IN THE SUPREME COURT OF IOWA

NO. 18-0505

UNITED ELECTRICAL, RADIO, & MACHINE WORKERS OF AMERICA,
Petitioner-Appellant,
v.
IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent-Appellee,
and
STATE OF IOWA and IOWA BOARD OF REGENTS,
Intervenors.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE DOUGLAS F. STASKAL, JUDGE
POLK COUNTY NO. CVCV054946

INTERVENORS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE AND FILING

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Statutes and Rules

ROUTING STATEMENT

Because this case presents substantial questions of first impression, it should be retained by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of an Iowa Code § 17A.19 Ruling on a Petition for Judicial Review. By Iowa statute, the only mandatory subjects of bargaining for non-public safety state employees are "base wages." This case involves application of the statutory term "base wages."

Course of Proceedings

In a Petition for Declaratory Order, Petitioner-Appellant United Electrical, Radio, & Machine Workers of America (UE) asked Respondent-Appellee Iowa Public Employment Relations Board (PERB) to declare whether certain proposals are mandatory, permissive, or prohibited subjects of bargaining. UE also presented a fifth issue, which was a question of arbitrator authority. PERB held that Proposals 1 (subparagraphs C-G), 3, and 4 are permissive subjects of bargaining, and also ruled on the question

of arbitrator authority.[1] In a Petition for Judicial Review (as amended), UE then asked the district court to overturn PERB's decision and hold that the proposals declared permissive are mandatory subjects of bargaining. The district court affirmed PERB's decision.

Now back for a third try, UE is seeking to overturn these two previous rulings interpreting the statutory term "base wages." UE is attempting to bootstrap numerous other subjects into the term as factors in determining "base wages," and under its reasoning, any term or condition of employment affecting a base wage would be mandatorily negotiable. That interpretation is not consistent with the statutory directive that "base wages" shall be interpreted narrowly and restrictively.

Statement of Facts

Intervenors have no supplement to Petitioner-Appellant's and Respondent-Appellee's Statements of Facts.

[1]PERB did not rule on Proposal 2 due to insufficient facts. Amended Appendix ("Am. App.") 30. That determination is not at issue in this appeal.

ARGUMENT

I. THE COURT SHOULD AFFIRM THAT THE PROPOSALS AT ISSUE ARE PERMISSIVE SUBJECTS OF BARGAINING.

A. Standard of Review and Preservation of Error

UE correctly states that the applicable standard of review is for correction of errors at law. *See* Petitioner-Appellant's Br. at 16. When the Legislature has clearly vested an agency with interpretive authority, the courts will reverse the agency's ruling only when its interpretation of a statutory provision is "irrational, illogical, or wholly unjustifiable." *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 886 (Iowa 2017) (quotation and citation omitted). If the Legislature has not clearly vested the agency with interpretive authority, the courts review questions of statutory interpretation for correction of errors at law. *Id.* (citations omitted).

At issue is PERB's interpretation of the Iowa Public Employment Relations Act (PERA), Iowa Code Chapter 20. Under current law, PERB's role is to "administer" the provisions of the chapter. Iowa Code § 20.6(1). Review for correction of errors at law is therefore appropriate under *Waterloo Education Association v. Iowa Public Employment Relations*, 740 N.W.2d 418, 420 (Iowa 2007) (citations omitted) ("*Waterloo II*"). Nevertheless, while the Court must make an independent determination as to the meaning of a particular statutory provision, it may also give weight to

the agency's interpretation if that interpretation does not make law or change the legal meaning of the statute. *See West Des Moines Educ. Ass'n v. Pub. Emp't Relations Bd.*, 266 N.W.2d 118, 125 (Iowa 1978).

UE has the burden of demonstrating that PERB's decision is invalid. "The burden of demonstrating . . . the invalidity of agency action is on the party asserting invalidity." *Bd. of Regents v. Iowa Pub. Emp't Relations Bd.*, 861 N.W.2d 268, 271 (Iowa Ct. App. 2014) (quoting Iowa Code § 17A.19(8)(a)).

Error was preserved.

B. Application of the Plain Language of Iowa Code Section 20.9 Indicates that the Proposals are Permissive Subjects of Bargaining.

