IN THE SUPREME COURT OF IOWA

No. 19–1644
POLK COUNTY NO. EQCE084330

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation,

Plaintiffs-Appellees,

vs.

STATE OF IOWA; DEPARTMENT OF NATURAL RESOURCES; BRUCE TRAUTMAN, in his official capacity as Acting Director of the Department of Natural Resources; ENVIRONMENTAL PROTECTION COMMISSION; MARY BOOTE, NANCY COUSER, LISA GOCHENOUR, REBECCA GUINN, HOWARD HILL, HAROLD HOMMES, RALPH LENTS, BOB SINCLAIR, JOE RIDING, in their official capacities as Commissioners of the Environmental Protection Commission; NATURAL RESOURCE COMMISSION; MARCUS BRANSTAD, RICHARD FRANCISCO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD, in their official capacities as Commissioners of the Natural Resource Commission; DEPARTMENT OF AGRICULTURAL AND LAND STEWARDSHIP; and MICHAEL NAIG, in his official capacity as Secretary of Agriculture,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY, IOWA
THE HONORABLE ROBERT B. HANSON

DEFENDANTS-APPELLANTS' FINAL BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

JACOB J. LARSON
DAVID S. STEWARD
ERIC M. DIRTH
THOMAS J. OGDEN
Assistant Attorneys General
Department of Justice
Environmental Law Division
Hoover State Office Building, 2nd Fl.
1305 E. Walnut St.
Des Moines, Iowa 50319
Ph: (515) 281-8760
Fax: (515) 281-4209
E-mail: Jeffrey.thompson@ag.iowa.gov
E-mail: Jacob.larson@ag.iowa.gov
E-mail: David.steward@ag.iowa.gov
E-mail: Eric.dirth@ag.iowa.gov
E-mail: Thomas.ogden@ag.iowa.gov
ATTORNEYS FOR DEFENDANTS-APPELLANTS

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRONEOUSLY CONCLUDED PLAINTIFFS DO NOT NEED TO SATISFY CAUSAL CONNECTION AND REDRESSABILITY ELEMENTS TO ESTABLISH STANDING.

Authorities

Allen v. Wright, 468 U.S. 737 (1984)

Alons v. Iowa Dist. Court for Woodbury County¸ 698 N.W.2d 858 (Iowa 2005)

Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470 (Iowa 2004)

Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)

Kanuk v. State, Dept. of Natural Resources, 335 P.3d 1088 (Alaska 2014)

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014)

Lujan v. Defenders of Wildlife¸ 504 U.S. 555 (1992)

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

40 C.F.R. § 141.62(b)(7)

Iowa Const. art I § 25

II. WHETHER THE REMEDIES SOUGHT BY PLAINTIFFS RENDER THEIR CLAIMS NONJUSTICIABLE UNDER THE SEPARATION OF POWERS OR POLITICAL QUESTION DOCTRINES.

Authorities

Aji v. Washington, No. 18-2-04448-1 (Wash. Super. Aug. 14, 2018), *appeal docketed*, No. 93616-9-A (Wash. Sept. 18, 2018)

Baker v. Carr, 369 U.S. 186 (1962

Dash v. Van Kleeck, 7 Johns. 477 (N.Y. Sup. Ct. 1811)

Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491 (Iowa 1996)

Ferguson v. Skrupa, 372 U.S. 726 (1963)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892)

In Interest of C.S., 516 N.W.2d 851 (Iowa 1994

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986)

Kanuk v. State, Dept. of Natural Resources, 335 P.3d 1088 (Alaska 2014)

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

Maryland Heights Leasing v. Mallinckrodt, 706 S.W.2d 218 (Mo. 1985)

National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983)

Rousso v. State, 239 P.3d 1084 (Wash. 2010)

Sanders-Reed v. Martinez, 350 P.3d 1221 (N.M. Ct. App. 2015)

Sinnok v. Alaska, Case No. 3AN-17-09910 (D. Alaska Oct. 30, 2018), *appeal docketed*, No. S-17297 (Alaska Nov. 29, 2018)

Svitak v. State, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. 2013)

State v. Barker, 89 N.W. 204 (1902)

State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)

State v. Phillips, 610 N.W.2d 840 (Iowa 2000)

State v. Sorensen, 436 N.W.2d 358 (Iowa 1989)

State ex rel. Turner v. Scott, 269 N.W.2d 828 (Iowa 1978)

Witke v. State Conservation Comm'n, 56 N.W.2d 582 (Iowa 1953)

33 U.S.C. § 1319

Iowa Code ch. 202B

Iowa Code ch. 459

Iowa Code ch. 459A

Iowa Code § 455B.171(21)

Iowa Code § 455B.177(3)

Iowa Code § 459A.205(1)(a)(1)

Iowa Code § 459A.208(1)(a)

Iowa Code § 459A.401(2)

Iowa Code § 459A.401(21)

Iowa Code § 459.102(51)

Iowa Code § 459.311(2)

Iowa Code § 459.303(1)

Iowa Code § 459.312(1)(a)

Iowa Code § 459.313A

Iowa Code § 614.17

567 Iowa Admin. Code 60.2

Section 20 Senate File 512 (2018)

40 C.F.R. § 122.23(b)

Iowa Const. art. III § 1

Iowa Const. art. IV § 1

III. WHETHER PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF ARE JUSTICIABLE.

Authorities

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)

Bechtel v. City of Des Moines, 225 N.W.2d 326 (Iowa 1975)

Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877 (Iowa 1997)

Katz Investment Co. v. Lynch, 47 N.W.2d 800 (Iowa 1951)

Section 20 of Senate File 512 (2018)

IV. WHETHER PLAINTIFFS FAILED TO STATE A CLAIM UNDER IOWA'S ADMINISTRATIVE PROCEDURE ACT.

Authorities

Alberhasky v. City of Iowa City, 433 N.W.2d 693 (Iowa 1988)

Banos v. Shepard, 419 N.W.2d 364 (Iowa 1988)

Center for Biological Diversity v. FPL Group, Inc., 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008)

De La Fuente v. Stokely-Van Camp, Inc., 514 F. Supp. 68 (D. Ill. 1981)

Ghost Player, L.L.C. v. State (*Ghost Player I*), 860 N.W.2d 323 (Iowa 2015)

IES Utilities, Inc. v. Iowa Dep't of Revenue & Fin., 545 N.W.2d 536 (Iowa 1996)

Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n, 850 N.W.2d 403 (Iowa 2014)

Kerr v. Iowa Public Service Co., 274 N.W.2d 283 (Iowa 1979)

Lujan v. Defenders of Wildlife¸ 504 U.S. 555 (1992)

Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004)

Salsbury Laboratories v. Iowa Dep't of Envtl. Quality, 276 N.W.2d 830 (Iowa 1979)

Shell Oil Co. v. Bair, 417 N.W.2d 425 (Iowa 1987)

Iowa Code chapter 17A

Iowa Code § 17A.19

Iowa Code § 17A.19(1)

Iowa Code § 17A.9(1)(a)

K. Davis, Administrative Law § 20.04 (1958)

Iowa Const. art I, section 9

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents substantial constitutional questions as to the validity of a statute(s) and/or the separation of powers among Iowa's three branches of government, it presents substantial issues of first impression, and it presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(a), (c) and (d).

STATEMENT OF THE CASE

"Iowa is largely defined by its proud and rich agricultural economy. Approximately ninety percent of the land within its borders is devoted to agriculture, and the presence of agriculture in Iowa not only profoundly impacts all its residents, but, literally, the world beyond." *Worth Cty. Friends of Agric. v. Worth Cty.*, 688 N.W.2d 257, 259 (Iowa 2004). The environmental impact of this fertile heritage on the state's water quality has been the subject of "difficult debate and discourse" for decades. Id. at 260.

In 2018, the Iowa legislature enacted Senate File 512 (2018), declaring the state should implement the Iowa Nutrient Reduction Strategy ("NRS") to evaluate progress of nutrient reduction in Iowa's waters and creating multiple water quality funds, which are estimated to receive $270,200,000.00 from

2019-2030, to reduce nitrogen and phosphorous in Iowa waters. *See* S.F. 512, 87th Gen. Assem. (2018); *see also* Fiscal Note, Senate File 512, p. 4 Table 2 (Jan. 31, 2018) (available at https://www.legis.iowa.gov/docs/publications/FN/917568.pdf).

Wanting the Defendant-Appellants (hereafter collectively referred to as "State") to do more, Plaintiff-Appellees, Iowa Citizens for Community Improvement and Food & Water Watch (hereafter collectively referred to as "ICCI"), cast off the political process and filed a lawsuit, asking the judiciary to insert itself into the management and regulation of the State's nutrient reduction efforts and the construction and/or expansion of certain livestock production facilities in Iowa's Raccoon River watershed. ICCI asks the District Court to overturn the nutrient reduction efforts and strategies chosen and implemented by the executive and legislative branches in the watershed; manage, over an indeterminate period of time, replacement efforts and strategies; and suspend a variety of laws related to the construction and/or expansion of certain livestock facilities until sufficient progress is achieved. This the judiciary cannot do.

The District Court erroneously denied the State's Motion to Dismiss, concluding: 1) ICCI had standing and did not need to meet other prudential requirements—causal connection or redressability elements—recognized by

the Iowa Supreme Court; 2) the sweeping injunctive relief sought by ICCI—including a court order directing the legislature to create, amend, or repeal certain statutes—did not present a political question or violate the separation of powers; 3) ICCI's requested declaratory relief did not violate the political question doctrine, even though the State never argued otherwise; and 4) ICCI was not required to exhaust administrative remedies because, although naming a myriad of agencies and agency officials as defendants and describing a number of specific agency actions or decisions in their Petition, they were not challenging agency actions, but rather, statutes that limit the executive branch agencies. The District Court's ruling denying dismissal should be reversed.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Given the nature of the claims and the number of different state agencies and individuals named as defendants, a brief description of the different agencies, their respective jurisdictions over water quality regulations, and the State's past nutrient reduction efforts may be helpful.

A. Department of Natural Resources

The Department of Natural Resources ("DNR") is the state agency with "primary responsibility for . . . managing fish, wildlife, and land and water resources in [Iowa]." Iowa Code § 455A.2. The DNR is administered by an

appointed director who is subject to senate confirmation. Iowa Code § 455A.3. The director has the power and duty to administer the DNR as provided by the legislature. Iowa Code § 455A.4.

