ADVERTISER (Aug. 12, 2016), https://www.policeone.com/OfficerSafety/ articles/209489006-Ala-officers-call-in-sick-in-Blue-Flu-protest/ (App. 162-63); Jean Reynolds, *Detroit and Memphis Face Police Benefit Cuts* LAW ENFORCEMENT TODAY (July 10, 2014), http://www.lawenforcementtoday.com/detroit-and-memphis-face-police-benefit-cuts/ ("Wharton also expressed concern about the safety of residents") (App. 165-68); *Selma Cops Get "Blue Flu," Call In Sick To Protest Unsafe Conditions And Low Pay* BLUE LIVES MATTER (Aug. 15, 2016) https://bluelivesmatter.blue/selma-alabama-blue-flu/ (App. 169-71); *Blue Flu* AMERICAN POLICE BEAT (Feb. 22, 2016) https://apbweb.com/east-orange-police-officers-call-out-sick-amid-contract-dispute/ (App. 172).

State's burden, or Court's role, to delve into each legislator's thought process. *See Baker*, 867 N.W.2d at 57–58 ("[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness or logic of legislative choices.") (quoting *Heller*, 509 U.S. at 319–21).

C. The Legislature had a rational basis to set the threshold for determining whether a bargaining unit has sufficient Public Safety Employees at thirty percent.

The district court also correctly upheld the Legislature's thirty-percent threshold for determining whether a bargaining unit has enough Public Safety Employees. It is perfectly rational to conclude the risk from labor unrest is materially greater in a unit with a larger percentage of Public Safety Employees. *See Harwell v. Leech*, 672 S.W.2d 761, 764 (Tenn. 1984) (upholding legislation prohibiting sale of fireworks in larger county because "[t]he likelihood of injury resulting from the use or misuse of fireworks is greater in a thickly populated county than in a county with a small population"). A unit containing a small percentage of Public Safety Employees simply does not present the same risk as a unit containing

a large percentage, or at least the Legislature could properly so conclude.

The fiscal interests of the government are routinely accepted as a rational basis for legislative cost-saving measures for the public. *See Adams v. Fort Madison Community School Dist. in Lee, Des Moines and Henry Counties*, 182 N.W.2d 132, 141 (Iowa 1970); *see also Zaber v. City of Dubuque*, 789 N.W.2d 634, 645-46 (Iowa 2010) (identifying "protection of the public fisc" as a rational legislative purpose). The State has a compelling interest in seeing that government is maintained in healthy financial condition. *Id.*

Plaintiffs argue creating the thirty-percent threshold was unnecessary and only served to produce unlawful classifications. To the contrary, the line lawfully addresses competing objectives—preservation of public safety, and protection of the public fisc—which the Legislature reasonably sought to balance in the Amendments.

The Legislature rationally held two goals in mind when setting the thirty-percent threshold: seeking to limit the number of

public employees eligible for expanded bargaining rights, while ensuring sufficient numbers of Public Safety Employees to preserve public safety in the event of labor unrest. Providing enhanced bargaining rights for units with thirty percent or more Public Safety Employees reasonably provided the Legislature greater assurance that in the event of labor unrest the State would have, while not every law-enforcement employee available to preserve public safety, certainly a critical mass of public safety personnel available. It is rational for a legislator to have believed, with the thirty percent threshold, the risk to public safety was sufficiently alleviated.

Plaintiffs' argue the Legislature could have mandated enhanced bargaining rights for all Public Safety Employees regardless of the percentage of Public Safety Employees in their units. In other words, Plaintiffs contend the Legislature should have required the State to engage in differentiated bargaining within the same unit for those with expanded rights, and those without.

But the potential inter-unit differences in bargaining rights would not involve, as Plaintiffs imply, a simple difference on a lim-

ited issue or two. To the contrary, the Amendments require bargaining on topics for Public Safety Employees that are quantitatively different in scope than those for other employees. Plaintiffs' argument thus ignores the increased complexity of inter-unit negotiating between the State and Public Safety Employees, and the State and non-Public Safety Employees. The Legislature rationally could have sought to avoid such a process as too burdensome, too unwieldy, and too expensive for the State. Moreover, such inter-unit bargaining does not address the conflict and morale issues arising from Public Safety Employees enforcing Chapter 20's penalties against fellow members of their own units who do not receive the same bargaining rights and thus would be more likely to strike.

