IN THE SUPREME COURT OF IOWA
No. 19-1644

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT and FOOD & WATER WATCH,

Plaintiffs/Appellees,

v.

STATE OF IOWA, et al.,

Defendants/Appellants

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

The Honorable Robert B. Hanson; CASE NO. EQCE084330

BRIEF OF AMICUS CURIAE DRAKE LAW PROFESSORS NEIL HAMILTON, ALLAN VESTAL, MARK KENDE, AND JERRY ANDERSON IN SUPPORT OF IOWA CITIZENS FOR COMMUNITY IMPROVEMENT AND FOOD AND WATER WATCH

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This brief is submitted by a group of Drake University Law Professors, who collectively have many years of experience teaching law, including subjects relevant to the questions presented in this case. Our goal in submitting this brief is to help inform the Court's understanding of the broader issues involved. We have no personal stake in this case. Instead, we have a professional interest in seeing Iowa law develop in a way that preserves citizen's access to the courts of Iowa for the vindication of their constitutional rights.

Rule 6.906(4)(d) Statement of Authorship

This brief was not authored, in whole or in part, by counsel for any party; no party or party's counsel, or any other person, contributed money to fund the preparation or submission of this brief.

Argument

I. THE COURT SHOULD DEFINE THE IOWA POLITICAL QUESTION DOCTRINE NARROWLY TO PRESERVE VITAL ACCESS TO THE COURTS.

The political question doctrine springs from separation of powers concerns. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The non-justiciability of a political question is primarily a function of separation of powers"); *see also Des Moines Register & Tribunal Company v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). Yet, unless the doctrine is handled very carefully, it could become an endlessly malleable tool, a form of judicial "universal solvent" capable of dissolving vital access to courts, necessary to vindicate important constitutional and common law rights. The federal political question doctrine, a controversial rule uncertain in its current scope, is not binding on the Iowa courts. *See generally* Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. Pa. J. Const. L. 153, 154 (2018) ("state courts are not required to slavishly adhere to the Supreme Court's interpretation of parallel constitutional provisions"). We urge the Iowa Supreme Court to adhere to a narrowly defined political question doctrine, to prevent indiscriminate use and preserve vital access to the courts.

A. The Political Question Doctrine Should Be Confined to Cases Explicitly Committed by the Text of the Constitution to the Political Branches.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court articulated a vague, indeterminate, multi-factor test for deciding political question issues. In more recent cases, the Court has narrowed its focus to the core of the doctrine, which excludes only those cases involving issues that the Constitution clearly allocates to the other branches. For example, in *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986): "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations *constitutionally committed* for resolution to the halls of Congress or the confines of the Executive Branch" (emphasis added**).** The Court noted that *Baker "*carefully pointed out that not every matter touching on politics is a political question." *Japan Whaling*, 478 U.S. at 229 (*citing Baker*, 369 U.S. at 209). Therefore, even if the question involves controversy and policy choices, exclusion is appropriate only where the Constitution has specifically designated the issue for decision to the political branches.

That narrow version of the political question doctrine was involved in *Des Moines Register & Tribunal Company v. Dwyer*, 542 N.W.2d 491, 496

(Iowa 1996), which focused on whether there was a "textually demonstrable constitutional commitment" of the question at issue to the other branches. Although this Court noted the multi-factor test of *Baker*, it focused only on the narrow issue of textual constitutional exclusion. *Dwyer*, 542 N.W.2d at 496; *see also Baker*, 369 U.S. at 217. Thus, the *Dwyer* court did not say that the political question doctrine excludes *any* questions that involve policy choices and value determinations, but only those choices which are constitutionally committed by specific text to the political branches. *See Dwyer*, 542 N.W.2d at 495-496.

More recently, in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 89-90 (Iowa 2014), this Court noted extensive criticism of the *Baker* test and the rarity of its application. The Court cast doubt on whether the political question doctrine should apply in the state of Iowa, and if so, whether a narrower version than the "open-ended" and "not clearly defined" *Baker* test would be more appropriate. *Id.* at 90-93. The Court also noted that Iowa had rarely used the political question doctrine to preclude judicial determination, and then only in a narrow set of circumstances, where there is a "textually demonstrable constitutional commitment of decision-making power to another branch of government." *Id.* at 92.

