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 REPLY BRIEF

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I. ICCI LACKS STANDING TO BRING THEIR CLAIMS.

A. The "Bushby Standard" does not Preclude the Consideration of Prudential Requirements for Standing.

Plaintiff-Appellees, Iowa Citizens for Community Improvement and Food & Water Watch (hereafter collectively referred to as "ICCI") erroneously argue the standing analysis for environmental and public trust doctrine cases begins and ends with whether plaintiffs can show "their members use the affected area and suffer injuries to aesthetic and recreational interests." (ICCI Br. at 36). The State agrees that for the injury requirement for standing in environmental and public trust cases, this is the standard the Iowa Supreme Court has adopted. *See Bushby v. Wash. County Conservation Bd.*, 654 N.W.2d 494, 496-97 (Iowa 2002); *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 837 (Iowa 2019). However, there are two additional prudential considerations for standing: causation and redressability. Although the Court did not discuss the causation and redressability requirements in *Bushby* or *Puntenney*, it did not reject them as elements of the standing requirement.

The absence of any discussion in *Bushby* and *Puntenney* of causation or redressability likely stems from the nature of the governmental action being challenged in both cases: the removal of trees from a county park, and the placement of an underground crude oil pipeline, respectively. 654 N.W.2d at

495-96; 928 N.W.2d at 832. In both instances, the plaintiffs challenged governmental action—as opposed to inaction—and there was no dispute the alleged harm to the plaintiffs was caused by the governmental action or the harm would be redressed by stopping said action. *Bushby*, 654 N.W.2d at 495-96; *Puntenney*, 928 N.W.2d at 837. The sole issue in both cases was whether the plaintiffs had sufficiently pled an injury. *Id*.

Conversely, here, ICCI is primarily challenging governmental inaction. As is often the case in environmental cases, where "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* [or something else], much more is needed"—causation and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasis in original). The Iowa Supreme Court recognized the importance of prudential considerations in *Godfrey v. State*, where the Court stated 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." 752 N.W.2d 413, 424-25 (Iowa 2008). The Court further stated in *Godfrey* it had previously relied on prudential concerns to resolve standing issues and then discussed the holding in *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470 (Iowa 2004) (Court held plaintiffs lacked standing to challenge

issuance of bonds for a public improvement project because the alleged harm stemmed from the project itself—not the issuance of the bonds). 752 N.W.2d at 413.

ICCI argues the Iowa Supreme Court's reference to prudential concerns in *Godfrey* was *dicta* and *Citizens* did not recognize causation or redressability elements in its standing analysis. ICCI Br. at 38-39. ICCI errs on both accounts. First, although causation and redressability did not serve as a basis for the holding in *Godfrey*—where the Court held plaintiffs failed the injury requirement—this does not render the Court's recognition of its previous reliance on prudential requirements *dicta*. 752 N.W.2d at 423-28. Moreover, ICCI's assertion that the Court's reference in *Godfrey* was mere *dicta* stands in stark contrast the words used by the Court itself when discussing causation and redressability, "[t]hese two additional considerations 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 at 422 (emphasis added).

Second, ICCI misunderstands the holding in *Citizens*. There, the Court held plaintiffs lacked standing because their alleged injury came from the project itself, not the governmental action—issuance of the bonds. *Citizens*, 686 N.W.2d at 475. ICCI concludes that because the Court did not expressly identify causation or redressability requirements in its standing analysis or cite

any federal cases applying such standards, the Court should not rely upon the *Godfrey* court's characterization of the holding in *Citizens*. ICCI Br. at 39. ICCI's argument places form over substance. In *Citizens*, the Court concluded that the "nexus" between the alleged harm and the challenged action was not sufficient to confer standing. 686 N.W.2d at 475. The Court's use of the term "nexus" indicates its consideration of whether the harm was caused by the challenged conduct as opposed to whether plaintiffs alleged a legally cognizable injury. *See also Molinaro v. City of Waterloo*, No. 12-0930, 2013 WL 2145983 (Iowa Ct. App. 2013) (unpublished opinion) (court, applying prudential standing requirements, concluded plaintiff lacked standing to challenge city's statutory compliance with sale of right-of-way because the alleged harm stems from the sale itself, not compliance with the statute—"[t]hat nexus does not give [plaintiff] standing to sue").

Accordingly, the District Court's Ruling should be reversed for failing to apply the causation and redressability standing requirements to ICCI's claims.