Although Plaintiffs do not argue a different percentage (other than zero percent) should have been used instead of thirty percent, the Legislature rationally could believe thirty percent struck the proper balance. Such line drawing is well within the auspices of legislative determination. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) ("Iowa's tripartite system of government requires

the legislature to make difficult policy choices, including distributing benefits and burdens amongst the citizens of Iowa. . . . [D]eference to legislative policy-making is primarily manifested in the level of scrutiny we apply to review legislative action."); *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 263 (Iowa 2007) ("The court's power to declare a statute unconstitutional is tempered by the court's respect for the legislative process."); *State v. Drake*, 219 N.W.2d 492, 496 (Iowa 1974) ("Sound reasons might be advanced for either side of this argument. However, determining the line which separates what is criminal from what is not lies peculiarly within the sphere of legislative discretion. . . ."); *State v. Darling*, 246 N.W. 390, 391–92 (Iowa 1933) ("[T]his court will not set aside a statute [as unconstitutional] unless the invalidity is clear and practically beyond doubt. This is a concession due to the co-ordinate branch of the government, and has always been recognized and followed by this court.")

The Legislature's line-drawing need not, and cannot, be perfect. "The fit between the means and the end can be far from perfect

so long as the relationship is not so attenuated as to render the distinction arbitrary or irrational." *Qwest Corp.*, 829 N.W.2d at 558 (internal quotation omitted); *see Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) ("Perfection in making the necessary classifications is neither possible nor necessary."). There is nothing inherently irrational about the Legislature's choice of the thirty percent threshold.

III. Strict scrutiny does not apply to Plaintiffs' claims, as no fundamental right is at issue because Plaintiffs had, and retain, all the rights the First Amendment protects.

Plaintiffs presumably do not emphasize their claim that a fundamental right is implicated because the argument has been rejected frequently and forcefully. "The right to public employment is not a fundamental right." *Bennett v. City of Redfield*, 446 N.W.2d 467, 473 (Iowa 1989). Likewise, public sector collective bargaining is not a fundamental right. *State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 113 (Iowa 1970) (granting collective bargaining rights to public employees "is a matter for the legislature, not the courts."). "Mandatory

collective bargaining is not a fundamental right, and public employees do not constitute a suspect class. Rather, the classification of public employees in the area of mandatory collective bargaining is purely an economic matter subject to the rational basis standard of review." *Slifer v. Pub. Employee Relations Bd. of Kansas*, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992); *see Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 127 (1999); *Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014).

Plaintiffs thus retreat to arguing that the limitations on collective bargaining under the Amendments unconstitutionally impinge freedom of association. This argument, too, is routinely rejected. The reason is simple: There is a fundamental distinction between the right to associate and whether someone must listen when you do. Declining to collectively bargain over certain topics does not inhibit the ability to associate. The Fourth Circuit Court of Appeals made this clear in a statement equally applicable here: "This legislation does not prohibit, regulate, or restrict the right of the [union]

or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities, or to affiliate or cooperate with other groups." *Campbell*, 883 F.2d at 1256.

Under the Amendments, Plaintiffs retain the right to associate with a union. What is different, and what Plaintiffs are really complaining about, is they no longer have the privilege of *forcing* the State to negotiate over certain topics. That distinction—between the right to associate and the absence of a right to compel bargaining—is the beginning and end of the analysis. No court has held public employees have a fundamental right to force a state to bargain on specific issues. Several courts have squarely rejected that argument. *See Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979) ("[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it."); *Campbell*, 883 F.2d at 1257; *Arkansas State Highway Employees, Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980)

("while a public employer may not constitutionally prohibit its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas, the First Amendment does not impose any duty on a public employer . . . even to recognize a union.").

Plaintiffs claim this case is somehow different because AFSCME is more disadvantaged than other unions. But that argument fails factually and, more importantly, legally. Obviously, units in other unions likewise face bargaining limitations, as evidenced by the previously referenced pending appeal by teachers' unions challenging the Amendments. Moreover, Public Safety Employees retain the option to organize and bargain through AFSCME, as the law applies to types of employees regardless of their union choice.