B. Environmental Protection Commission

The Environmental Protection Commission ("EPC") was created within the DNR. Iowa Code § 455A.6. The EPC exists to protect Iowa's environment and conserve its natural resources. *Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 406 (Iowa 2014). The EPC consists of a panel of nine citizens, from diverse backgrounds, who provide policy oversight for Iowa's environmental protection efforts. *See* Iowa Code § 455A.6(1)(a)-(d).

The EPC is tasked with protecting Iowa's groundwater and water supply. It cooperates with cities, subdivisions, and landowners in matters "relating to flood control and the use of water resources." Iowa Code § 455B.263(7). The EPC "will attempt to prevent and abate the pollution of all waters to the fullest extent possible consistent with statutory and technological limitations." 567 Iowa Admin. Code 61.2(1)). The EPC has rulemaking authority relating to water quality, pretreatment, and effluent standards; and the location, construction, operation, maintenance, inspection, monitoring, record keeping, and reporting requirements for disposal systems.

Iowa Code § 455B.173(2), (3) and (6). Implementing rules are contained in 567 Iowa Admin. Code 60-69.

C. Natural Resource Commission

The Natural Resource Commission ("NRC") was created within the DNR and is responsible for protecting Iowa's environment through the conservation of public lands, waterways, and flora and fauna. *See generally* Iowa Code § 455A.5. The NRC establishes policy, adopts rules, approves budgets, and hears appeals of contested cases related to conservation. *Id*. The NRC also approves or denies proposals in areas related to state-owned lands or bodies of water. Iowa Code § 455A.5(6)(f). The NRC is made up of seven members who are appointed by the governor and subject to senate confirmation. Iowa Code § 455A.5(1).

D. Secretary of Agriculture and Iowa Department of Agriculture and Land Stewardship

The Secretary of Agriculture is a State-wide elected official and the head of the Iowa Department of Agriculture and Land Stewardship ("IDALS"). Iowa Code § 159.5. IDALS is responsible for promoting the interests of agriculture in Iowa. Iowa Code § 159.2(1). Within IDALS, the Division of Soil Conservation and Water Quality ("DSC") is responsible for assisting local soil and water conservation districts with preserving and protecting the soil and water resources of Iowa. *See generally* Iowa Code §

161A.4. The DSC oversees the water quality initiative, assessing the reduction of nutrients in Iowa's watersheds, and implements designated responsibilities under the NRS. Iowa Code § 466B.42. The DSC establishes and administers projects to reduce nutrients in surface waters from nonpoint sources in a "scientific, reasonable, and cost-effective manner." *Id*. In administering the projects, the DSC utilizes a "pragmatic, strategic, and coordinated approach with the goal of accomplishing reductions over time." *Id*.

E. Water Quality Regulation

The Iowa Code declares that "the control and development and use of water for all beneficial purposes is vested in the state, which shall take measures to ensure the conservation and protection of the water resources … ensure long-term availability in terms of quantity and quality to preserve the public health and welfare." Iowa Code § 455B.262(3). The legislature acknowledges that human activity has caused "a significant deterioration in the quality of Iowa's surface waters and groundwaters." Iowa Code § 455A.15(2). It vested the DNR with jurisdiction over the surface and ground water of the state to prevent, abate and control water pollution by establishing standards for water quality and for direct or indirect discharges of wastewater to waters of the state and by regulating potential sources of

water pollution through a system of general rules or specific permits. *See* Iowa Code § 455B.172(1); 567 Iowa Admin. Code 60.1. The DNR regulates the direct discharge of pollutants to a water of the state. Iowa Code § 455B.172(5)(a). The DNR and IDALS cooperate in the "administration of programs relating to water quality improvement and watershed improvements." Iowa Code § 455A.4(1)(j).

The DNR is authorized to issue permits for the discharge of any pollutant to waters of the state, including conditions and schedules of compliance necessary to meet the requirements of the Clean Water Act ("CWA") and all applicable state and federal water quality standards and effluent standards. Iowa Code § 455B.174(4)(a)(1) and (b); 567 Iowa Admin. Code 64.7. Specifically, the DNR is authorized to issue permits related to the administration of the National Pollutant Discharge Elimination System ("NPDES") permit program pursuant to the CWA, 33 U.S.C. chapter 26, as amended, and 40 C.F.R. part 124. Iowa Code § 455B.197. Any state NPDES permit program must be in accordance with the requirements of 33 U.S.C. § 1342, and guidelines promulgated pursuant to section 1314(i)(2). 33 U.S.C. § 1342(c)(2).

The dumping, depositing, or discharging of pollutants into any water of the state is prohibited, except adequately treated sewage, industrial waste, or

other waste in accordance with rules adopted by the EPC. Iowa Code § 455B.186(1); 567 Iowa Admin. Code 62.1(1). An NPDES permit authorizes the discharge of a pollutant into a navigable water. 567 Iowa Admin. Code 60.2. "Discharge of a pollutant" means any addition of any pollutant or combination of pollutants to navigable waters or waters of the state from any point source. *Id.* A "point source" is any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged, but does not include agricultural storm water discharges and return flows from irrigated agriculture. Iowa Code § 455B.171(19); 567 Iowa Admin. Code 60.2.

The DNR regulates two types of animal feeding operations: confinements and open feedlots. *See* Iowa Code chs. 459 and 459A; 567 Iowa Admin. Code 65.1(1) (definition of "animal feeding operation" and "confinement feeding operation"); Iowa Code § 459A.102(28) (definition of "open feedlot operation"); *but see* 40 C.F.R. § 122.23(b)(2) (definition of "concentrated animal feeding operation" or "CAFO," which ICCI references in their request for injunctive relief). Confinement feeding operations are required to retain and control all manure produced between periods of manure

disposal, and open feedlots must ensure any liquids that leave a facility do not cause a water quality violation. Iowa Code §§ 459.311(1) and 459A.401. A confinement feeding operation is not permitted under Iowa law to discharge manure directly into water of the state or into a tile line that discharges directly into water of the state. Iowa Code § 459.311(1) .

A confinement feeding operation or open feedlot that is a concentrated animal feeding operation as defined in 40 C.F.R. § 122.23(b) is required to comply with applicable NPDES permit requirements. Iowa Code §§ 459.311(2) and 459A.401(2); *see also Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 504–06 (2d Cir. 2005) (NPDES permit requirements only apply to concentrated animal feeding operations actually discharging pollutants to navigable waters). Iowa NPDES requirements for these entities may not be more stringent than requirements under the CWA. *Id.* Accordingly, the EPC has adopted federal NPDES regulations applicable to concentrated animal feeding operations by reference. 567 Iowa Admin. Code 65.6 and 65.102.

F. Iowa's Nutrient Reduction Efforts

The 2008 Gulf Hypoxia Action Plan calls for Iowa and states along the Mississippi River to develop strategies to reduce nitrogen and phosphorous loadings to the Gulf of Mexico by at least forty-five (45) percent. (App. at 18

(¶ 58)). In 2012, IDALS, DNR, and Iowa State University ("ISU") released a draft NRS, adopted a final NRS in 2013, and jointly adopted revisions to the NRS in 2014, 2016 and 2017. (App. at 18-19 (¶ 59)); *see* Iowa Code § 455B.171(11) (defining the NRS as "a water quality initiative developed and updated … to assess and reduce the nutrients in this state's watersheds that utilize a pragmatic, strategic, and coordinated approach with the goal of accomplishing reductions over time."). The NRS calls for, in part, a "voluntary, incentive-based program for agricultural nonpoint sources to achieve the majority of the overall reductions needed." (App. at 18-19 (¶ 59)).

The Iowa Nutrient Research Center ("INRC") was established in 2013 at ISU to "pursue a science-based approach to nutrient management research" that evaluates current and emerging nutrient management practices and provides "recommendations for the implementation of nutrient management practices and the development of new nutrient management practices." Iowa Code § 466B.47(2). The Iowa Nutrient Research Center Advisory Council was created to assist the INRC in its mission and includes eight (8) members of various state agencies and universities. *Id*. at § 466B.48.

In 2018, the Iowa legislature enacted Senate File 512 (2018), declaring the State should implement the NRS, and, in order to evaluate progress of nutrient reduction, "the baseline condition shall be calculated for the time

period from 1980 to 1996." S.F. 512, 87th Gen. Assem., § 20 (2018), codified as Iowa Code § 455B.177(3). Senate File 512 (2018) also significantly expanded the funding for the Water Quality Initiative created in 2013[1] and added additional funds to promote water quality, including, but not limited to, the Water Quality Infrastructure Fund and the Water Quality Financial Assistance Fund, each of which are estimated to receive approximately $141,000,000.00 and $129,200,000.00, respectively, from 2019-2030, for a total of $270,200,000.00. Fiscal Note, Senate File 512, p. 4 Table 2.

The Water Quality Infrastructure Fund will support edge-of-field and in-field infrastructure projects for conservation structures or practices on agricultural land. *See* Iowa Code § 466B.43. The Water Quality Financial Assistance Fund will support projects in the following programs: the Wastewater and Drinking Water Treatment Financial Assistance Program, which provides assistance to wastewater and drinking water treatment

[1] Even prior to the Water Quality Initiative, the legislature sought to address water quality issues, creating the Water Resources Coordinating Council ("WRCC") within IDALS in 2008, which includes representatives from multiple state agencies and universities. Iowa Code §§ 466B.3(1)-(2) and (6)(b) and 466B.3(4)(a)-(k). The WRCC is advised by the Watershed Planning Advisory Council ("WPAC"), whose membership includes twenty-three (23) people from both the public and private sector. *Id*. at § 466B.31(2)(a)(1)-(19) and (b)(1)-(2).

facilities to install or upgrade wastewater and drinking water treatment facilities, *see* Iowa Code § 16.134(1)-(3); the Water Quality Financing Program Fund, which is a loan program operated by the Iowa Finance Authority to improve water quality by addressing point and nonpoint sources, *see* Iowa Code § 16.152; and the Water Quality Urban Infrastructure Fund, which is a program to support projects that decrease erosion and stormwater discharge and advance implementation of the NRS, *see* Iowa Code § 466B.44(2). *See* Fiscal Note, Senate File 512, pp. 1-2. Senate File 512 also created a program review committee for the Wastewater and Drinking Water Treatment Financial Assistance Program that will assess the effectiveness of the program and, beginning 2027—and every ten years thereafter—submit a report to the governor and general assembly on the program's effectiveness. *See* Iowa Code § 16.134(9)(a).