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

ICCI admits it is not alleging harm from the "indirect effects of [the State's] inadequate, but valiant, 'efforts … to reduce nutrient pollution in its waterways[.]'" (ICCI Br. at 41). Rather, ICCI is alleging their injuries are

caused by "the state's failure to regulate agricultural production pollution *at all*[.]" *Id*. However, not only does this allegation ignore a substantial number of statutes and rules the State has enacted or promulgated to address the pollution from agricultural production sources,[1] it does not establish the requisite causal link.

"[W]here the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, … the causal chain is too weak to support standing." *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013) (citing *Native Village of Kivalina v. ExxonMobile Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citations, quotes, and bracket omitted), *cert denied*, 569 U.S. 1000 (2013). In *Bellon*, plaintiffs sought to compel state and local agencies in Washington to regulate greenhouse gases emissions from the state's five oil refineries. *Id*. at 1135. The court held plaintiffs could not satisfy the causation or redressability requirements for standing. *Id*. at 1141-47. Under the

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[1] *See* State Br. at 22-28; *see also* Amici Curiae Iowa Cattlemen's Ass'n., et al., Br. at 31-37 (discussing history of environmental regulation of animal feeding operations and the Environmental Protection Agency's (EPA) review of Iowa's regulation of said operations); Amici Curiae Agricultural Legal Defense Fund, Br. at 28-35 (discussing history of Iowa's drainage laws and federal and state water quality laws).

causation analysis, the court concluded plaintiffs only offered vague, conclusory statements that the state's failure to act contributed to greenhouse gas emissions, which in turn, contributed to climate-related changes that result in their purported injuries. *Id*. at 1141-1144. Under redressability, the court concluded there was no evidence demonstrating the requested regulatory controls would sufficiently reduce greenhouse gas emissions from the oil refineries to redress plaintiffs' alleged injuries. *Id*. at 1146-47. The court noted causation and redressability are intertwined and there is significant overlap. *Id*. at 1146 (citing *Allen v. Wright*, 486 U.S. 737, 753 n. 19 (1984)).

Here, ICCI has pled a number of alleged failures by the State to address water quality as support for its claims, but the only government action/inaction ICCI is requesting the court remedy is: 1) the adoption of the Nutrient Reduction Strategy ("NRS") in Senate File 512 as the official policy of the State to address nutrient reductions in Iowa waters; 2) the lack of mandatory nitrogen and phosphorous limits for agricultural nonpoint sources; and 3) approving the construction/expansion of certain livestock production facilities. (App. at 26 (¶¶ (c)-(e))). ICCI has not set forth any statements or claims that mandatory limits will reduce nitrogen and phosphorous to a greater degree or in a more timely manner than the State's current efforts, including the NRS. ICCI's Petition, quoting the 2019 NRS Progress Report,

acknowledges that progress under the NRS will occur with a "greater degree of implementation" of "conservation practices." (App. at 19-20 (¶ 62)). That Progress Report was issued on March 7, 2019, a mere eight (8) months after Iowa enacted Senate File 512, which also provided for an additional $270,200,000.00 in nutrient reduction funding for the next decade.

In addition, certain livestock production facilities are prohibited from releasing manure between periods of manure disposal, and in any event, they are prohibited from discharging a pollutant into a water of the state. (State Br. at 23-25 (citing Iowa Code §§455B.186(1), 459.311(1) , 459A.401, and 567 Iowa Admin. Code 62.1(1)). Thus, ICCI has failed to demonstrate what, if anything, their requested remedies will do to reduce nitrogen and phosphorous pollution from those livestock production facilities.

Here, the causal chain involves numerous third parties whose independent decisions collectively may affect ICCI's alleged injuries, and, therefore, the causal chain is too weak to establish standing. For these same reasons, the pollution cases raised by ICCI where courts found plaintiffs had established standing are distinguishable. *See Association of Irritated Residents v. EPA*, 790 F.3d 934 (9th Cir. 2015) (involved a challenge to exemptions from pollution requirements for a very discrete and small subset of livestock production facilities in a specific geographic location); *WildEarth*

Guardians v. EPA, 759 F.3d 1064 (9th Cir. 2014) (involved a challenge to an emission limit for a single pollutant, SO_2, from a single, specific power plant); *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (involved a challenge to a specific provision in an EPA rule for a single industry, cement manufacturing, that would allow more pollution only in certain, limited circumstances).