As summarized by the district court, the proposals at issue in this appeal are as follows:

1. Pay of $50,000.00 for each employee:

   A. per year;
   B. paid in bi-monthly payments on the 1st and 15th of each month;
   C. for working 8 hours a day, 40 hours per week;
   D. with nine (9) holidays;
   E. three (3) weeks' paid vacation;
   F. ten (10) days paid sick leave; and
   G. time-and-a-half pay for hours worked over 40 hours in a single week.

2. An annual base wage of $55,000.00 with a one-hour lunch break and two fifteen minute breaks for employees whose work shift is from 11:00 p.m. to 7:00 a.m.

3. Increased pay based on years of service.

Amended Appendix ("Am. App.") 124.

Regarding the pay of $50,000 for each employee, PERB correctly determined that subparagraphs A and B above are mandatory, and subparagraphs C-G are permissive subjects of collective bargaining. Am. App. 25-29. The district court affirmed. Am. App. 126-127.

Iowa Code § 20.9 currently states, in relevant part:

> For negotiations regarding a bargaining unit that does not have at least thirty percent of members who are public safety employees, the public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employer's budget-making process, to negotiate in good faith with respect to base wages and other matters mutually agreed upon. Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession. Mandatory subjects of negotiation specified in this subsection shall be interpreted narrowly and restrictively.

Iowa Code § 20.9(1) (emphases added). The Legislature chose to use the more limited term "base wages" instead of wages. Courts must look to what the Legislature said, not what it should or might have said. *See* Petitioner-Appellant's Br. at 28-29 (quoting *Johnson v. Johnson*, 564 N.W.2d 414, 417 (Iowa 1997)).

First, "base wages" is a narrower category of "wages":

> Without question, base wages is an entirely new topic of bargaining in the context of Chapter 20 and was not defined by the legislature in House File 291. Given this context, the phrase "base" used by the legislature as a modifier of "wages" when it restricted the mandatory topics of bargaining applicable to non-public safety bargaining units should be given its common and ordinary meaning. See State v. White, 545 N.W.2d 552, 555 (Iowa 1996). In order to determine this meaning, it is appropriate to consider the dictionary definition of the modifier "base." See Waterloo II, 740 N.W.2d at 430 ("to determine the common and ordinary meaning of words, we have often consulted widely used dictionaries"); Kidd, 562 N.W.2d at 765 (Iowa 1997) ("The dictionary provides a ready source for ascertaining the common and ordinary meaning of a word."; referring to dictionary definition of the word "an"). See also Hearn, 797 N.W.2d at 583 (considering definition of "pursuer"); State v. Romeo, 542 N.W.2d 543, 548 (Iowa 1996) (referring to dictionary definition of the word "falsifies"). In the *American Heritage Dictionary of the English Language*, base is defined as: "Situated at or near the base or bottom: *a base camp for the mountain climbers.*" American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=base, last accessed on April 11, 2017. Similarly, the *Merriam-Webster Dictionary* defines base as "the starting point or line for an action or undertaking." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/base, last accessed on April 11, 2017.

Br. in Supp. of Pet. for Expedited Resolution of Negotiability Dispute, *In re Oskaloosa Cmty. Sch. Dist.*, Case No. 100823, at 6 (IA PERB April 13, 2017). "Base" is used as a modifier, and must be given effect and not rendered inoperative or superfluous, void or insignificant. *See id.* at 6-7, 4, 5; *Miller v. Marshall Cnty.*, 641 N.W.2d 742, 749 (Iowa 2002) ("Each term

is to be given effect, so that no single part is rendered insignificant or superfluous." (citation omitted)); *see also Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 427 (Iowa 2010) (interpretation should avoid absurd results and remain consistent with act's purpose and policies (citation omitted)).

Second, in addition to using the term "base wages," the Legislature did not include the expansive National Labor Relations Act language "other terms and conditions of employment." *See Waterloo II*, 740 N.W.2d at 421. Because the PERA does not include the phrase "other terms and conditions of employment," the Iowa Supreme Court has held that "if a proposal does not fall within one of the laundry list of terms contained in section 20.9, it is not a subject of mandatory bargaining." *Id.* at 425 (citations omitted). The laundry list in section 20.9 is now limited to "base wages."