G. Course of Proceedings

ICCI filed a lawsuit on March 27, 2019, seeking a judicial declaration that the State of Iowa has violated the public trust doctrine as secured by Section 25 of Article I of the Iowa Constitution for failing to adequately protect the public's recreational and drinking water use, and a declaration that Section 20 of Senate File 512, which establishes Iowa's policy for assessing and reducing nutrients in surface waters, is null and void. (App. at 25-26 (¶¶

(a)-(c))). ICCI is also seeking injunctive relief: requiring the State to "adopt and implement a mandatory remedial plan" to limit nitrogen and phosphorous pollution from nonpoint sources in the Raccoon River watershed; enjoining the State from "authorizing the construction and operation of new and expanding Medium and Large Animal Feeding Operations and CAFOs in the Raccoon River watershed" until the mandatory remedial plan is in place and monitoring data demonstrates sufficient progress; and enjoining the State from "taking any further action" that would violate the ICCI's constitutional rights or the public trust doctrine. (App. at 26 (¶¶ (d)-(f))).

The State filed a motion to dismiss on April 29, 2019, arguing: 1) ICCI lacked standing; 2) the injunctive relief involved nonjusticiable political questions or runs afoul of separation of powers; 3) the declaratory relief failed to present a justiciable controversy; and 4) the Iowa Administrative Procedure Act ("IAPA") provided ICCI their exclusive mechanism within which to bring their claims. (App. at 29-58). ICCI filed a resistance to the motion on May 10, 2019. (App. at 59-95). On May 17, 2019, the State filed a reply to ICCI's resistance. (App. at 96-103). The District Court denied the State's motion on September 10, 2019. (App. at 104-114).

The State then sought interlocutory appeal on October 1, 2019. (App. at 115-135). ICCI filed a resistance to the application on October 17, 2019.

(Resistance to Application for Interlocutory Appeal). The State filed a reply in support of the application on October 21, 2019. (Reply in Support of Application for Interlocutory Appeal). The application was granted on November 4, 2019. (Order, dated November 4, 2019).

ARGUMENT

Error Preservation: The arguments raised in this Brief were argued and ruled upon by the District Court. (App. at 104-114). The State then timely sought interlocutory appeal, which was granted. (App. at 115-135; Order, dated November 4, 2019).

Standard of Review: The standard of review when reviewing a district court's ruling on a motion to dismiss is for correction of errors at law. *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016). "A motion to dismiss should only be granted if the allegations in the petition, taken as true, could not entitle the plaintiffs to any relief." *Sanchez v. State*, 692 N.W.2d 812, 816 (Iowa 2005). "For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Argument Summary: The District Court's Ruling on the State's Motion to Dismiss ("Ruling") should be reversed, and ICCI's Petition should be dismissed in its entirety. First, ICCI lacks standing. The Petition does not

demonstrate ICCI's alleged injuries were caused by the action or inaction of the State, nor does it demonstrate the alleged injuries will be redressed by the relief sought. The Ruling erroneously held these factors do not apply to ICCI's claims.

Second, the requested injunctive relief raises nonjusticiable political questions or runs afoul of the separation of powers. ICCI asks this Court to usurp the role of the legislative and executive branches, seeking a sweeping, court-enforced mandatory remedial plan to reduce nitrogen and phosphorous in the Raccoon River watershed and the suspension of the construction and/or expansion of certain livestock facilities. The relief sought requires legislative—not judicial—action. Such relief is squarely precluded by the political question doctrine and separation of powers.

Third, the declaratory relief sought is nonjusticiable. The claims do not present a real and substantial controversy. Because a declaratory judgment would not impact nitrogen or phosphorous levels in the Raccoon River watershed, protect ICCI from the alleged injuries, or compel the State to take certain action, there is no actual controversy appropriate for judicial resolution.

Fourth, any justiciable claims challenging agency action must proceed according to the requirements of the IAPA. The Petition fails to meet these

requirements because ICCI has not exhausted administrative remedies and presents an improper programmatic challenge to a broad swath of water quality policies and programs.

I. ICCI LACKS STANDING TO BRING THEIR CLAIMS.

A. A Proper Standing Analysis Includes Prudential Considerations of Causal Connection and Redressability.

Any party petitioning the Court must have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). There are two threshold requirements for standing: (1) a party must have a specific personal or legal interest in the litigation, and (2) they must be injuriously affected. *Id.*; *see also Alons v. Iowa Dist. Court for Woodbury County*¸ 698 N.W.2d 858, 864 (Iowa 2005).

ICCI's members allege "aesthetic injury" and harm to their recreational use of the meandered section of the Raccoon River as a result of nitrogen and phosphorous pollution from agricultural sources in Iowa. (App. at 8 (¶ 6)). They also fear injury from drinking the water provided by Des Moines Water Works ("DMWW") and claim injury because they must pay costs incurred by DMWW to remove nitrate and cyanotoxin contamination from its source water. (App. at 8 (¶ 6)). The District Court held that ICCI satisfied the initial threshold standing elements (App. at 108), and the State concedes,

notwithstanding ICCI's unsubstantiated claim that they fear drinking water that meets the Environmental Protection Agency's ("EPA") Safe Drinking Water Act ("SDWA") standards for nitrate,[2] ICCI has pled facts sufficient to meet the injury requirements for standing. (App. at 43).

However, that does not end the standing analysis; ICCI must meet two additional prudential standing requirements—causal connection and redressability—and the District Court erroneously concluded otherwise. (App. at 108-109). The Iowa Supreme Court has cited with approval the standing requirements announced in federal courts under article III of the United States Constitution. *Alons*, 698 N.W.2d at 867-68 (Court considers "federal authority persuasive on the standing issue); *see also Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005). Notably, the federal test requires a "causal connection" between the injury and challenged conduct. *Alons*, 698 N.W.2d at 868 (quoting L*ujan v. Defenders of Wildlife*¸ 504 U.S. 555 (1992). In other words, the injury must be "fairly traceable" to the defendant's conduct. *Id.* Moreover, it must be "likely, as opposed to merely speculative, that the injury

---

[2] No allegations have been presented in ICCI's Petition or any other filings in this matter that the drinking water provided by DMWW to its customers has ever exceeded the maximum contaminant level set for nitrate (10 milligrams per liter ("mg/L")) by the EPA in the regulations implementing the SDWA. *See* 40 C.F.R. § 141.62(b)(7).

will be redressed by a favorable decision." *Id.* (internal quotation marks omitted).

The District Court held the Iowa Supreme Court has only adopted the federal article III standing requirements "for injury-in-fact, not concerning causation and redressability." (App. at 109). The District Court stated that the present case "does involve causation and redressability. As such, it is inappropriate to apply *Alons* to these facts." (App. at 109). The District Court's holding suffers from two fundamental flaws: 1) it equates this Court's silence on causation and redressability requirements with the rejection of those requirements by relying on cases where the focus was on the injury requirement or a standing analysis was not required; and 2) it ignores this Court's precedent on prudential considerations in standing.

While *Alons* and *Sanchez* raised federal article III standing requirements, including the causation and redressability prudential elements, but then did not discuss the application of those prudential requirements, the lack of discussion does not equate to rejection. *See* 698 N.W.2d at 868-70; 692 N.W.2d at 821. In *Alons*, plaintiffs filed a writ of certiorari with the Iowa Supreme Court asserting that a district court lacked the authority to recognize—and dissolve—a civil union between two same-sex partners. 698 N.W.2d at 862. The Court concluded plaintiffs did not have any personal or

legal interest in the dissolution proceeding below, and therefore, failed to meet the injury requirement for standing. *Id*. at 869-74.

In *Sanchez*, two classes of plaintiffs challenged the Iowa Department of Transportation's ("IDOT") refusal to issue driver's licenses to "illegal, undocumented aliens present in" Iowa. 692 N.W.2d at 816. One class of plaintiffs was the "illegal, undocumented aliens present in" Iowa ("Sanchez class"), and the other was a class of licensed drivers in Iowa who wanted the IDOT to license the Sanchez class to make Iowa's roads safer for driving ("Doe class"). *Id*. The Court concluded that because the Sanchez class had standing, and the district court correctly dismissed the lawsuit on the merits of the plaintiffs' claims, it was unnecessary to reach the issue of the Doe classes' standing. *Id*. at 821.

The focus in *Alons* was on whether the parties suffered an injury—not whether a causal connection existed between the alleged injury and defendant's conduct or whether their alleged injury could be properly redressed—while in *Sanchez*, the Court determined there was no need to conduct the standing analysis. Once a determination was made the plaintiffs failed to meet the injury requirement for standing or a standing analysis was not needed, it was unnecessary in either case to proceed with analysis of

causation and redressability. However, this does not equate to a rejection of those prudential requirements.

The District Court's erroneous conflation is compounded by its failure to distinguish binding precedent recognizing the applicability of prudential requirements for standing. In *Godfrey v. State*, this Court stated article III causal connection and redressability elements "largely relate to the prudential concerns we have recognized, and we too have relied on them to resolve standing claims in the past." 752 N.W.2d 413, 421-22 (Iowa 2008). The Court provided an example where it was presented with claims that a public-improvement project was illegal because the bonds used to finance the project were allegedly issued in violation of the law. *Id*. at 422 (citing *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 472 (Iowa 2004)). In *Citizens for Responsible Choices*, the Court held plaintiffs lacked standing because their alleged injury came from the project itself, not the governmental action—issuance of the bonds. *Id*. In *Godfrey*, the Court characterized the holding in *Citizens for Responsible Choices* as follows: "[t]o borrow from the federal language, the injury was not 'fairly traceable' to the challenged action." 752 N.W.2d at 422 (citing *Lujan*, 504 U.S. at 560).