We agree that unless the political question doctrine is cabined as the Court suggests, it can easily be used to foreclose litigants' ability to vindicate important rights and obtain important remedies. Unless the Court carefully limits the scope of this doctrine, it can be used to avoid judicial action on any controversial issue, which are often the most pressing, important issues, crying out for courts to intervene and protect the most vulnerable.

B. The Political Question Doctrine Should Not be Used to Avoid Decisions Involving Fundamental Limitations on the Political Branches.

At a minimum, the Court should not use the political question doctrine to avoid consideration of constitutional claims, one of the most fundamental duties of the judicial branch. This Court noted in *King v. State*, 818 N.W.2d 1, 22 (Iowa 2012), that the political question doctrine does not preclude the court's consideration of constitutional issues, such as the equal protection claim presented in that case. *King* affirmed "the exercise of the judiciary's power to interpret the constitution and to review the constitutionality of the laws and acts of the legislature does not offend these [separation of powers] principles". 818 N.W.2d at 17 ; *see also Marbury v. Madison*, 5 U.S. 137 (1 Cranch), 177–78 (1803); *Luse v. Wray*, 254 N.W.2d 324, 327–28 (Iowa 1977). Moreover, a nonjusticiable political question does not arise merely

because an issue has been debated or even partially addressed by the political branches. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229 (1986) ("[N]ot every matter touching on politics is a political question"); *see also Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 942-43 (1983) ("[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications").

In fact, this Court has decided many important constitutional cases that could be considered very "political" in nature. In fact, the Court's first reported decision, *In re Ralph*, 1 Morris 1, 5 (Iowa 1839), dealt with perhaps the most controversial, political issue ever presented to American courts, that of property in slaves. Due to the inherently "political" nature of the issues presented, this Court could have left the matter to the legislature to determine. Instead, the Court vindicated the constitutional rights of a slave from Missouri working in Iowa by identifying a state constitutional basis for protections not yet recognized by the state legislature. *Id.* at 14.

In the landmark school desegregation case of *Clark v. Board of Directors*, 24 Iowa 266, 269-270 (1868), this Court was urged to defer to the

elected school board to exercise its own discretion regarding school attendance; and the Court was reminded that current "public sentiment" favored segregation. Nevertheless, the Court acted to uphold the constitutional right of Susan Clark to attend the public school in Muscatine. *Id.* at 277. Most recently, the Court did not refuse to protect the fundamental rights of same-sex couples in *Varnum v. Brien*, 763 N.W.2d 862, 906-907 (Iowa 2009), merely because it involved a matter of public controversy, which had been the subject of legislative action. Moreover, the Court did not refuse to address the questions presented in *Board of Water Works Trustees of the City of Des Moines v. Sac County*, 890 N.W.2d 50, 52 (Iowa 2017), on the ground that water quality issues were reserved for the legislature.

This case similarly presents a controversial issue, one that has been the subject of political debate. Yet, because the case is based on a fundamental right embodied in the public trust doctrine, Iowa courts should be able to rule on whether the action or inaction of the political branches have violated those principles. Certainly, the court may decide that the public trust doctrine does not extend to this type of protection, but it should not avoid deciding the case on the basis that the subject is controversial and involves difficult questions of policy.

The case at bar involves the fundamental rights of the public to the use and enjoyment of public property. This court has often noted the important role of the judicial branch in protecting both private and public fundamental property rights from legislative intrusion. *See Bormann v. Board of Supervisors*, 584 N.W.2d 309, 322 (Iowa 1998) (protecting common law nuisance action from statutory limitation); *Gacke v. Pork Xtra L.L.C.*, 684 N.W.2d 168, 170 (Iowa 2004) (holding that a statute making animal feeding operations immune from nuisance suits violates the Iowa Constitution). As this Court noted in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 66-68 (Iowa 2014), common law historically has been the primary source of citizens' protection from environmental harms. Common law claims like nuisance and trespass have "a deep legal tradition that find their roots well into the past and extend to the present day." *Id.* at 68. Thus, the Court has acknowledged that, despite some regulatory action by the political branches, courts continue to have an important role to play in the remediation of environmental harms.