ICCI mistakenly alleges the State's redressability argument relies "entirely on a mischaracterization of the U.S. Supreme Court's analysis in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)" and "misleadingly implies that *Lujan* addressed a challenge to a regulation over *polluters*." (ICCI Br. at 43-44) (emphasis in original). The State neither mischaracterized the holding in *Lujan* nor misleadingly implied the case involved a regulation over polluters. The State accurately quoted and referenced the Supreme Court's concern about the conduct of third parties not before the Court under the redressability factor. *Lujan* involved a challenge to an agency regulation applicable to other federal government agencies—not parties before the court—and it was not clear to the Court that the regulation imposed binding requirements on the non-party agencies. Those facts do not mean the Court's underlying concern in its redressability analysis about conduct of third parties not before the Court was solely limited to that specific factual context; those are just allegedly distinguishable facts from the present case.

Moreover, other courts have considered the conduct of nongovernmental, third parties in pollution cases and concluded the plaintiff lacked standing under the redressability factor. *See Bellon*, 732 F.3d at 1141-47; *Native Village of Kivalina*, 696 F.3d at 868-69 (court held plaintiff lacked standing, in part, to challenge greenhouse gas emissions by defendants because a significant number of nonparty polluters had also caused the alleged harm); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227-29 (9th Cir. 2008) (court held plaintiff lacked standing, in part, to challenge the federal government's participation in a salmon-harvesting treaty, allowing allegedly excessive harvesting, because withdrawing from a treaty would arguably allow over-harvesting and the court cannot control the other parties to the treaty).

ICCI has failed to meet the causation or redressability requirements. 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 Political Question Doctrine has been Adopted, and Applied, by the Iowa Supreme Court, Utilizing the Baker Factors, and the Doctrine Avoids Entangling the Judiciary with the Policy-Making Functions of the Legislative and Executive Branches.

ICCI's argument that the political question doctrine should not apply in Iowa and, even if it does, it should be limited to the classical model—where there is textually demonstrable constitutional commitment of the issue to another branch of government—should be rejected.

First, the State contends the political question doctrine has already been adopted in Iowa. (*See* State Br. at 42-47). The Iowa Supreme Court has applied the doctrine, as set forth in *Baker v. Carr*, 369 U.S. 186 (1962) (known as the "*Baker* factors") in at least four cases, concluding it served as grounds for dismissal in two of them. *See Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 92-94 (Iowa 2014) (claims did not present nonjusticiable political questions); *King v. State*, 818 N.W.2d 1, 16-22 (Iowa 2012) (the Court conducted a political question analysis but decided the case on other grounds);[2] *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491,

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[2] ICCI erroneously asserts the "State incorrectly argues that this Court held that 'the [political question] doctrine warranted dismissal' in *King*." (ICCI Br. at 52 n. 7). The State, citing *King*, *Dwyer*, and *Scott*, explained this Court had applied the political question doctrine "multiple times, holding the doctrine warranted dismissal in several cases." (State Br. at 44-45). Referring

495-501 (Iowa 1996) (concluding claims presented nonjusticiable political question); and *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 830-33 (Iowa 1979) (concluding claims presented nonjusticiable political question). Thus, ICCI's argument that "[t]his Court recently observed that the political question doctrine does not apply in state courts" is erroneous. (ICCI Br. at 45-46). The Iowa Supreme Court made no such observation or ruling; it observed that "the United States Supreme Court has made clear that the *federal* political question doctrine does not apply to state courts." *Freeman*, 848 N.W.2d at 91 (citing *Goldwater v. Carter*, 444 U.S. 996, 1005 n. 2 (1979) (Rehnquist, J., concurring)) (emphasis added). This simply means the doctrine does not automatically apply to state courts; it does not prohibit state courts from adopting the doctrine—which this Court has already done.

Second, to the extent this Court would consider abandoning the political question doctrine or adopting a doctrine different from the *Baker* factors, the State argues the political question doctrine, as set forth in *Baker*

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to the Court's consideration of the doctrine "multiple times" but then identifying that it only dismissed claims under the doctrine in "several cases" implies that not all the cases the State cited concluded dismissal was proper under the doctrine. Moreover, the State clearly, and accurately, discussed the Court's holding in *King* on the following page. (State Br. at 46 (stating the Court in *King* conducted a political question analysis but decided the case on other grounds)).