The doctrine of standing was built upon "a foundation of prudential policies to promote the effective operation of our courts and . . . define the

proper role of the courts within our democratic society." *Godfrey*, 752 N.W.2d at 424-25. More specifically, this Court has recognized the importance standing plays in our system of government, stating:

> [S]tanding is deeply rooted in the separation-of-powers doctrine and the concept that the branch of government with the ultimate responsibility to decide the constitutionality of the actions of the other two branches of government should only exercise that power sparingly and in a manner that does not unnecessarily interfere with the policy and executory functions of the two other properly elected branches of government.

Id. at 425. Prudential considerations are important for cases like this one, where plaintiffs are seeking broad-scale change in state laws because of allegedly insufficient regulation of third parties not before this Court and "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562. In *Godfrey*, the Court recognized as much when it stated the causation and redressability elements of standing were particularly applicable in federal cases where the "'asserted injury arises from government's allegedly unlawful regulation (or lack of regulation) of someone else,' as opposed to cases in which the 'plaintiff is himself an object of the action (or foregone action) at issue.'" 752 N.W.2d at 421 (citing *Lujan*, 504 U.S. at 561-62). When the "plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."

Lujan, 504 U.S. at 562 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated in non-relevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

Accordingly, the District Court's Ruling should be reversed for failing to apply the causation and redressability standing requirements to ICCI's claims. Although the Court could remand this case with instructions to apply the proper standing analysis, given that the parties below have already briefed the issues, the State would respectfully request this Court consider and rule on the prudential standing requirements arguments raised below.

B. ICCI does not Meet the Causal Connection or Redressability Requirements for Standing.

Under the correct standing analysis, ICCI's injury: 1) must establish a "causal connection" or be "fairly traceable" to particular conduct of the State; and 2) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. ICCI does not allege the State is directly responsible for discharging nitrogen and phosphorous the Raccoon River watershed. Rather, ICCI alleges the ongoing efforts by the State to reduce such pollution have proved inadequate. The "links in the chain" between the State's challenged conduct and the alleged injury are too weak to sustain ICCI's standing. *See Allen*, 468 U.S. at 759. The Petition identifies numerous efforts by the State to reduce nutrient pollution in its waterways over a number

of years. (App. at 12-13, 15-20 (¶¶ 31-34, 43, 50-63)). The EPC denied a petition for rulemaking in 2019, reasoning, in part, the "State of Iowa continues to dedicate significant resources to efforts to reduce nutrient loadings to the waters of the state." (App. at 18 (¶ 56)). ICCI cannot establish a causal link based on conduct that they consider simply inadequate, but even if they could, they have not established that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

As previously indicated, in *Lujan*, one of the seminal decisions on standing in environmental cases, the Court explained that where plaintiff alleges her injury is caused by the government's failure to properly regulate some third party, redressability hinges on the response of the regulated third party to government action or inaction, and under such circumstances, standing is ordinarily substantially more difficult to establish. *Lujan*, 504 U.S. at 561-62. The *Lujan* plaintiffs challenged federal regulations that limited the reach of the Endangered Species Act, and they sought an injunction requiring the Secretary of the Interior promulgate a new regulation. *Id*. at 558–59. The Supreme Court held plaintiffs failed to demonstrate redressability because even if the Secretary of the Interior revised his regulation, plaintiffs failed to show such revisions would actually change the conduct of third parties. *Id.* at 563, 568–69. The Court noted that rather than attack particular decisions

causing them harm, plaintiffs chose to challenge general government action or inaction, and such challenges are "'rarely if ever appropriate for federal-court adjudication.'" *Id.* at 568 (quoting *Allen*, 468 U.S. at 759-760. It held the injury could not be redressed because the parties causing the injury were not parties to the lawsuit and any ruling would not be binding on them. *Id.* at 568-569.

In this case, Plaintiffs' alleged injury cannot be redressed by the declaratory relief they seek. *See Kanuk v. State, Dept. of Natural Resources*, 335 P.3d 1088, 1100-03 (Alaska 2014) (declaratory relief does not compel the State to take any particular action, nor does it protect the plaintiffs from the injuries they allege). Plaintiffs also seek injunctive relief requiring the State to adopt a mandatory remedial plan to implement nitrogen and phosphorus limitations in the Raccoon River watershed and suspend the construction and operation of certain livestock operations until monitoring data demonstrates sufficient reductions of said pollutants. (App. at 26 (¶¶ (d)-(e))). In both instances, ICCI seeks to compel the State to regulate third parties.

Under *Lujan*, ICCI can only establish standing by demonstrating the injunctive relief they seek would accomplish all of the following: (1) cause the State to adopt new statutes and/or regulations that would require agricultural nonpoint sources and livestock operations to reduce nitrogen and

phosphorus discharges to the Raccoon River watershed; (2) that said entities would comply with these new standards; (3) that compliance by said entities would actually reduce nitrogen and phosphorus discharges in the watershed; and (4) the lower discharges would reduce nitrogen and phosphorus to an extent and within a time-frame that would alleviate ICCI's alleged injuries. *See Lujan*, 504 U.S. at 562. ICCI's Petition does not satisfy these requirements.

ICCI has failed to meet the causation standard because they cannot show a connection between their alleged injury and any action of the State. Instead, the only injury they claim is the result of independent actions of agricultural nonpoint sources and livestock operations. *See Lujan*, 504 U.S. 555, 560–61; *Alons*, 698 N.W.2d 867–68. ICCI also fails to satisfy the redressability requirement. It is only speculative their alleged injury will be redressed by the relief they seek. *Id.* Accordingly, ICCI has failed to establish it has standing to bring its claims, and their Petition must be dismissed.

II. ICCI's CLAIMS FOR INJUNCTIVE RELIEF ARE NOT JUSTICIABLE.

A. The District Court Erred in Concluding that the Political Question Doctrine Does Not Apply in Iowa.

It is well-established courts will not intervene or attempt to adjudicate a challenge that involves a "political question." *King v. State*, 818 N.W.2d 1,

16 (Iowa 2012) (quoting *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996)). "The nonjusticiability of 'political questions' is primarily rooted in the separation of powers doctrine, 'which requires [courts to] leave intact the respective roles and regions of independence of the coordinate branches of government.'" *Id.*

The separation of powers is violated "if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000). Legislative power is the power to make, alter, and repeal laws and to formulate legislative policy, while executive power is the power to put the laws enacted by the legislature into effect. *In Interest of C.S.*, 516 N.W.2d 851, 859 (Iowa 1994). Courts exercising legislative or executive power delegated to the other branches of state government would "result in tyranny." *State v. Barker*, 89 N.W. 204, 209 (1902) (citing *Dash v. Van Kleeck*, 7 Johns. 477, 508 (N.Y. Sup. Ct. 1811).

> 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 [the General Assembly] or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate [state] policies or develop standards for matters not legal in nature.

King, 818 N.W.2d at 16-17 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). A political question arises when one or more of the following is present:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 17 (quoting *Dwyer*, 542 N.W.2d at 495). These are taken from the United States Supreme Court decision in *Baker v. Carr*, 369 U.S. 186 (1962), and are now known as the "Baker factors."

ICCI argued below the political question doctrine does not apply in Iowa, and the District Court appears to agree. (App. at 110-111). The District Court states "Defendants' argument cannot prevail where the federal government has failed to extend the political question doctrine to the courts and the State has not acted to apply it on its own." (App. at 110). The District Court then later states "even if the [Court] does acknowledge the political question doctrine as applying to state courts, which is questionable, the

doctrine likely does not apply here." (App. at 111). ICCI's arguments and the District Court's conclusion are wrong as a matter of law.[3]

The Iowa Supreme Court has long recognized the existence of the political question doctrine and applied it multiple times, holding the doctrine warranted dismissal in several cases. *See King*, 818 N.W.2d at 16; *Dwyer*, 542 N.W.2d at 495; *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 831 (Iowa 1978). The District Court's erroneous conclusion to the contrary appears to stem from a misinterpretation of the Iowa Supreme Court's discussion—and ultimate conclusion—about the status of the political question doctrine in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). (App. at 110). In *Freeman*, plaintiffs brought common law and statutory nuisance claims as well as common law trespass and negligence claims against a corn wet milling facility for its alleged emission of harmful pollutants and noxious odors, seeking damages for lost use and enjoyment of their properties,

---

[3] Although the District Court ultimately concluded the political question doctrine does not exist in Iowa, the Court appears to contradict that conclusion earlier in its ruling, stating the political question doctrine is "longstanding" and applied in Iowa. (App. at 109) (citing *King*, 818 N.W.2d at 16). The District Court further stated if it found ICCI's claims presented political questions, it would be appropriate to dismiss their case. (App. at 109). Notwithstanding the earlier contradictory statement, the State's understanding of the District Court's ultimate conclusion was the political question doctrine does not exist in Iowa. (App. at 110-111).

punitive damages, and injunctive relief. *Id*. The defendant alleged the claims presented a political question because it involved the balancing of economic benefits—jobs—against the harms of air pollution and allowing the judicial branch to balance those interests would result in a collateral attack on the elaborate system created by Congress—the Clean Air Act. *Id*. at 90.

In *Freeman*, the Court acknowledged some scholars question whether the political question doctrine should exist, while noting others support the doctrine. *Id*. at 91. The Court also discussed the rare application of the doctrine in Iowa, citing the *Dwyer* and *Scott* cases, where the political question doctrine served as the basis for dismissal in both. *Id*. at 92 (citing *Dwyer*, 542 N.W.2d at 501; *Scott*, 269 N.W.2d at 831). The Court then observed plaintiffs had not questioned whether the doctrine applies in Iowa, and if so, whether the doctrine in Iowa should depart from the federal doctrine. *Id*. Notwithstanding the discussion of the origins and continued applicability of the political question doctrine in *Freeman*, the Court nonetheless adopted the federal political question doctrine for purposes of the case, reserving the right to apply the doctrine differently than under federal cases, and proceeded to conduct an analysis under the doctrine, ultimately determining it did not warrant dismissal of the claims. *Id*. at 92.

Moreover, *Freeman*, was issued a mere two years after *King*, where the Court—without questioning the applicability of the political question doctrine—conducted a political question analysis of a claim that Iowa's education standards were unconstitutionally deficient, although ultimately deciding the case on other grounds. 818 N.W.2d at 16-22. This Court's discussion of the origins and continued applicability of the political question doctrine in *Freeman* does not amount to a rejection of the doctrine as the District Court erroneously concluded. The Iowa Supreme Court's analysis of the applicability of the political question doctrine in *Freeman*, *King*, *Dwyer*, and *Scott* demonstrate the doctrine is alive and well in Iowa jurisprudence. Accordingly, this Court should reverse the District Court's erroneous determination that the political question doctrine is not recognized in Iowa.

