BEFORE THE IOWA SUPREME COURT

NO. 20-0575
BLACK HAWK CO. CASE NO. EQCV139257

THE IOWA ASSOCIATION OF BUSINESS AND INDUSTRY,

Plaintiff-Appellant,

v.

THE CITY OF WATERLOO, THE WATERLOO COMMISSION ON HUMAN RIGHTS and MARTIN M. PETERSON, in his official capacity,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF BLACK HAWK COUNTY
HON. HONORABLE JOHN BAUERCAMPER

APPELLANT'S REPLY BRIEF

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I. Waterloo and Amici raise policy positions and discuss legal doctrines that are not relevant to this Court's decision.

In this preemption case, which contains a small (and mostly irrelevant) factual record, the City of Waterloo and its supporting amici filed 141 combined pages of briefing that total 24,406 words. The result? The introduction of issues and arguments into this case that do not belong here. Some of them are policy issues raised by the ACLU Amici; others are legally irrelevant distractions raised by Waterloo. Before responding to the relevant arguments, it makes sense to address what this Court can simply set aside.

The ALCU Amici take the time, in this *judicial* proceeding, to lecture the Iowa legislature on the type of laws it should and should not be passing. Adopting terminology from law review articles written by some of the amici law professors, ACLU Amici claim that Section 364.3(12) is a type of "New Preemption" that "does not follow the contours of well-established legislative preemption statutes." (ACLU Br. 29 n.6). According to ACLU Amici, the enactment of these types of laws "merely illustrates the legislature's hostility to the state constitution's protection of home rule authority." (*Id.*). The legislature should, according to ACLU Amici, go back to the "well-established" type of preemption statutes that "impose uniform regulations or establish statewide minimum standards, which can be enhanced but not reduced." (*Id.*).

ACLU Amici are, of course, free to voice their opinion on the types of preemption statutes the Iowa legislature should and should not be enacting, but this is not the venue. In fact, this Court has been clear on the subject, stating in the preemption context that it "does not entertain arguments that statewide regulation is preferable to local regulation or vice versa, but focuses solely on legislative intent as demonstrated through the language and structure of a statute." *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

Yet that is exactly what the ACLU Amici *expressly* ask this Court to do: to put a thumb on the scale and express a preference for local regulation over state regulation. ACLU Amici claim that "this Court should recognize" that section 364.3(12) "marks a remarkable transmogrification of that power in an attempt to erode Iowa municipalities' constitutionally protected home rule powers," and that the Court should thus take the "opportunity to evaluate" not only the breadth but the very "legitimacy of a New Preemption statute." (*Id.* at 30). That is a remarkable statement, since no one has argued that section 364.3(12) is illegitimate, *in any way*, either constitutionally or otherwise. Nor is there such an argument; the Iowa Constitution gives the legislature "the power to trump or preempt local law." *Baker v. City of Iowa City*, 750 N.W.2d 93, 99 (Iowa 2008) (quotation omitted). There is nothing in the Constitution that says the legislature cannot set the ceiling (as opposed to the floor) on regulation, nor is there some kind of presumption against the legislature when it does.

So when the ACLU Amici tell the Court that it should consider the legitimacy of "New Preemption" statutes that cabin the power of cities to regulate, they are really asking this Court to ignore the law—to decide this case on a matter of policy preferences. Of course, this Court cannot and would not do that, but these types of stray arguments have a way of confusing and obfuscating the issue; of suggesting that this case is not so much about statutory interpretation as about wise policy. This is not the place for that discussion, and "[a]ny implication that certain policy preferences are relevant" to the interpretation of section 364.3(12) "undermines the appearance of impartiality of judicial review." *State v. Thompson*, 836 N.W.2d 470, 492 (Iowa 2013) (Appel, J., concurring).