(particularly the first three factors), serves an important role in avoiding entangling the judiciary with policy-making, which is the province of the executive and legislative branches. *See Kanuk*, 335 P.3d at 1098 (noting the purpose of the political question doctrine is to "exclude[] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.") (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Moreover, the importance of the political question doctrine and its purpose in avoiding courts making policy judgments is heightened in cases where plaintiffs are seeking broad structural reform of a government program. *See King*, 818 N.W.2d at 40-41 (Waterman, J., concurring) (noting plaintiffs' constitutional claims sought broad educational reform and "[o]ur courts are not institutionally competent to make educational policy judgments.").

Justice Waterman's concurrence in *King* highlighted similar concerns raised by Justice Scalia about the use of structural injunctions to obtain institutional reform. *Id*. Justice Scalia has warned:

> Structural injunctions … turn[] judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials…
> …

> When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.
> …
>
> When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.

Brown v. Plata, 563 U.S. 493, 555-56 (2011) (Scalia, J., dissenting) (citations omitted). The political question doctrine provides a mechanism for courts to evaluate whether they are being asked to invade the provinces of the other branches of government by making policy judgments about the best way to manage a governmental institution or program. *See King*, 818 N.W.2d at 41 (Waterman, J., concurring) (stating it is not the Court's role to "'develop or choose among schemes for public education' and that the proper forum for such debate is 'in the other branches of state government.'"). Moreover, judicial involvement in such policy making judgments would invite additional lawsuits by persons with different ideas about how a governmental program should be run, seeking different structural injunctive relief. *Id*. ("such trials would be a waste of time and scarce resources in the absence of a cognizable claim upon which relief may be granted.").

Third, ICCI only identified three jurisdictions—two states and one territory—where courts have rejected the political question doctrine as set forth in *Baker*. (ICCI Br. at 48) (citing *Backman v. Secretary of the Commonwealth*, 441 N.E.2d 523 (Mass. 1982); *State v. Campbell County School District*, 32 P.3d 325 (Wyo. 2001); *Bryan v. Fawkes*, 61 V.I. 201 (Virgin Islands 2014)). Meanwhile, a significant number of state courts have adopted the political question doctrine in some form, primarily mirroring the factors set forth in *Baker*.[3] In any event, the separation of powers doctrine,

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[3] *See, e.g., Magee v. Boyd*, 175 So.3d 79, 101-06 (Ala. 2015) (court, applying several of the *Baker* factors, concluded plaintiffs' claims did not present a political question); *Kanuk v. State, Dept. of Natural Resources*, 335 P.3d 1088, 1097-1100 (Alaska 2014) (court concluded plaintiffs' requested injunctive relief requiring the state regulate greenhouse gas emissions presented a nonjusticiable political question under *Baker*); *Kromko v. Arizona Bd. Of Regents*, 165 P.3d 168, 170-73 (Ariz. 2007) (court, applying several *Baker* factors, concluded the claims presented political questions); *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 217-26 (Conn. 2010) (court applied the *Baker* factors and concluded the claims did not present a political question); *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 407-408 (Fla. 1996) (court, applying several *Baker* factors, concluded plaintiffs' claims presented nonjusticiable political questions); *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1191-93 (Ill. 1996) (court, applying several *Baker* factors, concluded the claims presented nonjusticiable political questions); *Kansas Bldg. Industry Workers Compensation Fund v. State*, 359 P.3d 33, 42-48 (Kan. 2015) (court, applying all the *Baker* factors, concluded the claims did not present a political question); *Bevin v. Commonwealth, ex rel., Beshear*, 563 S.W.3d 74, 81-86 (Ky. 2018) (court, applying all of the *Baker* factors, concluded plaintiffs' claims did not present political questions); *Makowski v. Governor*, 852 N.W.2d 61, 65-71 (Mich. 2014) (court, applying

which arguably serves as the basis for the entire political question doctrine, and in particular, the first *Baker* factor—a textually demonstrable constitutional commitment of the issue to a coordinate political department—