The State has argued that action taken by the legislature and agencies (along with a non-governmental entity, Iowa State University) are relevant to the political question decision. The State argues in the current case, for example, that courts should not "second-guess the wisdom of the

legislature." (Gov't Br. 49, 66 Dec. 27, 2019, No. 19-1644). Unless the Iowa Constitution has expressly delegated a particular matter to one of the other branches, those separation of powers concerns are more properly confined to the doctrine of preemption, which considers whether legislative action has left no room for common law claims.

The State could not make such a preemption argument in this case. In *Freeman*, this Court explicitly determined that while the federal Clean Water Act did preempt federal common law claims, as well as state common law claims against out-of-state sources, it did *not* preempt state common law claims. 848 N.W.2d at 80. Moreover, the claims in this case are based, not on common law, but on the public trust doctrine, which represents a fundamental limitation on legislative power. *See San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.") As this Court noted in *State v. Sorenson*, 436 N.W.2d 358, 362 (1989), the public trust doctrine "reflects the assertion of public rights that preexist any private property rights in the affected resource." (quoting Richard J. Lazarus, *Changing Conceptions of Prop. and Sovereignty in Nat. Res.: Questioning the Public Trust Doctrine*, 71 Iowa Law Rev. 631, 648-49 (1986)). The public trust doctrine is "based

on the notion that the public possesses inviolable rights to certain natural resources." *Sorensen*, 436 N.W.2d at 361. Therefore, as a fundamental limitation on legislative power, courts should hear claims regarding public trust violations to the same extent that they police the limits of legislative authority in cases of constitutional conflict.

The Pennsylvania Supreme Court recently noted the danger of adopting a broad political question doctrine barrier when it considered the controversial claim that the state's public education system failed to meet constitutional education mandates. *William Penn School District v. Pennsylvania Department of Education*, 642 Pa. 236, 241-242, 170 A.3d 414, 417 (2017). The court rejected the argument that the case was nonjusticiable as a "political question" best left to the legislature. The court noted that it had a duty to consider whether legislative policy met constitutional boundaries:

> It is a mistake to conflate legislative policy-making pursuant to a constitutional mandate with constitutional interpretation of that mandate and the minimum that it requires. In this domain, as in so many others, courts have the capacity to differentiate a constitutional threshold, which ultimately is ours to determine, from the particular policy needs of a given moment, which lie within the General Assembly's purview.

William Penn School Dist., 642 Pa. at 316, 170 A.3d at 463-64. Additionally, the Court noted that "rhetoric raising the specter of judicial

interference with legislative policy does not remove a legitimate legal claim from the Court's consideration; the political question doctrine is a shield and not a sword to deflect judicial review. Furthermore, a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly's expression of policy rendered in a polarized political context." *Id.* at 276, 170 A.3d at 438.

The Pennsylvania Supreme Court quoted Chief Justice Marshall in *Cohens v. Virginia* concerning the duty of courts to enter into difficult questions:

> [t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the [C]onstitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us."

Id. at 315, 170 A.3d at 463 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). In *Cohens*, Chief Justice Marshall went on to state a maxim appropriate here: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." 19 U.S. at 404.

We urge the Iowa Supreme Court to follow the admonition of Chief Justice Marshall and keep the doors of our courts open to the protection of the fundamental rights of citizens.

II. THE IOWA SUPREME COURT HAS EXERCISED ITS POWERS TO ARTICULATE IMPORTANT CONSTITUTIONAL PROTECTIONS FOR IOWA'S LAND AND WATER.

A fundamental feature of our state is the role played by our water and land resources. As a leading agricultural state, it is hard to overstate the importance to our citizens of having access to fertile soils and clean water. This Court has previously recognized the importance of Iowa's natural resources – and the role of the Court in helping preserve them - in a series of important cases.