As far as legal relevance, the Court can also ignore Waterloo's lengthy discussion about implied preemption. This is an express preemption case; indeed, preemption is *expressly* the point of section 364.3(12). Waterloo argues that the Court should do an implied-preemption analysis because, to decide whether Ordinance 5522 is preempted, the Court must determine, as directed by section 364.3(12), whether the ordinance's regulation of hiring practices exceeds that of state or federal law. But that is not what courts mean when they refer to implied preemption; not at all. So Waterloo's discussion and application of implied-preemption principles does nothing but confuse things.

II. The NAACP's new argument cannot be considered and is, in any event, incorrect.

The NAACP, unlike Waterloo and the ACLU Amici, does address the actual text of the statute, arguing that Ordinance 5522 is not affected by section 364.3(12) because, according to the NAACP, the ordinance does not regulate "terms and conditions of employment." That argument fails for two reasons: (1) It was not raised by Waterloo in the district court or on appeal, and (2) Waterloo's interpretation is an implausible one that would write the phrase "hiring practices" out of section 364.3(12).

Throughout this litigation, Waterloo has conceded that Ordinance 5522 regulates hiring practices and that these hiring practices, as that term is used in the statute, are subsumed within the definition of "terms and conditions of employment." ABI highlighted that concession during the summary judgment hearing (which was not transcribed) but ABI also repeated it in its opening brief, stating: "Waterloo conceded [in the district court] that Ordinance 5522 regulates terms and conditions of employment, and hiring practices specifically, so the only question for the district court was whether the ordinance's regulations exceed the regulation of hiring practices under either federal or state law." (ABI Br. 8). In its brief to this Court, Waterloo did not dispute that characterization of the record. Nor could it.

But even if Waterloo had not made a concession on this point, the Court can see that Waterloo has never raised this argument—not in district court filings or in its brief on appeal. Because amici cannot inject new arguments into the case,[1] and because this Court cannot reverse *or affirm* the district court based on a ground not raised by a party in the district court,[2] there is no basis to consider the NAACP's new argument.

Nevertheless, the NAACP's argument is incorrect on the merits. In relevant part, Iowa Code section 364.3(12) states that that a "city shall not adopt, enforce, or otherwise administer an ordinance . . . providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to . . . hiring practices . . . or other terms or conditions of employment." If "terms and conditions of employment," as used in the statute, refers only to *post*-employment activities, as NAACP claims, then the statute's reference to "hiring practices" is nonsensical. *Hiring* practices are, by

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[1] *Press–Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 493–94 (Iowa 2012) ("Although this argument is developed at some length in the brief of the amici, it was not raised below or by the Press–Citizen. We therefore decline to reach it."); *Rants v. Vilsack*, 684 N.W.2d 193, 198–99 (Iowa 2004) (declining to reach an argument raised by amici curiae that was not presented to the district court); *Mueller v. St. Ansgar State Bank*, 465 N.W.2d 659, 660 (Iowa 1991) (refusing to consider an argument first raised by amici and stating that "[u]nder Iowa law, the only issues reviewable are those presented by the parties").

[2] *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002) (citing cases).

definition, practices that an employer engages in during the *hiring* process, which is *pre*-employment. So under the NAACP's reading, section 364.3(12) states that a city cannot enact an ordinance that regulates *post*-employment to the extent it exceeds federal or state law regulation of *pre*-employment activities. That makes no sense.

To support that nonsensical interpretation, the NAACP points to common-law contract decisions and other statutes to argue that the phrase "terms or conditions of employment" does not encompass pre-employment activities. But most of those decisions do not even analyze the meaning of the phrase "terms or conditions of employment," and none of them interprets that phrase in the context that it is used in section 364.3(12). "The meanings of particular words may be indicated or controlled by associated words," (*Lowe's Home Centers, LLC v. Iowa Dep't of Revenue*, 921 N.W.2d 38, 51 (Iowa 2018)), so context matters, and the context here dictates the result. If the phrase "terms and conditions of employment" does not include pre-hiring activities, then the statute's reference to "hiring practices" is meaningless, which is to say that there would be no point for the legislature to have included it in the statute. That cannot be. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012) (stating that, "[i]n interpreting a statute, each term is to be given effect" and that the Court will "not read a statute so that any provision will be rendered superfluous"); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory*

Construction § 46:6, at 230 (7th ed. 2007) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." (citation and internal quotation marks omitted)).