B. ICCI's Requested Injunctive Relief Renders Their Claims Nonjusticiable Political Questions or Violates the Separation of Powers.

The Petition includes three requests for injunctive relief: 1) requiring the State to adopt a mandatory remedial plan to implement nitrogen and phosphorus limitations in the Raccoon River watershed; 2) suspending the construction and operation of certain livestock operations until monitoring data demonstrates sufficient reductions of said pollutants; and 3) an order

enjoining the State from "taking any further action" that would violate the Iowa Constitution or the public trust doctrine. (App. at 26 (¶¶ (d)-(f))).

Although the District Court determined the political question doctrine was not recognized in Iowa, it nonetheless proceeded to conduct an analysis, ultimately concluding ICCI's requested injunctive relief did not present a political question. (App. at 111). The District Court reasoned that, although the legislative and executive branches have attempted to address water quality, ICCI's request would simply require the court to order those branches "enact and enforce a mandatory remedial plan in line with EPA standards." (App. at 111). The District Court then referenced the EPA's 10 mg/L nitrate standard for drinking water and stated ICCI's remedies do not call for the judiciary to encroach upon the powers of the other branches. (App. at 111). However, a careful review of ICCI's specific requests for injunctive relief demonstrates they present nonjusticiable political questions under the first, second, and third Baker factors and violate the separation of powers.

1. ICCI's Request that the Court Order the State to Adopt a Mandatory Remedial Plan Presents a Nonjusticiable Political Question or Violates the Separation of Powers.

ICCI has argued, and the District Court agreed, that their first request for injunctive relief—the "mandatory remedial plan"—does not implicate the Baker factors or violate the separation of powers because they are not

requesting the Court develop and adopt the plan, but are simply asking the Court order the State to develop and adopt the plan. (App. at 74-75). However, appearances can be deceiving. The "mandatory remedial plan" ICCI would have the Court order the State develop would essentially turn the Court into a "water quality czar" for the State of Iowa, regulating the State's efforts to reduce nutrients and the construction and/or expansion of certain livestock facilities. Such relief runs afoul of the political question doctrine and/or the separation of powers because it would require the Court to: order the legislature to adopt several new laws; invalidate or amend several other laws; oversee executive branch rule-making; and make initial policy determinations and/or decide technical remedial questions. These are the provinces of separate branches of government—not the judiciary.

a. The First Baker Factor.

The court-ordered remedial plan ICCI seeks the State to develop and adopt requires a complex regulatory scheme, the assessment of numerous costs and benefits, the balancing of many important interests, and the resolution of difficult social, economic, and environmental issues. This kind of policy-making implicates core legislative and regulatory functions that are textually committed to the political branches of government. *See* Iowa Const. art. III § 1, art. IV § 1. The legislative and executive branches have addressed

water quality issues through a variety of legislative and regulatory efforts, including the NRS. *See* Statement of Facts and Course of Proceedings, § A-F, pp. 19-28. "It is not the role of the judiciary to second-guess the wisdom of the legislature. . .The court has no authority to conduct its own balancing of the pros and cons…." *Rousso v. State*, 239 P.3d 1084, 1086-87 (Wash. 2010). The District Court's own words acknowledge ICCI is seeking "review of the legislature's actions and inactions related to policy." (App. at 112 (emphasis added)); *see also* (App. at 20 (¶ 63) ("Effective July 1, 2018, the Iowa legislature enacted section 20 of Senate File 512 (2018) which declared the Iowa Nutrient Reduction Strategy the state policy for nitrogen and phosphorous water pollution controls.") (emphasis added)).

In effect, the District Court ruled decades of policy determinations involving scientific research, economic analyses, social and environmental priorities, financial abilities, and federal guidance—which together make up each law enacted by the Iowa General Assembly—are now subject to scrutiny by the Court for determination of whether the Iowa Legislature has properly balanced these priorities. "[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see also* Iowa Const. art. III § 1 ("[N]o person charged with the exercise of powers properly

belonging to one of these departments shall exercise any function appertaining to either of the others.").

In addition to encroaching on the broad policy-making functions of the legislative and executive branch, ICCI's requested remedial plan would also encroach on the specific legislative power to "make, alter, and repeal laws." *See In Interest of C.S.*, 516 N.W.2d at 859. First, as ICCI readily admits in their Memorandum of Law in Support of Plaintiffs' Resistance to Defendants' Motion to Dismiss ("MTD Resistance"), their request that executive branch agencies be given authority to adopt mandatory nitrogen and phosphorous limits for agricultural nonpoint sources will require this Court to order the legislature to adopt a new law providing for such authority. (App. at 83-85 (ICCI asserts they do not have to exhaust administrative remedies because the agencies themselves do not have authority to require mandatory nitrogen and phosphorous limits)).

Second, to the extent these new mandatory limits would be included in a NPDES permit,[4] ICCI's request would also require the Court order the

[4] It is not clear from ICCI's Petition how they would like the mandatory limits implemented for agricultural nonpoint sources, but restrictions on land application of manure and the discharge of pollutants in Iowa are generally addressed by Manure Management Plans ("MMP"), Nutrient Management Plans ("NMP") and NPDES permits, respectively. *See* Iowa Code

legislature to amend portions of Iowa Code §§ 455B.171(21), 459.311(2), and 459A.401(21). Iowa Code § 455B.171(21) provides that agricultural stormwater discharge is not a point source, exempting those discharges from NPDES permit requirements. *See* 567 Iowa Admin. Code 60.2 (NPDES permits authorize the "discharge of a pollutant," which is further defined as the addition of any pollutant by a "point source."). Iowa Code sections 459.311(2) and 459A.401(2) provide that NPDES permits issued to confinement feeding operations or open feedlots that meet the definition of a "concentrated feeding operation" in 40 C.F.R. § 122.23(b) can be "no more stringent" than the federal requirements under the CWA. But ICCI's MTD Resistance admits the CWA "does not require states to implement mandatory nonpoint source controls" and "also exempts agricultural storm water discharges" from the definition of point source, precluding the State's ability to implement said controls without an amendment to Iowa Code sections 459.311(2) and 459A.401(2), removing the "no more stringent" language. (App. at 85 (referencing 33 U.S.C. §§ 1313 and 1319)).

---

§ 455B.186(1), 455B.197, 459.311(2), 459.312(1)(a), 459A.208, and 567 Iowa Admin. Code 60.2.

Third, as ICCI again readily admits in their MTD Resistance, their request that mandatory nitrogen and phosphorous limits apply to all animal feeding operations—not just medium and large—will require this Court either order the legislature to amend the definition of "small animal feeding operation" in Iowa Code § 459.102(51) or invalidate the exemption from the requirement for a MMP[5] for such operations in § 459.312(1)(a). (App. at 86-87 (ICCI asserts they do not have to exhaust administrative remedies for MMPs because Iowa law exempts: 1) small animal feeding operations from the MMP requirements; and 2) storm water discharges from animal feeding operations from NPDES permit requirements)).

Fourth, as ICCI again readily admits in their MTD Resistance, their request that the "mandatory remedial plan" include changes to DNR's alleged inability to prohibit manure spreading on "frozen, snow-covered ground" will require this Court order the legislature to amend Iowa Code § 459.313A, which governs manure application on frozen or snow-covered ground. (App.

---

[5] Owners of certain "confinement feeding operations" are required to submit an MMP to the DNR for its approval in order to receive a permit from the DNR for construction of a confinement feeding operation structure, and the MMP sets forth certain restrictions on the land application of manure generated from the confinement feeding operation. *See* Iowa Code § 459.312(1), (7)(a) and (b), and (10)(a)-(h).

at 16 (¶ 46), 87 (ICCI asserts they do not have to exhaust administrative remedies for manure application on frozen or snow-covered ground because the DNR "lacks the authority to prohibit manure spreading on frozen or snow-covered ground in manure management plans")). ICCI also admits they "seek relief that *far exceeds* what DNR is authorized to require via manure management plans," underscoring their need for this Court to order the legislature amend or adopt legislation addressing the matter. (App. at 87).

In addition to the aforementioned specific legislative changes ICCI is seeking the Court order be included in the remedial plan, ICCI is requesting the following be included as well:

> the State, when adopting the mandatory remedial plan, can and should adopt technical assistance to support farmers' implementation of the plan, while holding integrators accountable for implementation on operations where animals they own are raised. Iowa Citizens support broader reforms to farm policy that are needed to increase the economic viability of independent farms while they implement the mandatory remedial plan, including commodity policy reform to ensure that farmers can receive a fair price for their crops and livestock.

ICCI's Resistance to Application for Interlocutory Appeal at 14-15 ¶ 23 (Oct. 17, 2019) ("Interlocutory Appeal Resistance"). ICCI's Interlocutory Appeal Resistance defined "integrator" as an "entity that both processes and owns livestock, such as Smithfield." *Id*. at 15 ¶ 23 n. 5. Integrated processor-production entities are regulated, in part, by Iowa Code chapter 202B, which

is separate from Iowa's statutory environmental requirements for construction and operation of animal feeding operations, contained in chapters 459 and 459A, and center around the construction and operation of the actual structures (buildings and manure storage structures)—not the ownership of the animals housed within. *See* Iowa Code §§ 459.303(1) (requiring construction permit for confinement structures), 459.312(1)) (requiring owner of confinement feeding operation submit a manure management plan), 459A.205(1)(a)(1) (requiring construction permit for settled open feedlot effluent basins for open feedlot operations), Iowa Code 459A.208(1)(a) (requiring owner of an open feedlot operation to submit a nutrient management plan).

ICCI's request that the remedial plan includes technical assistance to farmers, holds "integrators" accountable, and includes commodity policy reform would require legislative action. But ordering the Legislature to pass laws violates separation of powers. Moreover, these additional requests about "integrators" and commodity policy reform inclusion suggests ICCI is not just asking for the Court to become a "water quality czar," directing the State's efforts to reduce nitrogen and phosphorous pollution, but rather an "agricultural production czar" as well, directing the State's regulation of

integrated processor-producer entities and the pricing of agricultural commodities such as livestock, grains and dairy.