Third, in case the language was not already clear enough, the Legislature explicitly stated: "Mandatory subjects of negotiation specified in this subsection shall be interpreted narrowly and restrictively." Iowa Code § 20.9(1). Under the required narrow and restrictive reading for mandatory subjects of negotiation, terms and conditions of employment such as hours worked, holidays, vacation, sick leave, and time and a half are not "base wages." If the Iowa Legislature had meant to include these items, it could

have said so. They are not listed in the statute, and would instead fall under "and other matters mutually agreed upon." Therefore, they are permissive subjects of bargaining. "Permissive subjects are those that the legislature did not specifically list in section 20.9, but are matters upon which both the public employer and the employee organization simply agree to bargain." *Waterloo II*, 740 N.W.2d at 421 (citation omitted).

A comparison to the mandatory topics of negotiation applicable to public safety bargaining units is helpful. While eliminating all of the mandatory topics applicable to non-public safety bargaining units except for "base wages," the Legislature left a wide scope of mandatory topics applicable to bargaining units with at least thirty percent of members who are public safety employees. Those include "wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, [and] grievance procedures for resolving any questions arising under the agreement[.]" Iowa Code § 20.9(1). Further, the Legislature designated prohibited topics specifically with respect to non-public safety bargaining units: "insurance, leaves of absence for political activities, supplemental pay, transfer procedures,

evaluation procedures, procedures for staff reduction, and subcontracting public services shall also be excluded from the scope of negotiations." Iowa Code § 20.9(3). In other words, the category of "wages" applicable to public safety bargaining units still exists – but the language suggests it now includes two distinct wage categories applicable to non-public safety bargaining units: "base wages" (mandatory) and "other wages" (permissive). Br. in Supp. of Pet. for Expedited Resolution of Negotiability Dispute, *In re Oskaloosa Cmty. Sch. Dist*., Case No. 100823, at 5 (IA PERB April 13, 2017).

UE argues that meaningful negotiation on base wages is not possible unless the proposal sets forth the amount of work to be done for the wage requested. These considerations cannot override the plain language of the statute. Furthermore, PERB's Declaratory Order discussed the provision of such information:

> This does not mean that an employee organization is required to bargain base wages in a vacuum, completely unaware of the extent of the work which is to be required of employees in exchange for their base wages. PERB has long held that the duty to bargain in good faith carries with it an obligation on the employer's part to supply the certified employee organization with information which may be relevant to bargaining. This principle has been accepted by our Supreme Court in *Greater Cmty. Hospital v. PERB*, 553 N.W.2d 869, 871 (Iowa 1996). We think the duty to bargain in good faith requires that an employer presented with proposals which are premised on the existence of certain conditions of employment has an

> affirmative obligation to inform the employee organization if the premises of its proposal are not accurate, just as is the case when the issue is what job classifications the employer will establish or maintain.

Am. App. 28. That concept was reiterated in *In re Greene County Community School District*, Case No. 100828, 2017 WL 3588058, at *6 (IA PERB Aug. 16, 2017).

As the district court explained on its judicial review:

> There is no error in PERB's analysis. There is also no error in PERB's application of what it concluded is the definition of "base wages" to the UE's proposals. All but the first two items of proposal 1 involve either non-wage matters or a category of "wages" that is beyond "base wages", such as higher pay for longevity and working a night shift. As PERB correctly noted, if the UE's argument were accepted, the terms "base wage" and "wage" would have co-extensive meaning. This would be contrary to both the plain meaning of the words used and the statutory mandate that the term be interpreted "narrowly and restrictively."
>
> The court acknowledges, as did PERB, that the changes to chapter 20 applicable to non-public safety employees have drastically curtailed the pre-existing collective bargaining rights for such employees. As the UE points out, its bargaining rights have been so limited that it can only force bargaining for the relatively few new employees coming in at a "base wage." Whether this is good or bad policy, or whether it is even what the legislature really intended, is not a proper subject matter for the court or PERB. The court (and PERB) are bound to enforce the literal meaning of the words of legislative enactments. Here, PERB made no error in doing so.