Even ignoring these facts, however, granting a right to one entity and not another does not transform a *non*-fundamental right into a fundamental one. Again, the U.S. Supreme Court and multiple other courts tell us so:

> The Court of Appeals also held that the differential access provided the rival unions constituted impermissible

> content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. As we have explained above, PLEA did not have a First Amendment or other right of access to the interschool mail system. The grant of such access to PEA, therefore, does not burden a fundamental right of the PLEA. Thus, the decision to grant such privileges to the PEA need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983); *see Campbell*, 883 F.2d at 1263 (finding strict scrutiny inappropriate because granting right to one labor organization (SEA), deemed not controversial, and not another (SCEA), deemed more controversial, did not transform a non-fundamental right into a fundamental one); *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (holding same); *Afro-American Police League v. Fraternal Order of Police, Chicago Lodge No. 7*, 553 F.Supp. 664, 670 (N.D. Ill. 1982) (holding same). Even if Plaintiffs were correct that AFSCME alone lost something (and they are not), a non-fundamental right does not somehow become fundamental because others enjoy it. *Id.*

Plaintiffs in their brief vacillate between incongruous claims their constitutional rights have been invaded by intentional targeting, on the one hand, or by "incidental, yet unintended, infringement," on the other. (Plaintiffs' Brief at 52-55.) Concerning the "incidental" infringement argument, Plaintiffs did not raise this argument in the district court, and the district court's ruling obviously does not address it. *See Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 585 (Iowa 2017) (issue must be raised and decided in district court before appellate court may decide it).

In any event, in making these arguments, Plaintiffs' ignore AFSCME is the largest public employee union in the state and, whenever any significant change is made to collective bargaining for public employees, AFSCME unavoidably will be impacted. There is a distinct difference between nearly unavoidable impact, however, and unconstitutional targeting. Plaintiffs in their own petition concede AFSCME represents both Public Safety Employees and other public employees. (Amended Petition ¶ 23.) Employees associated with AFSCME are just as able to bargain with the State

on all the subjects available under the Amendments as employees associated with any other union. Nothing in the Amendments facially disadvantages AFSCME any more or less than any other union. The Iowa State Education Association's lawsuit filed regarding the same amendment belies AFSCME's suggestion that AFSCME has been "red circled" to bear alone the consequences of the Legislature's action.

Plaintiffs' invite the Court to speculate, without citation to any evidence, that the Legislature bore some undisclosed animus toward AFSCME in passing the Amendments. Under rational basis review, however, courts cannot search for the legislature's motive. *Munn v. Indep. Sch. Dist. of Jefferson*, 176 N.W. 811, 817 (Iowa 1920) ("This is a question which in no manner affects the merits of the case. The enactment of the statute was clearly within the power of the General Assembly, and the motives of the legislators and the reasons or arguments leading them to such action are not a matter into which we can properly inquire."); *O'Brien*, 391 U.S. at 383 ("It is a familiar principle of constitutional law that this Court will not

strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

Stated differently, even if Plaintiffs had some evidence of animus against them, it would not matter, as "animus only invalidates a law when no rational basis exists." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 654 (citing *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 546 (7th Cir. 2008) (holding "[a]nimus comes into play only when [there is] no rational reason or motive . . . for the injurious action taken by the [legislature]"). The Amendments are not subject to a strict scrutiny test, and Plaintiffs' insinuations about animus by the Legislature have no impact on the validity of the Amendments in this case.

CONCLUSION

The Amendments are presumed constitutional. The Legislature's action does not present the "clearly, palpably, and without a doubt" case of infringement of a constitutional right necessary to strike down a law. Plaintiffs cannot meet their burden to negate every reasonable basis for the challenged classifications. The Leg-

islature acted within its constitutional authority in passing amendments rationally directed to achieve greater fairness for Iowa taxpayers and financial flexibility for local governments, schools, and state government, while maintaining public safety in the event of widespread labor unrest. Accordingly, the district court order dismissing the action should be affirmed.

REQUEST FOR ORAL ARGUMENT

The State respectfully requests to be heard orally upon the submission of this appeal.

BELIN McCORMICK, P.C.

By: Matthew C. McDermott

Michael R. Reck, AT0006573
Matthew C. McDermott, AT0005085
Kelsey J. Knowles, AT0004233
Espnola F. Cartmill, AT0010237

666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
E-Mail: mrreck@belinmccormick.com;
mmcdermott@belinmccormick.com;
kjknowles@belinmccormick.com;
efcartmill@belinmccormick.com

ATTORNEYS FOR DEFENDANTS/
APPELLEES STATE OF IOWA and
IOWA PUBLIC EMPLOYMENT
RELATIONS BOARD

PROOF OF SERVICE

I hereby certify that on the 22nd day of May, 2018, I electronically filed the foregoing Appellees' Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

Mark T. Hedberg
Sarah M. Baumgartner
Hedberg & Boulton, P.C.
100 Court Avenue, Suite 425
Des Moines, IA 50309
mark@hedberglaw.com
sarah@hedberglaw.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,170 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

Dated: May 22, 2018

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