ICCI's requested remedial plan will require the Court to order the Legislature to adopt specific legislative amendments and/or new legislation in a variety of areas of the Iowa Code, including, but not limited to: water quality standards; NPDES permits; the regulation of certain livestock facilities; manure management and application; integrated livestock processor-producers; and commodity pricing. The power to make, alter, and repeal laws resides in the legislative branch, and, based upon the foregoing, the District Court erroneously concluded ICCI's requested remedial plan would not encroach upon the power textually committed in Iowa's Constitution to a separate and co-equal branch of government. Accordingly, ICCI's request that the Court order the State to adopt and implement a mandatory remedial plan presents a nonjusticiable political question under the first Baker factor and/or violates the separation of powers.

b. The Second and Third Baker Factors.

In addition to requiring the Court intrude into the legislature's domain, the court-ordered remedial plan ICCI seeks the State to develop and adopt will require the Court oversee the rulemaking processes for the DNR, EPC, NRC, and IDALS after the Legislature makes any necessary statutory changes. It

will also require the Court make initial policy determinations and/or decide technical remedial questions of a kind clearly for nonjudicial discretion without the benefit of judicially discoverable and manageable standards for resolving the issues. All of the above render ICCI's requested injunctive relief nonjusticiable political questions.

Under the second Baker factor, while ICCI relied upon several public trust doctrine cases below to argue judicially manageable standards exist to resolve this matter, those cases are easily distinguishable because none of them set forth a standard under the public trust doctrine to assist courts in evaluating a state's efforts to develop, implement and measure progress for numeric water quality limits for specific pollutants. (App. at 75 (citing *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) (Court held public trust doctrine prohibits state from conveying certain portions of Lake Michigan's lakebed to private parties); *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017) (Court, relying upon public trust doctrine, held the loss of the paramount right of Iowans to use state waterways—operate a boat in that case—weighed against finding Pettijohn's consent to a breath test for alcohol was voluntary and uncoerced); *State v. Sorensen*, 436 N.W.2d 358 (Iowa 1989) (holding the public trust doctrine prevented Iowa Code section 614.17, which barred claims to real estate predating 1970, from applying to the State in its quiet title

action for land adjacent to the Missouri River); *Witke v. State Conservation Comm'n*, 56 N.W.2d 582 (Iowa 1953) (Court invalidated state law requiring permits and fees for use of state waters, in part, under the public trust doctrine because the State had not made any improvements to the water for navigation); *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (holding the state must take the public trust doctrine into account in the planning and allocation of water resources, but acknowledging the state may have to approve allocations despite foreseeable harm to public trust resources)).

ICCI did not identify a single case below where a court, pursuant to the public trust doctrine, set forth any specific standards to manage its oversight of a state's development and implementation of a mandatory remedial plan to reduce specific pollutants in state waters. The scale of ICCI's requested remedy, the nature and status of the Defendants here, and the legal doctrine ICCI's claims are based upon, all stand in stark contrast to the same in *Freeman*, where this Court concluded the second Baker factor did not apply. There, plaintiffs brought tort claims—nuisance, trespass and negligence—seeking damages and unspecified injunctive relief to remedy the common law torts against a single private party allegedly emitting harmful pollutants. *Freeman*, 848 N.W.2d at 63. This Court concluded that tort law had devised

a number of doctrinal approaches to accommodate resolution of complex environmental and toxic tort cases, noting the United States Supreme Court had never found a lack of judicially manageable standards in a "tort suit involving private parties." *Id*. at 93. In addition, the Court recognized claims for damages are generally immune from efforts to dismiss based upon the political question doctrine. *Id*. (citing *Maryland Heights Leasing v. Mallinckrodt,* 706 S.W.2d 218, 221 (Mo. 1985) ("[i]ndividual tort recoveries…are not precluded by the political question doctrine. Appellants are not trying to establish standards that conflict with legislative determinations; they are seeking compensation for injuries.") (citations omitted)).

Here, ICCI is not simply seeking damages against a single private party for harms to a public trust resource, but rather, seeking wholesale change to the State's water quality efforts to reduce nitrogen and phosphorous[6]—and arguably the regulation of agricultural production and commodity pricing—pursuant to a court-ordered, and overseen, process. ICCI is seeking such relief without identifying any specific judicially discoverable and manageable

---

[6] Although ICCI's Petition is limited to nitrogen and phosphorous, their arguments could conceivably apply to any number of different pollutants, the discharge of which is regulated by the State.

standards and has not identified a single case where any court has ordered a state to develop a similar remedial plan pursuant to the public trust doctrine. Simply reciting the "public trust doctrine" does not a judicially discoverable and manageable standard make.

With respect to the third Baker factor, despite ICCI's arguments to the contrary, their request for the remedial plan will require the Court make initial policy determinations and/or decide technical remedial questions of a kind clearly for nonjudicial discretion. In order for the Court to both 1) provide adequate notice to the State of requirements that should be included in any remedial plan and 2) eventually review the adequacy of said remedial plan, the Court will need to make findings on the following, non-exhaustive list of factors: the specific nitrogen and phosphorous limits applicable to all[7] farmers in the Raccoon River watershed; the baseline level of nitrogen and phosphorous by which the State evaluates progress; the level of nitrogen and

[7] Although ICCI's Petition focuses a significant amount of attention on livestock facilities, their request that the State impose mandatory nitrogen and phosphorous limits on "agricultural nonpoint sources" would apply to all non-livestock farmers as well, including producers of corn, soybeans, and other crops. (App. at 26 (¶ (d)) (requesting the injunctive relief apply to "agricultural nonpoint sources and CAFOs")).

phosphorous reduction that is acceptable; the speed at which said reductions occur; and when sufficient reduction has occurred.

For example, ICCI's request that the Court invalidate Section 20 of Senate File 512 (2018) would eliminate the nitrogen and phosphorous baseline set under the NRS, leaving the State without a baseline from which to evaluate progress. *See* Iowa Code § 455B.177(3) (to evaluate progress under the NRS, the legislature set the baseline as "the time period from 1980 to 1996"). Without the aforementioned initial policy determinations made by the Court, the legislative and executive branches would be forced to spend a considerable amount time and effort crafting a plan that does not—according to the Court—reduce nitrogen and phosphorous to acceptable levels or achieve said reductions on a sufficiently acceptable timeline.

The concerns and potential problems sought to be addressed by each specific Baker factor are further compounded by the realistic possibility of claims similar to ICCI's made in other watersheds, resulting in conflicting court orders among various jurisdictions throughout Iowa. Although ICCI's requested remedial plan is limited to the Raccoon River watershed, their claims could just as easily be raised by plaintiffs in the Cedar River watershed or any other Iowa watershed. The result of which could be conflicting remedial plans, with different nitrogen and phosphorous reduction

requirements and timelines or livestock production practices and/or commodity price reforms in Iowa's many watersheds.

Based upon the foregoing, the court-ordered remedial plan ICCI seeks the State to develop and adopt presents a nonjusticiable political question under the second and third Baker factors.

2. ICCI's Request that the Court Suspend the Construction or Expansion of Certain Livestock Production Facilities Presents a Nonjusticiable Political Question or Violates the Separation of Powers.

ICCI's second request for injunctive relief must be dismissed with the first. If the Court cannot order the State to fashion a mandatory remedial plan, the Court cannot prohibit the State from authorizing construction or expansion of certain livestock facilities until such a plan is in place. Moreover, such injunctive relief would require the Court suspend significant portions of Iowa Code chapters 459 and 459A and Iowa's administrative rules relating to the application for construction and/or expansion of certain livestock operations until the Court determined the "mandatory remedial plan and monitoring data demonstrate viable recreational and drinking water use." For the same reasons set forth above, suspending the application and enforcement of laws that have not been ruled unconstitutional and making a policy determination on the level of nitrogen and phosphorous reduction necessary to "demonstrate viable

recreational and drinking water use" present nonjusticiable political questions under the first, second and third Baker factors and violates the separation of powers.[8]

3. Jurisprudence on Public Trust Doctrine Claims Seeking Greenhouse Gas Emission Reductions Demonstrates ICCI's Requested Relief Presents Nonjusticiable Political Questions and/or Runs Afoul of the Separation of Powers.

There are a number of courts in other jurisdictions that have considered similar claims where plaintiffs have raised the public trust doctrine—generally seeking greenhouse gas emission reductions and declaratory relief—and ultimately concluded the claims present nonjusticiable political questions or violate the separation of powers. *See*, *e.g.*, *Kanuk*, 335 P.3d at 1088; *Sinnok v. Alaska*, Case No. 3AN-17-09910 (D. Alaska Oct. 30, 2018) (available at http://climatecasechart.com/case/sinnok-v-alaska/), *appeal docketed*, No. S-17297 (Alaska Nov. 29, 2018); *Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015); *Svitak v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. 2013); *Aji v. Washington*, No. 18-2-04448-1 (Wash. Super. Aug. 14, 2018) (unpublished) (available at

[8] ICCI's third request for injunctive relief simply seeks to enjoin future violations of their rights under the public trust doctrine and the Iowa Constitution, and must also be dismissed for the reasons set forth herein.

http://climatecasechart.com/case/aji-p-v-state-washington/), *appeal docketed*, No. 93616-9-A (Wash. Sept. 18, 2018).

In *Kanuk*, plaintiffs, based upon public trust doctrine and constitutional claims, sought injunctive relief requiring the State of Alaska reduce greenhouse gas emissions by a certain amount annually until the year 2050. 335 P.3d at 1097-1099. The Supreme Court of Alaska began by noting that while "the science of anthropogenic climate change is compelling, government reaction to the problem implicates realms of public policy besides the objectively scientific." *Id*. at 1097. The Court further explained,

> The legislature—or an executive agency entrusted with rule-making authority in this area—may decide that employment, resource development, power generation, health, culture, or other economic and social interests militate against implementing what the plaintiffs term the "best available science" in order to combat climate change.
>
> …
>
> We cannot say that an executive or legislative body that weighs the benefits and detriments to the public and then opts for an approach that differs from the plaintiffs' proposed "best available science" would be wrong as a matter of law, nor can we hasten the regulatory process by imposing our own judicially created scientific standards. The underlying policy choices are not ours to make in the first instance.