Am. App. 126.

Regarding the employees whose work shift is from 11:00 p.m. to 7:00 a.m.,[2] PERB correctly determined that this proposal is permissive. Am. App. 32. The district court affirmed. Am. App. 126-127. PERB and the district court determined that a proposal to pay employees of the same job classification a higher pay rate for working the overnight shift, with a one-hour lunch break and two fifteen-minute breaks, is a permissive subject of bargaining. This conclusion is consistent with PERB's definition of "base wages" as meaning the minimum (bottom) pay for a job classification, category or title, exclusive of additional pay such as bonuses, premium pay, merit pay, performance pay or longevity pay. *See In re Columbus Cmty. Sch. Dist.*, Case No. 100820, 2017 WL 2212060, at *3 (IA PERB May 17, 2017). The employees who are paid more for the overnight shift receive a "shift differential" which is a form of additional pay, not included within an employee's base wage.

[2]At oral argument before PERB, UE clarified that all of the employees in this group are employed in the same job classification, and that other employees working different schedules are also employed in that same job classification, although at a different base wage than that specified in the proposal. Am. App. 31-32.

Regarding increased pay based on years of service,[3] PERB correctly held that "if an employer agrees or unilaterally determines that a classification or classifications are to exist, the minimum salary for each (*i.e.*, the "Year 1" step) is mandatorily negotiable. The remainder of the proposal is a permissive subject of bargaining." Am. App. 31. The district court affirmed. Am. App. 126-127. In other words, it is only mandatory to bargain on the first step in each job classification, and the remaining steps are permissive subjects of bargaining.

Under a narrow and restrictive reading of "mandatory," only the first step in each job classification constitutes "base wages." PERB defined the new section 20.9 bargaining subject of "base wages" as "the minimum (bottom) pay for a job classification, category or title, exclusive of additional pay such as bonuses, premium pay, merit pay, performance pay or longevity pay." *In re Columbus Cmty. Sch. Dist.*, 2017 WL 2212060, at *3; *see also* Am. App. 24 (citing *Columbus* and continuing to subscribe to that definition).

The Court should reject UE's argument that every single step in a job classification should be considered a "base wage." As expressed by PERB

[3]At oral argument before PERB, UE clarified that its reference to the employee organization representing employees in four different "pay grades" actually refers to four different job classifications. Am. App. 30.

on the same day as *Columbus*: "Such longevity pay, although within the scope of the permissive subject of 'wages,' does not fall within the meaning of the narrower mandatory topic of 'base wages' as we have defined it. These provisions are accordingly permissive subjects of bargaining." *In re Oskaloosa Cmty. Sch. Dist.*, Case No. 100823, 2017 WL 2212061, at *3 (IA PERB May 17, 2017).

When the *Oskaloosa* PERB decision cited above was reviewed by the district court, the court reached a decision similar to the district court here, affirming PERB's decision that involved interpretation of the same key term of "base wages." *Oskaloosa Educ. Ass'n v. Iowa Pub. Emp't Relations Bd.*, 2018 WL 659020 (Iowa Dist. Ct. Jan. 26, 2018).

II. THE COURT SHOULD AFFIRM THE STATEMENT OF ARBITRATOR'S AUTHORITY.

A. Standard of Review and Preservation of Error

UE correctly states that the applicable standard of review is for correction of errors at law. *See* Petitioner-Appellant's Br. at 37. Error was preserved.

B. Harmonizing the Statutes Indicates that an Arbitrator May Consider the Existing but Expiring Collective Bargaining Agreement.

PERB correctly determined that an arbitrator may look to the existing collective bargaining agreement to determine the existing base wages. Am.

App. 38. The district court affirmed. Am. App. 127. The Court should affirm the statement of the arbitrator's authority.

Iowa Code § 20.22(8)(b)(1) provides that "[p]ast collective bargaining agreements between the parties or bargaining that led to such agreements" shall not be a factor considered by the arbitrator. However, that statute would not negate other statutory requirements, namely that any increase awarded conform to Iowa Code § 20.22(10). *See* Iowa Code § 20.22(10)(b)(1) (prohibiting an arbitrator from selecting a proposal that represents an increase in each year of a collective bargaining agreement that is greater than the lesser of three percent or consumer pricing index for urban consumers in the midwest region). To the extent UE's proposal assumes an award could violate § 20.22(10), Intervenors disagree with such an assumption. The statutes may be harmonized, and an arbitrator may consider the existing but expiring collective bargaining agreement.