In *Benschoter v. Hakes*, 8 N.W.2d 481, 486-487 (Iowa 1943), the Court recognized the fundamental need to protect our soil from exploitation, in upholding the requirement that farm tenants receive advance notice of lease terminations as an appropriate use of the state's police powers. *See* Iowa Code § 562.6 (2019). In *Woodbury County Soil and Water Conservation District v. Ortner*, 279 N.W.2d 276, 279 (Iowa 1979), the court recognized the vital role Iowa's fertile land plays as the basis of Iowa's wealth and prosperity, in upholding the constitutionality of the soil conservation law, requiring landowners to expend funds to implement practices required by the county to reduce erosion below allowed levels. *See* Iowa Code § 161A.43 (2019).

In *Iowa Natural Resources Council v. Van Zee*, 158 N.W.2d 111, 116-117 (Iowa 1968), this Court recognized the unique nature and importance of our water resources and the crucial government role in their protection. The Court dismissed constitutional challenges to a state order requiring a landowner who had channelized a stream without state permission to correct the action. In considering the proper role of the state, the Court noted "a vital resource such as water must be subject to regulation by the state under the police power." *Id.* at 117. The Court continued: "However, it is noteworthy that the governmental power over watercourses is more substantial than that relating to property rights in things other than natural resources." *Id*. at 118 (quoting Lauer, Water Resources, 131, 223). The Court added: "Proper control of rivers and streams, of course, involves the exercise of control of the use of property adjoining those streams in the recognized floodway and flood plains. Police Power properly regulates use of that property because uncontrolled use would be harmful to the public interest." 158 N.W.2d at 118. After considering whether the exercise of the ability to control stream straightening under the then "new" Iowa water law was a constitutional exercise of the police power, the Court concluded "We are satisfied, as plaintiff maintains, that 453A.33 is a proper exercise of these great powers of government." *Id.*

These cases illustrate the importance this Court has traditionally placed on the use of and protection of Iowa's water and land. The case at bar fits comfortably within this tradition of giving heightened attention to constitutionally based claims involving the use of and protection of Iowa's vital natural resources.

The Public Trust Doctrine, an essential aspect of Iowa law protecting the rights of citizens to enjoy the unimpeded use of Iowa's waters, predates Iowa's statehood and is a constitutional protection available to all citizens of the state who may seek its explication through access to the courts. In fact, the earliest document governing the territory that would include the land that became Iowa, the Northwest Ordinance of 1787, guaranteed the public use of waters:

> The navigable waters leading into the Mississippi and St. Lawrence, and carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.

Ordinance of 1787: The Northwest Territorial Government, Fourth Article of Compact, reprinted in 1 U.S.C. at LV (2006); *see also* Act of Apr. 20, 1836, ch. 54, §§ 1, 12, 5 Stat. 10, § 10, 11, 15. The Northwest Ordinance of 1787, which was seen by the framers as wholly compatible with the Federal Constitution which closely followed it, suggests the importance the drafters

of our foundational documents attached to public use of waters. Allan W. Vestal, *"No Person . . . Shall Ever Be Molested on Account of His Mode or Worship or Religious Sentiments . . .": The Northwest Ordinance of 1787 and Strader v. Graham*, 102 Marquette L. Rev. 1087,1136-38 (2019).

The Northwest Ordinance of 1787 provides that its Articles of Compact were "to fix and establish those principles as the basis for all laws, constitutions, and governments, *which forever hereafter* shall be formed in the said territory." *Northwest Ordinance, supra*, § 13 (emphasis added). Accordingly, the Articles of Compact themselves were created to "forever remain unalterable." *Id.*at §14. Thus the public waters guarantee of the Northwest Ordinance of 1787 is arguably effective as to the waters of Iowa even today. Vestal, *supra*, at 1124-38. *But see Strader v. Graham*, 51 U.S. 82, 94 (1851).