Id. at 1098. The court, noting some progress had been made on acknowledging the harms of climate change, nonetheless concluded plaintiffs'

request for injunctive relief presented a nonjusticiable political question. *Id*. at 1098-99.

In *Sinnok*, plaintiffs, relying upon the public trust doctrine and constitutional claims, sought injunctive relief ordering the State of Alaska to prepare an accounting of carbon emissions and create a climate recovery plan that would reduce greenhouse gas emissions. Case No. 3AN-17-09910 at 1. The court held plaintiffs' challenges to Alaska's general "energy policy" were not sufficiently specific to a state action, and their requested relief would run afoul of the separation of powers and conflict with the third Baker factor—essentially creating a policy where none existed. *Id*. at 8-9.

In *Sanders-Reed*, plaintiffs, relying upon the public trust doctrine, sought injunctive relief ordering the State of New Mexico to prepare an accounting of carbon emissions and create a climate recovery plan that would reduce greenhouse gas emissions. 350 P.3d at 1222-23. The court concluded claims to reduce greenhouse gases must be brought within the state's constitutional and statutory framework, which had incorporated the public trust doctrine, and not through the common law. *Id*. at 1225. The court based its decision, in part, on the separation of powers doctrine, holding that the normal processes for challenging governmental action related to climate change—judicial review of agency actions—remained available to plaintiffs

and issuing a judicial decision ignoring such process would violate the separation of powers. *Id*. at 1226-27.

In *Svitak*, plaintiffs, relying upon the public trust doctrine, sought injunctive relief to accelerate the State of Washington's efforts to reduce greenhouse gas emissions. 2013 WL 6632124 at 1. The court held plaintiffs did not challenge an affirmative state action or failure to undertake a duty to act as unconstitutional, and therefore, the claims were not redressable. *Id*. at 2. The court further declined to issue declaratory relief to create a new regulatory program for greenhouse gas emissions, recognizing that such a remedy would violate the separation of powers. *Id*. ("[I]t is not the role of the judiciary to second-guess the wisdom of the legislature.").

Finally, in *Aji*, plaintiffs, relying upon the public trust doctrine and constitutional claims, sought injunctive relief ordering the state of Washington to prepare an accounting of carbon emissions and create a climate recovery plan that would reduce greenhouse gas emissions. No. 18-2-04448-1 at 4-5. The court characterized plaintiffs' request as seeking the "court to order and oversee the development of far-ranging climate action plan that would involve a complex regulatory scheme." *Id*. at 6. The court held such "policy-making" is the prerogative and role of the other branches of government and plaintiffs requested relief violates the separation of powers.

Id. at 6-7. The court recognized it was ill-equipped to "legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can [it] determine which risks are acceptable and which are not." *Id*. at 7.

The District Court distinguished these cases, stating they "make broad, overarching statewide climate change claims. Here, the parties are disputing the impact of pollution and state action or inaction on a discrete part of Iowa's waterways." (App. at 110). Respectfully, the aforementioned climate change public trust cases are not so easily distinguished. Although the District Court characterized the present action as addressing a "discrete part of Iowa's waterways," the Racoon River watershed is not so discrete; it drains 3,625 square miles, or 2.3 million acres, in west-central Iowa. (App. at 12 (¶ 29)). Moreover, while some of these cases have distinguishing characteristics of varying degrees from the present case, the overarching theme is equally applicable here. The sweeping declaratory and injunctive relief sought by ICCI would require the Court—notwithstanding the "discrete" nature of the waterway at issue here—rewrite Iowa's statutory provisions for nutrient reduction and livestock management and legislate an extensive regulatory regime in violation of the separation of powers and present nonjusticiable

political questions that must be addressed through the other branches of government.

In this action, there is no dispute the State views the assessment and reduction of nutrients in the surface waters over time as a goal that is "in the interest of the people of Iowa." (App. at 20, 23-25 (¶¶ 63, 82, 94)). Iowa is acting to address nitrogen and phosphorous pollution. ICCI disagrees with the State's chosen methods and schedule, but for that their remedy is found at the ballot box—not the courthouse. *See Sanders-Reed*, 350 P.3d at 1227.

ICCI's requests for injunctive relief violate the separation of powers and/or present nonjusticiable political questions. Accordingly, their claims for injunctive relief should be dismissed.

III. ICCI'S CLAIMS FOR DECLARATORY RELIEF ARE NOT JUSTICIABLE.

ICCI's Petition includes three requests for declaratory relief. The first two requests for declaratory relief ask the court to declare the public has a "right" and a "property interest" in the recreational and drinking water use of navigable waterways, the State has a duty to protect the same, and the "actions and inactions" of the State violated that duty. (App. at 25-26 (¶¶ (a)-(b))). The third request seeks a declaration that Section 20 of Senate File 512 (2018) is "null and void as inconsistent with the public trust doctrine." (App. at 26 (¶ (c))).

The District Court, with little discussion, concluded ICCI's requested declaratory relief did not violate the separation of powers or present a nonjusticiable political question. (App. at 111-113). However, the State did not advance any such argument below, instead arguing the requests for declaratory relief should be dismissed because they do not present a real and substantial controversy.

For there to be a justiciable controversy, there must be a "substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." *Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975) (citing *Katz Investment Co. v. Lynch*, 47 N.W.2d 800, 805 (Iowa 1951)). There must not be "a difference or dispute of a hypothetical or abstract character; … one that is academic or moot." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Rather, "[i]t must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 241.

In this case, a declaration that the public has a "right" and a "property interest" in the recreational and drinking water use of navigable waterways, the State has a duty to protect the same, and the "actions and inactions" of the State violate that duty do not provide for specific relief of a conclusive

character. The declaratory relief would have no immediate impact on the water quality of the Raccoon River watershed, does not compel the State to take any particular action, and will not protect ICCI from their claimed injury. Under those circumstances, the Petition presents a controversy that is "abstract" and "academic."

ICCI highlighted the true nature of their requested declaratory relief—an advisory opinion—in their MTD Resistance where they requested the Court issue declaratory relief to assist ICCI in future political campaigns and elections, contrary to Iowa Supreme Court precedent. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) ("This court has repeatedly held that it neither has a duty nor the authority to render advisory opinions."); (App. at 80 (in the event ICCI's injunctive relief claims are dismissed, they request the court still issue declaratory relief because it "would support further remedial relief 'at the ballot box,' State Br. at 19, by informing Iowans of the rights of the public…")). However, courts should not "decide an abstract question simply because litigants desire a decision on a point of law or fact." *Bechtel*, 225 N.W.2d at 330.

Moreover, it is hard to understand what ICCI hopes to achieve because invalidation of Section 20 of Senate File 512 (2018) would result in the State rescinding its acknowledgement of the importance of reducing nutrients in

State waters and halting implementation of the nitrogen and phosphorous reduction goals of the NRS. What ICCI really seeks is for the Court to invalidate the statute and then establish its own enforceable reduction limits, which would violate the separation of powers.

Accordingly, ICCI's claims for declaratory relief should be dismissed.

IV. ICCI FAILED TO STATE A CLAIM UNDER IOWA'S ADMINISTRATIVE PROCEDURE ACT.

A. Any Justiciable Claim ICCI Asserted Challenging Agency Actions Must Proceed Under the Iowa Administrative Procedure Act.

To the extent ICCI has identified any justiciable claims challenging agency action, supported by a specific or individualized interest, the IAPA provides the sole mechanism for them to bring their claims. ICCI must comply with the IAPA's requirements for judicial review and their attempt to seek declaratory and injunctive relief outside the IAPA's requirements must be dismissed. The IAPA provides that judicial review under chapter 17A is the "exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19. The carefully crafted framework of the IAPA "requires litigants affected by the actions of state agencies to follow the rules as a prerequisite to obtaining *proper* access to the district court for judicial

review." *IES Utilities, Inc. v. Iowa Dep't of Revenue & Fin.*, 545 N.W.2d 536, 538 (Iowa 1996) (emphasis in original).

ICCI argued below, and the District Court agreed, they need not exhaust their administrative remedies because, rather than challenging the discrete, agency actions identified in their Petition, ICCI is actually challenging various statutory provisions that allegedly limit state agencies from providing sufficient relief through the administrative process. (App. at 112-113).[9] ICCI made this argument despite naming a multitude of executive agencies and officials as defendants. ICCI's Petition alleges a variety of specific agency actions (or inactions) that violate their constitutional rights and the public trust doctrine. Specifically, they identify the following agency actions/inactions to support their claims: DNR's alleged failure to issue NPDES permits to certain livestock operations; DNR's alleged authorization of certain livestock operations to apply manure on "frozen, snow-covered ground;" EPC's denial of a petition for rulemaking seeking numeric nitrogen and phosphorous water quality standards; and DNR's alleged failure to mandate nitrogen and

---

[9] The State concedes that to the extent ICCI is challenging any statutory provisions, Section 20 of Senate File 512 (2018) for example, they are not required to exhaust their administrative remedies for those specific challenges.

phosphorous limits from certain livestock operations as part of their MMPs. (App. at 16, 18, 22-25 (¶¶ 45-46, 49, 56, 74-75, 82, 94)).

ICCI's decision to sue executive agencies and officials demonstrates the State's decisions regarding water quality are made by many individual agencies and officials, all of which are operating pursuant the IAPA and their respective governing statutes. Each challenged agency decision—each alleged failure to issue an NPDES permit, each alleged authorization to apply manure on frozen ground, each alleged denial of a petition for rulemaking, and each alleged approval of an MMP—is an "agency action" reviewable, if at all, under the IAPA.

B. ICCI has Failed to Exhaust their Administrative Remedies.

Rather than proceed through the proper and exclusive channel under chapter 17A, ICCI seeks a quick and easy bypass. They filed a direct action seeking declaratory and injunctive relief to force the State to reverse certain agency actions and prohibit or expedite others. (App. at 25-26 (¶¶ (a)-(f))). But the IAPA precludes this type of action:

> There is no basis on which to conclude the 'exclusive means' language in section 17A.19 is mitigated by an exception for common-law writs such as certiorari, declaratory judgment, or injunction. A person or party aggrieved or adversely affected by agency action must utilize the provisions of section 17A.19 in seeking judicial review of that action.