CONCLUSION

This Court should affirm the decision that the proposals at issue are permissive, and should also affirm on the question of arbitrator authority.

REQUEST FOR ORAL ARGUMENT

Intervenors respectfully request oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,044 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 Microsoft Word in Times New Roman font, size 14.

/s/ AUDRA DRISH
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Paralegal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DICKTEN MASCH PLASTICS, LLC, Plaintiff, vs. ANGELA WILLIAMS, in her official capacity as an Iowa Civil Rights Commissioner, PATRICIA LIPSKI, in her official capacity as an Iowa Civil Rights Commissioner, MATHEW HOSFORD, in his official capacity as an Iowa Civil Rights Commissioner, TOM CONLEY, in his official capacity as an Iowa Civil Rights Commissioner, DOUGLAS OELSCHLAEGER, in his official capacity as an Iowa Civil Rights Commissioner, LILY LIJUN HOU, in her official capacity as an Iowa Civil Rights Commissioner, LAWRENCE CUNNINGHAM, in his official capacity as an Iowa Civil Rights Commissioner, and William E. Cooper, Jr., Defendants.	Case No. 4:16-cv-00104-JEG-HCA **STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

COME NOW Defendants Angela Williams, in her official capacity as an Iowa Civil Rights Commissioner; Patricia Lipski, in her official capacity as an Iowa Civil Rights Commissioner; Mathew Hosford, in his official capacity as an Iowa Civil Rights Commissioner; Tom Conley, in his official capacity as an Iowa Civil Rights Commissioner; Douglas Oelschlaeger, in his official capacity as an Iowa Civil Rights Commissioner; Lily Lijun Hou, in her official capacity as an Iowa Civil Rights Commissioner; and Lawrence Cunningham, in his

official capacity as an Iowa Civil Rights Commissioner (collectively the "State Defendants" or "Commissioners"), and submit this Reply in support of their Motion to Dismiss.

The Iowa Civil Rights Commission (ICRC) is charged with investigating a range of alleged discriminatory practices under Iowa Code Chapter 216. In this case, however, Plaintiff is asking this Court to cut off an ICRC investigation based on Plaintiff's own interpretation of a pro se complainant's administrative complaint. The Court should dismiss or abstain.

I. The Court Lacks Federal Subject Matter Jurisdiction, and Plaintiff Fails to State a Claim, as Against the State Defendants.

Plaintiff states that it is bringing its claims under 29 U.S.C. § 1132(a)(3) and is "seeking to enjoin a violation of § 1132(e) and not § 1144." ECF No. 28, Pl.'s Resistance at 2-3.[1] The State Defendants had generously read Plaintiff's Amended Complaint as attempting to bring a § 1132(a)(3) claim based on an alleged violation of § 1144 because they question whether there is such a thing as a "violation" of § 1132(e). Plaintiff nevertheless insists that § 1132(e) is the sole alleged "violation" here, remarkably, without a citation to any case which has held that a party "violated" § 1132(e). It is Plaintiff's burden to establish subject matter jurisdiction, not the State Defendants' burden to negate the existence of a § 1132(e) violation. *See Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012) (quotation omitted).

Defendant William E. Cooper, Jr. has not yet filed a "civil action," so the Commissioners cannot be violating § 1132(e). If Cooper had filed a civil action, the Anti-Injunction Act would prevent this Court from halting the state court action. *See* 28 U.S.C. § 2283. In *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, the plaintiffs argued that a state court contract action violated the exclusive jurisdiction provision in § 1132(e)(1), such that

[1]Plaintiff alternatively argues that the Court would have jurisdiction of the request for declaratory relief under the "mirror image" rule. *See* Pl.'s Resistance at 5. As the State Defendants argued, Plaintiff does not have a § 1140 claim against them. *See* ECF No. 20-1, State Defs.' Br. in Supp. of Mot. to Dismiss at 4-5.