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a different standard than the *Baker* factors, determined plaintiffs' claims did not present a political question); *Nebraska Coalition for Educational Equity and Adequacy (Coalition) v. Heineman*, 731 N.W.2d 164, 176-183 (Neb. 2007) (court adopted the *Baker* factors and concluded constitutional claims presented nonjusticiable political questions under several factors); *Hughs v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736, 743-47 (N.H. 2005) (court, applying several *Baker* factors, determined some of plaintiffs' claims presented nonjusticiable political questions); *N. Lake Tahoe Fire v. Washoe Cnty. Cmm'rs*, 310 P.3d 583, 586-90 (Nev. 2013) (court adopted the *Baker* factors and concluded several claims presented nonjusticiable political questions under several); *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1065-67 (Okla. 2007) (court, applying the political question doctrine, determined some of plaintiffs' claims presented nonjusticiable political questions); *William Penn School District v. Pennsylvania Dep't of Education*, 170 A.3d 414, 437-57 (Penn. 2017) (court applied the *Baker* factors, although a slightly different formulation and/or foundation than the federal doctrine, and determined claims did not present a political question); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57-60 (R.I. 1995) (court, applying the separation of powers and political question doctrines, concluded plaintiffs' claims present nonjusticiable political questions); *Bredesen v. Tennessee Judicial Selection Com'n*, 214 S.W.3d 419, 434-36 (Tenn. 2007) (court, applying several *Baker* factors, determined some of plaintiffs' claims presented nonjusticiable political questions); *Turner v. Shumlin*, 163 A.3d 1173, 1180-82 (Vt. 2017) (court, *sua sponte* raising the political question doctrine, concluded plaintiffs' claims did not present a political question under any of the *Baker* factors); *State v. Chvala*, 678 N.W.2d 880, 895-902 (Wis. Ct. App. 2004) (court, applying the separation of powers and several *Baker* factors, concluded some criminal charges against defendant did not present political questions), *aff'd* 693 N.W.2d 747 (Wis. 2005).

has long been recognized in Iowa. (State Br. at 42 (citing *King*, 818 N.W.2d at 16)).

For these reasons, this Court should reverse the District Court's erroneous determination that the political question doctrine is not recognized in Iowa and should apply the political question doctrine as set forth in *Baker* to determine whether ICCI's requests for injunctive relief present nonjusticiable political questions.

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

ICCI raises several arguments that, should the Court determine the political question doctrine applies, its claims do not present nonjusticiable political questions. ICCI's arguments are without merit and should be rejected.

ICCI incorrectly argues their constitutional claims are always justiciable because courts maintain the power to interpret the constitution, and, therefore, ICCI's requested injunctive relief is shielded from scrutiny under the political question doctrine. (ICCI Br. at 49-56). The State has not argued, at this stage, that ICCI's constitutional claims or request for declaratory relief are nonjusticiable under the political question doctrine. Instead, the State is arguing: 1) ICCI's requested injunctive relief presents a

nonjusticiable political question; and 2) ICCI's requested declaratory relief—seeking declarations of their constitutional rights and invalidation of Section 20 of Senate File 512—does not present a real and substantial controversy. (State Br. at 47, 68).[4]

Courts are not limited to only reviewing plaintiffs' claims when conducting a political question analysis but can also consider the requested relief.[5] This approach—looking to the relief requested—is appropriate because only by analyzing the relief requested can a court determine whether it is being asked to direct a state's policy choices, oversee government

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[4] The State will address ICCI's claims for declaratory relief in Section III of this Brief (pp. 36-40).

[5] *See Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068, 1074 (N.D. Cal 2015), *aff'd sub nom.*, 865 F.3d 1187 (9th Cir. 2017) ("The Court finds that it lacks the standards necessary to fashion the type of injunctive relief Plaintiff seeks. Accordingly, the Court finds it must dismiss this case as non-justiciable because it involves a political question."); *Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001) (plaintiffs' requested relief "would require courts to make 'initial policy determinations' in an area devoid of 'judicially discoverable and manageable standards.'"); *Brown v. Hansen*, 973 F.2d 1118, 1121 (3rd Cir. 1992) ("The political question doctrine … precludes courts from granting relief that would violate the separation of powers…"); *Kanuk*, 335 P.3d at 1097-1100 (court held plaintiffs' requested relief rendered their constitutional claims nonjusticiable political questions); *Aji v. Washington*, No. 18-2-04448-1 (Wash. Super. Aug 14, 2018) (unpublished) (available at http://climatecasechart.com/case/aji-p-v-state-washington/), *appeal docketed*, No. 93616-9-A (Wash. Sept. 18, 2018) (court held plaintiffs' requested relief violates the separation of powers).