Salsbury Laboratories v. Iowa Dep't of Envtl. Quality, 276 N.W.2d 830, 835 (Iowa 1979); *see also Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636 (Iowa 2013) (upholding dismissal of "Petition for Judicial Review" because it was in fact a request for declaratory and injunctive relief and plaintiffs failed to exhaust their administrative remedies); *IES Utilities*, 545 N.W.2d at 539 (upholding dismissal of petition for declaratory judgment based upon failure to exhaust administrative remedies); *Banos v. Shepard*, 419 N.W.2d 364, 366-67 (Iowa 1988) (district court sitting in equity lacks authority to review agency action); *Kerr v. Iowa Public Service Co.*, 274 N.W.2d 283, 287-88 (Iowa 1979) (courts lack original jurisdiction to provide relief against an agency outside of the scope of chapter 17A); *see also Center for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 605 (Cal. Ct. App. 2008) (allowing an action for declaratory and injunctive relief to proceed outside the administrative process would not only threaten "duplication of effort and inconsistency of results," but would also require the courts to "perform an ongoing regulatory role as technology evolves and conditions change.").

Because ICCI must proceed with their claims against agency action under the IAPA, they are required to exhaust their administrative remedies prior to proceeding in district court. *See* Iowa Code § 17A.19(1). They have

not done so. They are seeking declaratory relief and injunctive relief based upon constitutional and common law claims. Parties seeking such relief from an administrative agency must first seek a declaratory order under section 17A.9(1)(a) or petition for rule-making in order to exhaust their administrative remedies. *Sierra Club*, 832 N.W.2d at 648 (holding section 17A.9(1)(a) imposes a mandatory duty to seek a declaratory order from an agency prior to seeking declaratory relief from the district court); *see also De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68 (D. Ill. 1981) (court rejected claim for injunctive relief directing agency to conduct rule-making for failure to exhaust).

A party must exhaust their administrative remedies unless the remedy would be inadequate or fruitless. *Salsbury*, 276 N.W.2d at 836. Here, a request for a declaratory order at the administrative level would not be fruitless as it would provide the appropriate agency or commission an opportunity to "state in its order the facts it relied upon and the basis for its decision," ensuring that the agency "will make a complete record and the parties will know the rationale supporting the agency's decision." *Sierra Club*, 832 N.W.2d at 647. In *Sierra Club*, the Iowa Supreme Court rejected an argument that the exhaustion requirements under section 17A.9(1)(a) did not apply because it would have been futile to ask an agency to reverse its

own prior decision, noting there is "no evidence agencies will conduct their declaratory order proceedings in a biased, unprofessional manner and without regard for the rules promulgated by the legislature." *Id*. at 647-48.

More importantly, where an action or inaction of an agency "bears a discernable relationship to the statutory mandate of the agency as evidenced by express or implied statutory authorization, a party must first present the claim to the agency for other agency action before the party can proceed to district court." *Ghost Player, L.L.C. v. State* (*Ghost Player I*), 860 N.W.2d 323, 328-29 (Iowa 2015). In *Ghost Player I*, the plaintiff filed a breach of contract claim against the Iowa Department of Economic Development ("IDED") for the alleged failure to issue certain tax credits. *Id.* at 325. The court held that because the IDED's review of tax credits had a discernable relationship to the statutory mandate of IDED pursuant to express statutory authorization, the plaintiff failed to exhaust administrative remedies. *Id.* In this case, seeking to limit nitrogen and phosphorous in Iowa's waters and the regulation of certain livestock operations bears a discernable relationship to the statutory authorizations of several agencies and/or commissions named in this action.

With respect to ICCI's constitutional claim, they must still exhaust their administrative remedies. *See Alberhasky v. City of Iowa City*, 433 N.W.2d

693, 695-96 (Iowa 1988) ("as-applied" constitutional challenge should have been determined at the administrative level); *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987) (citing K. Davis, Administrative Law § 20.04, at 74-81 (1958) ("[w]e commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation."); *cf. Salsbury Laboratories v. Iowa Dept. of Environmental Quality*, 276 N.W.2d 830, 836-37 (Iowa 1979) (if a constitutional claim does not need to be examined in a particular factual context, the administrative remedy is "inadequate" for purposes of exhaustion of administrative remedies under section 17A.19(1)).

ICCI is proceeding with an "as-applied" challenge under the Unenumerated Rights Clause of the Iowa Constitution. (App. at 22-24 (¶¶ 79-87)). This "as-applied" challenge needs to be examined based on a factual record developed through the administrative law process. "The place for such record to be developed is, we believe, before the agency entrusted with the determination of the adjudicative facts." *Shell Oil Co.*, 417 N.W.2d at 430. Because ICCI must proceed under the IAPA, they have failed to exhaust their administrative remedies prior to seeking relief in district court as required by the IAPA.

C. ICCI's Challenges to Iowa's Water Quality Programs and Policies Fail to State any Permissible Claim under the IAPA.

Even if ICCI was not required to exhaust administrative remedies, judicial review under the IAPA must be directed toward "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62, 64 (2004) (dismissing challenge to agency's alleged failure to properly manage off-road vehicle use in federal lands classified as wilderness study areas because it was not a discrete agency action); *see also Lujan*, 497 U.S. at 891 (dismissing challenge to agency's land withdrawal review program because it was not a discrete agency action). Decisions by federal courts interpreting the federal Administrative Procedure Act ("APA") are persuasive when interpreting the IAPA. *Iowa Farm Bureau Fed'n*, 850 N.W.2d at 418.

While ICCI's Petition identifies several specific agency actions to support their claims (App. at 16, 18, 22-25 (¶¶ 45-46, 49, 56, 74-75, 82, 94)), the overall thrust of the Petition is a broad programmatic attack on agencies' water quality policies in general. ICCI admits as much, stating their challenge is to the State's "voluntary nutrient reduction strategy," and "challenging a myriad of agency actions under the IAPA does not provide an adequate remedy for the overriding problem in the Raccoon River watershed." (App.

at 88). Specifically, in both Count I and II of the Petition, ICCI states "Iowa has pursued a voluntary nitrogen and phosphorous control strategy for agricultural nonpoint sources, followed a *de facto* policy of under-regulating Animal Feeding Operations, [and] adopted voluntary agricultural nonpoint source controls in the Iowa Nutrient Reduction Strategy." (App. at 23-24 (¶¶ 82, 94)). These are not "*discrete* agency action[s]" the Supreme Court has held must be challenged under the APA. *Norton*, 542 U.S. at 64 (emphasis in original).

ICCI's Prayer demonstrates their failure to meet the requirements of the IAPA. Their requested injunctive relief presents broad, sweeping programmatic changes. (App. at 26 (¶¶ (d)-(f))). The United States Supreme Court has previously rejected requests for such broad remedies, stating

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered as well, to determine whether compliance was achieved-which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Norton, 542 U.S. at 66-67. The flaw here is more fundamental because ICCI seeks judicial supervision of agencies, commissions, and officials—without regard to statutory mandates—by relying on an alleged substantive due

process right under Article I, section 9 of the Iowa Constitution and the public trust doctrine.

The requirement that parties challenge discrete agency actions serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. It is hard to imagine an action that more squarely implicates those concerns than this one, in which ICCI asks a single district court to direct and oversee the development and implementation of a water quality program for the entire Raccoon River watershed by a variety of state agencies, commissions, and officials and suspension of a variety of statutes and rules addressing the construction or expansion of certain livestock facilities in the watershed. Such a request is precisely what the United States Supreme Court foreclosed when it explained that the APA prevents a challenger from seeking "*wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891 (emphasis in original). While this "case-by-case approach" may be "frustrating" to litigants like ICCI, it is "the traditional, and . . . normal, mode of operations of the

courts." *Id*. at 894. "[M]ore sweeping actions" are the province of "the other branches" of government. *Id*.

Accordingly, ICCI was required to exhaust their administrative remedies before proceeding directly to district court, and their claims challenging agency actions should be dismissed for failure to exhaust.

CONCLUSION

For the reasons stated herein, the District Court's ruling denying the State's Motion to Dismiss should be reversed, and the State respectfully requests this Court dismiss ICCI's Petition, or, in the alternative, remand the case to the District Court to apply the correct legal standard for standing.

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that counsel for Defendants-Appellants hereby desire to be heard in oral argument.

Respectfully submitted,

JEFFREY S. THOMPSON
Solicitor General of Iowa

/s/ *Jacob J. Larson*
Jacob J. Larson
Assistant Attorney General
Hoover State Office Bldg.,
2nd Fl. Des Moines, Iowa 50319
(515) 281-5164
jacob.larson@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 13,809 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Jacob J. Larson*
Jacob J. Larson
Assistant Attorney General

PROOF OF SERVICE

I, Jacob J. Larson hereby certify that on the 4th day of February, 2020, I or a person acting on my behalf did serve Defendants-Appellants' Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

Brent Newell
PUBLIC JUSTICE, P.C.
475 14th St., Ste. 610
Oakland, CA 94612
Email: bnewell@publicjustice.net
Email: lreed@publicjustice.net

Roxanne Barton Conlin
Devin Kelly
ROXANNE CONLIN & ASSOCS., P.C.
3721 S.W. 61st St., Ste. C
Des Moines, IA 50321
Email: roxanne@roxanneconlinlaw.com
Email: dkelly@roxanneconlinlaw.com
Email: dpalmer@roxanneconlinlaw.com

Tarah Heinzen
FOOD & WATER WATCH
2009 N.E. Alberta St., Ste. 207
Portland, OR 97211
Email: theinzen@fwwatch.org

Channing Dutton
LAWYER, LAWYER, DUTTON & DRAKE
1415 Grand Ave.
West Des Moines, IA 50265
Email: cdutton@LLDD.net
ATTORNEYS FOR PLAINTIFFS-APPELLEES

/s/ Jacob J. Larson
Jacob J. Larson
Assistant Attorney General

CERTIFICATE OF FILING

I, Jacob J. Larson, hereby certify that on the 4th day of February, 2020, I, or a person acting on my behalf, filed Defendants-Appellants' Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ *Jacob J. Larson*
Jacob J. Larson
Assistant Attorney General