§ 1132(a)(3) authorized an injunction against the state court action. 968 F.2d 401, 409-10 (3d Cir. 1992) (holding that § 1132(a)(3) does not expressly authorize injunctions of state court actions simply because they are preempted by ERISA, even if the state court claims are subject to exclusive federal jurisdiction). The court noted: "As an initial matter, the Fifth Circuit has questioned whether a state court suit truly 'violates' 29 U.S.C. § 1132(e)(1), as the verb is used in 29 U.S.C. § 1132(a)(3). . . . We will assume, however, that *Nobers II* 'violates' the supersedure and exclusive jurisdiction provisions of ERISA." *Id.* at n.8 (citing *Total Plan Servs. v. Tex. Retailers Ass'n*, 925 F.2d 142, 144 (5th Cir. 1991)).

Plaintiff also has not established standing. Plaintiff argues that "the Commissioners' improper exercise of jurisdiction over Cooper's ERISA claim" has injured and threatened further injury to Plaintiff. Pl.'s Resistance at 7. Plaintiff's underlying assumption is that Cooper alleges only a § 1140 ERISA claim. The State Defendants disagree with that assumption. It is not for Plaintiff to decide based on its own reading of the administrative complaint, and at the very least, the determination as to whether Cooper alleges a disability discrimination claim or an ERISA claim (or both) cannot be made until the ICRC conducts its investigation.

II. The Court Should Abstain Pursuant to the *Younger* Abstention Doctrine.

Plaintiff again assumes that "as a matter of law Cooper has not alleged a claim of disability discrimination." *Id.* at 10. Plaintiff argues that the State of Iowa has no interest in enforcing ERISA rights through ICRC proceedings, *see id.*, but the State clearly has an interest in eradicating discrimination in the workplace. *See Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 196 (1st Cir. 2015) (citation omitted). Cooper was asked a specific question and gave a specific answer: "Do you believe you were discriminated against because of a disability, real or perceived?" Answer: "yes." ECF No. 12-2, Pl.'s Exh. B, Question 12. Cooper's administrative

complaint and amendment must be construed as alleging disability discrimination, at least in part. He is pro se and filing an administrative complaint, not a state court petition.

Plaintiff also resists *Younger* abstention based on the exception for a "facially conclusive claim of preemption." Pl.'s Resistance at 12-15. The United States Court of Appeals for the Eighth Circuit has declined to rule on such an exception. *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002). A court in the Southern District of Iowa addressed whether there is a facially conclusive case for preemption for the purpose of deciding whether to abstain under *Younger*, and noted that "even a 'facially conclusive' case for preemption does not necessarily defeat an otherwise valid abstention claim in the Eighth Circuit." *OCMC, Inc. v. Norris*, 428 F. Supp. 2d 930, 935 & n.2 (S.D. Iowa 2006) (citations omitted).

III. The Court May Decide *Younger* Abstention Before Jurisdiction.

Although the State Defendants styled their motion as one to dismiss pursuant to Rule 12(b)(1), and in the alternative, Rule 12(b)(6) and *Younger* abstention, subject matter jurisdiction need not be the threshold inquiry here. This Court may decide *Younger* abstention first, if it finds that route more expedient than subject matter jurisdiction and Article III standing. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 431 (2007) ("Nor must a federal court decide whether the parties present an Article III case or controversy before abstaining under *Younger v. Harris*." (citation omitted)); *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1248 (8th Cir. 2012) (citations omitted).

CONCLUSION

WHEREFORE, the State Defendants respectfully request that the Court grant their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or *Younger* abstention, and in the alternative, pursuant to Rule 12(b)(6).

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on June 13, 2016.

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X Electronically

Signature: /s/ Molly M. Weber

United States Court of Appeals
For the Eighth Circuit

No. 12-3425

Linda Williamson,
on behalf of herself and all others similarly situated

Plaintiff - Appellant

v.

Hartford Life and Accident Insurance Company

Defendant - Appellee

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: April 9, 2013
Filed: June 19, 2013
[Published]

Before COLLOTON and SHEPHERD, Circuit Judges, and ROSE,[1] District Judge.

ROSE, District Judge.