functions that are committed to a different branch or otherwise act beyond the role of the judiciary. Thus, ICCI's argument that its constitutional claims are automatically justiciable or shield its requests for injunctive relief from scrutiny under the separation of powers or political question doctrine should be rejected.[6]

ICCI next erroneously argues its requested injunctive relief does not present a political question or run afoul of the separation of powers. (ICCI Br. at 59-66). Under the first *Baker* factor, ICCI argues it is not asking the District Court to order the State to engage in specific legislative actions but simply adopt a remedial plan. *Id*. at 62. Despite ICCI's claims to the contrary, the remedial plan will require the legislature enact new legislation, imposing

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[6] ICCI also erroneously argues it is premature to analyze whether their requested injunctive relief violates the separation of powers or presents a political question, and that such an analysis should come after the District Court crafts any injunctive relief. (ICCI Br. at 57-58). Here, there is no reason to delay any such analysis; ICCI's requested injunctive relief is clear: 1) a court-ordered remedial plan requiring the legislature to impose mandatory nitrogen and phosphorous limits for agricultural nonpoint sources and certain livestock production facilities; and 2) an order suspending the construction/expansion of certain livestock operations until the court determines sufficient nitrogen and phosphorous reductions have occurred. (App. 26 (¶¶ (d) and (e))). Both of these requests present nonjusticiable political questions or run afoul of the separation of powers for the reasons set forth elsewhere in this Brief and in the State's opening brief. (State Br. at 48-62).

mandatory limits for certain pollutants, which ICCI admits.[7] (App. at 83-85 (ICCI asserts it does not have to exhaust administrative remedies because the agencies themselves do not have the statutory authority to require mandatory nitrogen and phosphorous limits)). Arguing it is simply requesting the District Court order the State to develop a remedial plan, which will require the enactment and/or amendment of a number of statutes, places form over substance.

Under the second *Baker* factor, ICCI erroneously argues there are judicially manageable standards to resolve this matter: the substantial impairment standard. (ICCI Br. at 64-65). ICCI then cites several cases where courts have applied that standard in response to public trust doctrine claims. *Id*. However, all of the cases deal with a challenge to a specific and discrete agency action—not an entire regulatory program (agricultural nonpoint source pollution)—and, more importantly, none of them involved judicial oversight over the development, implementation and evaluation of a water quality program with numeric limits for specific pollutants.[8]

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[7] ICCI also does not deny its remedial plan will require a number of other statutory enactments and/or amendments. (State Br. at 51-55).

[8] *See Environmental Law Foundation v. State Water Resources Control Board*, 26 Cal. App. 5th 844 (Cal. Ct. App. 2018) (evaluating whether the extraction of groundwater impaired public trust uses of a river); *State v. Public*

ICCI further argues the District Court can rely upon other water quality and drinking water standards that already exist to evaluate impairment (ICCI Br. at 64), but the Court is being asked to do more than that. The Court will have to determine the time period within which pollution reductions have to occur and will have to determine when, if at all, the standards should be adjusted. Moreover, the DNR has not adopted numeric nitrogen and phosphorous water quality standards to address eutrophication, algae, and cyanobacteria, rejecting a petition for rule-making to set such standards for Iowa's lakes in 2019. (App. at 16, 18 (¶¶ 49, 56)). The DNR's denial of the rule-making petition was not appealed; any attempt by ICCI to get the District Court to consider and rely upon the numeric water quality standards rejected in the denial presents an impermissible collateral attack on agency action. *See State v. Clark*, 608 N.W.2d 5, 8-9 (Iowa 2000) (the judicial review procedures delineated in chapter 17A are exclusive, and plaintiffs must exhaust their administrative remedies to challenge agency action).

Serv. Comm'n, 81 N.W.2d 71 (Wisc. 1957) (evaluating whether the dredging and filling in of a portion of a lake violated the public trust); *In re Water Use Permit Applications*, 9 P.3d 409 (Hawaii 2000) (evaluating the public trust impacts of a ditch-system for collecting fresh surface water and dike-impounded ground water); *San Francisco Baykeeper, Inc. v. State Lands Comm'n*, 242 Cal. App. 4th 202 (Cal. Ct. App. 2015) (evaluating public trust impacts of state-issued permit for dredge mining of sand on land under San Francisco Bay).