As one of the pillars of Iowa law, the Public Trust Doctrine guarantees to citizens their right to have access to unimpeded use of the state's waters – not just for transportation, but for use, recreation and enjoyment – not least of which is access to safe drinking water. This Court, in a number of cases, has jealously guarded the Public Trust Doctrine as an important constitutional right shared by all Iowans – and allowed that it may burden other branches of state government in its protection. In *State v.*

Sorenson, 436 N.W.2d 358, 363 (Iowa 1989), the Court emphasized that the public trust doctrine "is not limited to navigation or commerce; it applies broadly to the public's *use* of property, such as waterways, without ironclad parameters on the types of uses to be protected." While the Court noted it did not subscribe to efforts to broaden the public trust doctrine to include parklands or historic battlefields, "a navigable river is unquestionably part of the public trust." *Id.* at 362. The Court noted "the expanding involvement of Iowans in recreational activities on and near navigable waters such as the Missouri River. Those uses include hiking, camping, biking and picnicking, as well as transportation on the river itself." *Id.* at 363. On this basis, the Court had little problem concluding the land and water in question was subject to the Public Trust Doctrine. *See* Id.

Although this Court has "cautioned against an overextension" of the public trust doctrine, the cases in which the doctrine has been limited are far afield from the case at bar. *See* Sorenson, 436 N.W.2d at 363. For example, in *Fencl v. City of Harper's Ferry*, 620 N.W.2d 808, 813-814 (Iowa 2000), the Court did not extend the doctrine to an alley, unconnected with navigable water. Similarly, in *Bushby v. Washington County Conservation Board*, 654 N.W.2d 494, 499 (Iowa 2002), the Court declined to apply the doctrine to

the state's management of forested areas. In contrast, the water and adjacent lands at issue in this case are at the core of the public trust doctrine.

This case raises the fundamental question of whether the state can allow private interests to trump the paramount rights of the public to the use of their waters. The California Supreme Court was confronted with that issue in *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 143-145, 4 P. 1152, 1153-1154 (1884), involving mining operators who used a large water cannon to wash gold-bearing gravel from hillsides which washed downstream, polluting the rivers and impairing navigation, as well as increasing flood risks to downstream land. The California Supreme Court affirmed an injunction against the dumping, noting that the Sacramento River was "a great public highway, in which the people of the State have paramount and controlling rights." *Id.* at 146, 4 P. at 1155. The Court held that the dumping constituted "an unauthorized invasion of the rights of the public to its navigation." *Id.* Similar to the defendants here, the mining company argued that custom and legislative acquiescence in their practices should control, but the Court held that "the rights of the people in the navigable rivers of the State are paramount and controlling." *Id.* at 151, 4 P. at 1159. The legislature could not allow private interests to impair those superior public rights. *Id.*

Thus, the California court recognized what plaintiffs here ask this Court to recognize – that legislative action or inaction cannot be allowed to trump the public's pre-existing and paramount rights to what is, after all, *our* water.

CONCLUSION

The State cannot wash away the Public Trust Doctrine and its protections for citizens, including through access to the courts, simply by labeling the water quality issues involved in this case as "political questions." The political question doctrine is not a universal solvent that can wash away Iowans rights to protect their access to water. Such a broad reading of the political question claim would render this court and all of the judiciary powerless to hear valid claims raised by our citizens across a breadth of social issues. Instead, the doctrine should be limited to those cases in which there is a clear textual Constitutional reservation of a question to the other branches of government. There is nothing in our Constitution that can been seen as so limiting the authority of the Court on this issue.

We urge the Court to carefully consider the implications of dismissing this case, which we believe raises important issues regarding one of the most

fundamental rights of our citizenry – the obligation to protect the waters held in public trust for their use and benefit.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point font size and contains 3928 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

_____ __January 17, 2020_____

Neil Hamilton Date

CERTIFICATE OF FILING

I, Maria Garcia, hereby certify that the attached Amicus Brief has been filed through the electronic document management system (EDMS) for the above-mentioned matter with the Iowa Supreme Court pursuant to Iowa Rules of Appellate Procedure 6.701 and 6.901 on the 21st day of January, 2020.

CERTIFICATE OF SERVICE

The undersigned certifies pursuant to Iowa Rules of Appellate Procedure 6.701 and 6.901 that this Amicus Brief was served on the 21st day of January, 2020, upon all necessary parties, by a notice of electronic filing through the electronic document management system (EDMS), pursuant to Rule 16.1220 to all registered filers for the above-mentioned matter. A review of the filers in this matter indicate all necessary parties have been served.

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