Plaintiff-Appellant Linda Williamson ("Williamson") filed this action on behalf of herself and all others similarly situated, seeking interest on benefits she

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[1]The Honorable Stephanie M. Rose, United States District Judge for the Southern District of Iowa, sitting by designation.

received under an Accidental Death and Dismemberment ("ADD") insurance policy issued by Defendant-Appellee Hartford Life and Accident Insurance Company ("Hartford"). The parties filed cross-motions for summary judgment, and the district court[2] reached a decision on the merits before ruling on whether to certify the class. The district court granted Hartford's motion and denied Williamson's motion. The district court determined that the policy is predominantly a group policy issued to a group policyholder in Tennessee, so the law of Tennessee applies to the dispute regarding whether interest is owed. The district court concluded that Hartford does not owe interest because the policy affords Hartford the right to investigate claims, and interest would not be "due" until completion of the investigation of any given claim. The district court then denied Williamson's motion to amend the judgment. We affirm, although with different reasoning than that employed by the district court.

I. BACKGROUND

Williamson's spouse was killed in an automobile accident on September 12, 2007, and she received benefits under ADD insurance policy number ADD-10900, issued by Hartford. Appellant's App. at 79, 80, 85, 88, 111. Over 14 months elapsed from the date of the claim to the date of payment. Id. at 97-99, 80, 111. Hartford did not pay any interest on the claim. The policy does not provide for interest. Id. at 57-74.

Williamson filed this action on behalf of herself and the alleged approximately 13,000 similarly situated beneficiaries who were not paid interest by Hartford on their paid claims under ADD-10900. Id. at 12-18, 240. Williamson seeks, inter alia, a declaratory judgment that Hartford must pay interest on claims for benefits under Tennessee Code Annotated section 47-14-109. Id. at 17-18. No judgment has been

[2]The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

entered against Hartford in this matter and there is no dispute that Williamson's benefits were paid. Williamson seeks "pre-judgment interest as provided by law," although it is not clear whether this is a separate period of interest from the statutory interest sought. Id. at 18, 359. Jurisdiction is premised on diversity. Id. at 12-13.

II. STANDARDS OF REVIEW

We review the district court's grant of summary judgment de novo. Reuter v. Jax Ltd., Inc., 711 F.3d 918, 919-20 (8th Cir. 2013) (citation omitted). Summary judgment is appropriate only if, after viewing the evidence in the light most favorable to the non-movant and affording the non-movant all reasonable inferences, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Preston v. City of Pleasant Hill, 642 F.3d 646, 651 (8th Cir. 2011) (citations omitted); Fed. R. Civ. P. 56(a). We also conduct de novo review of the district court's interpretation of state law, Orion Fin. Corp. of S.D. v. Am. Foods Group, Inc., 281 F.3d 733, 738 (8th Cir. 2002) (citation omitted), and the interpretation of contractual provisions of an insurance policy. Fuller v. Hartford Life Ins. Co., 281 F.3d 704, 706 (8th Cir. 2002) (citation omitted).

III. DISCUSSION

The parties disagree on whether Tennessee law or Missouri law applies.[3] Within each state's law, however, the parties agree on the particular state statutes that govern Williamson's claim for interest. This Court need not decide the choice-of-law

[3]Williamson questions Hartford's ability to raise the choice-of-law issue and other arguments beyond those raised in her appeal, as Hartford did not file a cross-appeal. Without filing a cross-appeal, an appellee may defend a judgment on any ground consistent with the record, even if rejected or ignored in the lower court. Spirtas Co. v. Nautilus Ins. Co., No. 12-3315, 2013 WL 2149902, at *2 (8th Cir. May 20, 2013) (quotation omitted). Thus, Hartford's issues may be raised.

question because whichever statute applies, Williamson's claim fails.[4] We hold that Williamson is not entitled to interest under either state's statute.

A. Missouri Law

The Missouri statute provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

Mo. Rev. Stat. § 408.020 (2000) (emphasis added). Pursuant to the statute, creditors shall be allowed to receive interest for all moneys after they become "due and payable." Id. Williamson does not dispute Hartford's argument that under Missouri law and the policy language, Hartford paid the benefit to her when it was payable. Under Missouri law, Williamson is not entitled to interest.