Under the third *Baker* factor, ICCI erroneously argues the State has made an initial policy determination—the NRS. (ICCI Br. at 65-66). ICCI again misunderstands the State's arguments. The State is not arguing, at this stage, the District Court's review of the NRS's constitutionality presents a political question. Rather, the State is arguing that ICCI's requested injunctive relief presents a political question. Requiring the State to adopt a remedial plan that necessitates the passage of new laws providing for mandatory nitrogen and phosphorous limitations requires the District Court to make an initial policy determination instead of the Legislature—namely, that mandatory limits on said pollutants is the best way to remedy any alleged constitutional or public trust violations. Moreover, the District Court will also have to make an initial policy determination on what level of nitrogen and phosphorous reduction is sufficient to allow the resumption of construction/expansion of certain livestock production facilities if they are suspended pursuant to ICCI's second request for injunctive relief.

ICCI's requested injunctive relief essentially substitutes the judiciary's policy or value judgments for that of the legislature. ICCI is asking the District Court to order the State to take one particular approach to reducing nitrogen and phosphorous—including requiring the Legislature to adopt specific laws or statutory amendments—which would require the Court to

make a policy determination that is "not [the Court's] to make in the first instance." *See Kanuk*, 335 P.3d at 1098. Ordering the State to adopt a specific approach to address nutrient reduction overrides the political branches' determination of how best to weigh the "employment, resource development, [row-crop and livestock production], health, culture, [and] other economic and social interests." *Id*.

This Court recently recognized in another water quality case the importance of deferring to agencies with expertise in water quality on how to remedy water pollution, as opposed to "generalist judges." *Board of Water Works Trustees of City of Des Moines v. Sac County Board of Supervisors*, 890 N.W.2d 50, 66-67 (Iowa 2017) (Court declined to overrule precedent providing immunity for drainage districts from damage claims for nitrate pollution in the Raccoon River). In *Water Works*, the Iowa Supreme Court relied, in part, on *American Elec. Power Co., Inc.* v. *Connecticut*, 564 U.S. 410 (2011) , where the United States Supreme Court held the Clean Air Act ("CAA") supplanted federal common law claims for greenhouse gas emission reductions. 890 N.W.2d at 67. In *American Elec. Power*, the Supreme Court compared the institutional competency of courts and regulators in addressing pollution as follows:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as the best suited to serve as the primary regulator of

> greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.

564 U.S. at 428. Although the current case involves different claims, the requested remedies present the same problems—placing the determination of the most appropriate method to reduce nitrogen and phosphorous pollution in the hands of the judiciary, not the legislative or executive branches.

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

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

A. Preservation of Error

ICCI argues the State failed to preserve error on its argument that ICCI's claim for declaratory relief was not justiciable, erroneously asserting the District Court allegedly failed to address such argument in its Ruling on Motion to Dismiss ("Ruling"). (ICCI Br. at 70). The argument was raised, briefed and argued below. (*See* App. at 50, 79-80). The District Court's

Ruling, although providing little discussion, concluded ICCI's requested declaratory relief was justiciable. (App. at 111 (discussing ICCI's requested declaratory relief, the State's arguments, and the Court's conclusion)). Moreover, section IV of the Ruling is entitled "Justiciability of Plaintiffs' Declaratory Relief Claims…" and the Court thereafter references ICCI's arguments that "their justiciable declaratory relief claims plead sufficient facts to create a live controversy concerning the rights and duties of the State." (App. at 111-112). Thus, the State properly preserved error on this argument; it was raised, and decided, below.

In any event, even if this Court concludes the District Court did not address the declaratory relief issue, where the issues were fully briefed and argued to the court, this Court should still decide the issues in the interest of sound judicial administration. *See Barnes v. Iowa Dept. of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986) (although the district court did not reach certain issues because they were unnecessary to its disposition of the case, where those issues were fully briefed and argued, the Court can decide those issues in the interest of sound judicial administration).

B. ICCI's Requests for Declaratory Relief do not Present a Real and Substantial Controversy.

ICCI has failed to sufficiently rebut the State's argument that the requested declaratory relief is essentially a request for an advisory opinion

from the courts. A declaration that a group of amorphous State "actions and inactions" (App. at 25-26 (¶¶ (a)-(b))) violates the public trust doctrine and ICCI's constitutional rights does not present a real or substantial controversy. Courts in other jurisdictions have dismissed similar requests for declaratory relief in public trust cases. *See Kanuk*, 335 P.3d at 1100-03; *Sinnok v. Alaska*, Case No. 3AN-17-09910, 9-14 (D. Alaska Oct. 30, 2018) (*available at* http://climatecasechart.com/case/sinnok-v-alaska/), *appeal docketed*, No. S-17297 (Alaska Nov. 29, 2018); *Svitak v. State*, No. 69710-2-I, 2013 WL6632124, 1-3 (Wash. Ct. App. 2013); *Aji*, No. 18-2-04448-1 at 4-7.

In *Kanuk*, plaintiffs requested declaratory relief that: 1) the atmosphere is a public trust resource; 2) the state has an affirmative duty to protect the atmosphere; 3) the state has failed to properly protect the atmosphere; and 4) sets forth the specific parameters of the state's duty to protect the atmosphere. 335 P.3d at 1091. The Alaska Supreme Court discussed the grounds for declining to grant declaratory relief as follows:

> Although declaring the atmosphere to be subject to the public trust doctrine could serve to clarify the legal relations at issues, it would not 'settle' them. It would have no immediate impact on greenhouse gas emissions in Alaska, it would not compel the State to take any particular action, nor would it protect the plaintiffs from the injuries they allege in their complaint. Declaratory relief would not tell the State what it needs to do in order to satisfy its trust duties and thus avoid future litigation; conversely it would not provide the plaintiffs any certain basis on which to determine in the future whether the State has

> breached its duties as trustee. In short, the declaratory judgment sought by the plaintiffs would not significantly advance the goals of 'terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding' and would thus fail to serve the principle prudential goals of declaratory relief.
> …
>
> Declaratory relief 'permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty and it helps avoid a multiplicity to actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants.' As already noted, the declaratory relief the plaintiffs seek here would not serve these goals; it would not serve to declare expediently 'in one action the rights and obligations of [the] litigants' and thus avoid further litigation. Within the very general framework of the public trust, 'the rights and obligations of [the] litigants' with regard to the atmosphere would depend on further developments—by the legislature, by executive branch agencies, and through litigation focused on more immediate controversies.

Id. at 1101-03 (internal citations omitted). Here, should the Court grant the requested declaratory relief but decline to issue the requested injunctive relief, this would not avoid a multiplicity of actions seeking to challenge the State's subsequent water quality efforts or regulation of livestock production facilities.

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

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

A. Preservation of Error

ICCI erroneously argues the State failed to preserve error on its argument that ICCI must challenge discrete agency actions under the Iowa Administrative Procedure Act ("IAPA") and may not raise programmatic claims under the IAPA because the District Court allegedly failed to address such arguments in its Ruling. (ICCI Br. at 73). The arguments were raised, briefed and argued below. (*See* App. at 55-57, 88-93, 97 n. 2). Although the District Court did not reach the aforementioned issues because it was unnecessary after it determined the IAPA did not control, the Iowa Supreme Court should still decide the issues in the interest of sound judicial administration—the issues were fully briefed and argued to the court. *See Barnes*, 385 N.W.2d at 263.

B. The Process for Challenging Agency Action Under the IAPA does not Violate ICCI's Right to Procedural Due Process.

ICCI argues that requiring "case-by-case review of a multitude of discrete actions and inactions" and prohibiting "broad programmatic claims" under the IAPA violates their right to procedural due process. (ICCI Br. at 82-83). While ICCI may find the use of Iowa's longstanding and existing method of challenging agency actions under the IAPA frustrating, frustration does not equal a deprivation of a constitutional right. *See Lujan v. National*

Wildlife Federation, 497 U.S. 871, 891, 94 (1990) (Supreme Court, rejecting an attempt to seek wholesale improvement of a broad agency policy, required plaintiffs to proceed through administrative process, noting that while the "case-by-case approach" may be frustrating to public interest litigants, it is the "traditional, and … normal, mode of operation of the courts."). Moreover, notwithstanding ICCI's assertion of a constitutional claim, such as-applied constitutional claims must be exhausted at the administrative level. (State Br. at 76-77).

Accordingly, ICCI was required to exhaust its administrative remedies before proceeding directly to district court, and ICCI's 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.

CERTIFICATE OF COMPLIANCE

This reply 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 reply brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 6,550 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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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 Reply Brief on all parties to this appeal by EDMS to their respective counsel for said parties:

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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 Reply Brief with the Clerk of the Iowa Supreme Court by EDMS.

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