B. Tennessee Law

Assuming that Tennessee law applies, the parties dispute whether subsection (b) or (c) of Tennessee Code Annotated section 47-14-109 applies to interest on an insurance benefit. Subsection (c) states: "In all other cases, the time from which

[4]The parties could have avoided ambiguity by including a choice-of-law provision in the policy.

interest is to be computed shall be the day when the debt is payable, unless another day be fixed in the contract itself." Tenn. Code Ann. § 47-14-109(c) (2001) (emphasis added). Pursuant to the statute, unless the contract states otherwise, interest begins to run when the debt is "payable." Id. For purposes of this case, we hold that the debt was "payable" at the time of payment designated in the policy.[5] Hartford paid the benefit to Williamson within the time of payment designated in the policy. See Appellant's App. at 73, 80. Williamson is not entitled to interest under subsection (c).

Subsection (b) states: "Liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned." Tenn. Code Ann. § 47-14-109(b) (2001) (emphasis added). Assuming without deciding that (b) applies, the question is whether the word "due" means interest accrues at an earlier time than when it is "due and payable." As a federal court sitting in diversity, our role is to interpret state law, not to fashion it. Orion Fin. Corp. of S.D., 281 F.3d at 738. This Court's task with respect to an unsettled issue of state law "is to predict how the highest court in the state would rule on the issue." Smith v. Chem. Leaman Tank Lines, Inc., 285 F.3d 750, 754 (8th Cir. 2002) (citation omitted). A federal court must follow the announced state law in a diversity action unless there are very persuasive grounds for believing the state's highest court would no longer adhere to it. Id. at 755 (quotation omitted).

[5]The policy states: "Time of Claim Payment: We will pay any benefit due as soon as possible after we receive proof of loss and other forms that may be necessary to adjudicate the claim." Appellant's App. at 73.

In a 1977 decision, the Tennessee Supreme Court stated:

> any written instrument, signed by the debtor, whereby he promises to pay to a person named a definite sum of money, for a valuable consideration stated, at a definite time, upon a specified condition, is within the provision of the statute, and will bear interest from the time of payment designated, upon proof of the happening of the contingency that makes the condition effective . . . .

Performance Sys., Inc. v. First Am. Nat'l Bank, 554 S.W.2d 616, 618 (Tenn. 1977) (emphasis added).[6] The Tennessee Court of Appeals applied Performance Systems to section 47-14-109(b) in Jaffe v. Bolton, 817 S.W.2d 19, 28 & n.1 (Tenn. Ct. App. 1991). Jaffe applied the first part of the above quotation from Performance Systems ("any written instrument . . . upon a specified condition") in determining that a fixed obligation to pay installments of rent pursuant to a lease agreement comes within the import of the statute and entitles the plaintiff to receive prejudgment interest as a matter of right. 817 S.W.2d at 28 & n.1 (citing Performance Sys., Inc., 554 S.W.2d at 618). Jaffe demonstrates the Tennessee Court of Appeals's use of Performance Systems to interpret the statute.

Relying upon Performance Systems as a predictor, the Tennessee Supreme Court would likely construe "due" in section 47-14-109(b) to mean the time of

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[6]The court quoted from the statute in existence at the time, Tennessee Code Annotated section 47-14-107: "All bonds, notes, bills of exchange, and liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned." Performance Sys., Inc., 554 S.W.2d at 618. With the exception of the beginning language regarding all bonds, notes, and bills of exchange, the language is the same as the current section 47-14-109(b).

payment designated in the policy. In other words, the Tennessee Supreme Court would not likely interpret "due" to mean the date of loss. The court would likely decide that the word "due" does not mean interest accrues at an earlier time than when it is "due and payable." Regarding the time of payment designated, the policy at issue states: "Time of Claim Payment: We will pay any benefit due as soon as possible after we receive proof of loss and other forms that may be necessary to adjudicate the claim." Appellant's App. at 73. As stated previously, Hartford paid the benefit to Williamson within the time of payment designated in the policy. See id. at 73, 80. Under subsection (b), therefore, Williamson is not entitled to interest.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.