Attempting to preemptively respond to this problem, the NAACP says that the "[i]nclusion of 'hiring practices' in this list only refers to and governs those which by virtue of application become part of the employment contract once it is formed." (NAACP Br. 18). There is no basis to believe the legislature intended for such an unnatural and cabined reading of that phrase. Indeed, it's not even clear what that means. But if we are understanding the NAACP correctly, that interpretation sets the course for an absurd destination: where an employer who wishes to reject an applicant based on his criminal history can just hire and then immediately fire him. After all, even under the NAACP's interpretation, section 364.3(12) makes criminal-history consideration a "term or condition of employment" once the employment relationship begins.

The most natural reading of section 364.3(12) is the one that Waterloo, the defendant, has assumed this entire time: that "terms and conditions of employment" includes the hiring practices that are prohibited by Ordinance 5522. So the only question on appeal, as has been the only question throughout this litigation, is whether Ordinance 5522's regulation of hiring practices exceeds that of state or federal law.

III. On its face, Ordinance 5522's regulation of hiring practices exceeds the regulation of hiring practices under Title VII and the Iowa Civil Rights Act.

The task of deciding whether Ordinance 5522 exceeds state or federal law when it comes to the regulation of hiring practices does not require a "challenging analysis," as Waterloo claims. (Waterloo Br. 38). It may seem that way, but only because Waterloo and amici convolute the issues.

On their face, neither Title VII nor the Iowa Civil Rights prohibit employers from asking about their criminal history on an application; nor do they restrict how an employer weighs that criminal history in making hiring decisions. Those statutes only prohibit such practices (and any others) if those practices intentionally or disproportionately discriminate based on a protected class.

Ordinance 5522, on the other hand, *always* prohibits employers from asking about criminal history on an application or making certain hiring decisions based on criminal history, *regardless* of the effect on a protected class. Consider this example: XYZ Company, which employs 15 people and makes new hires about once every five years, does not have a policy of rejecting applicants because of their arrest record, but it does consider it. For its latest job opening, XYZ received five applications and interviewed each applicant. Two of the applicants, both Caucasian, have criminal records and XYZ rejects one of them solely because of his recent arrest. In that scenario, XYZ Company has just violated Ordinance 5522, but it has *not* violated Title VII or the ICRA. That example can

be played out with each of prohibitions in Ordinance 5522. And it shows, quite clearly, that Ordinance 5522 exceeds Title VII and the ICRA.

At times, Waterloo and amici concede this—that Ordinance 5522 prohibits hiring practices related to criminal history in situations where Title VII and the IRCA do not. According to Waterloo, "Ordinance No. 5522 is confined to hiring decisions which are *likely* to be discriminatory because they are not based on business necessity or demonstrate disregard for business necessity such as refusing to employ an applicant based solely upon an arrest or a conviction which has been legally nullified." (Waterloo Br. 40-41). ABI disagrees that the ordinance is "likely confined" to conduct that is illegal under Title VII or the ICA; indeed, Waterloo claims that employers frequently ask about criminal history on an application yet ABI knows of no reported decision finding that such a practice violates Title VII or the ICRA. But even so, Waterloo's claim that Ordinance 5522 is confined to "hiring decisions that are *likely* to be discriminatory" is an acknowledgement of the obvious: that the ordinance prohibits some conduct that is *not* discriminatory based upon a protected class and thus does not violate Title VII or the ICRA.

Waterloo seems to be arguing that ordinance is close enough to federal and state discrimination law that the Court should spare it. Again, ABI disagrees: Ordinance 5522, which does not mention race or condition any of its prohibitions on discriminatory effect, goes significantly farther than Title VII

and the ICRA in regulating hiring practices. But even so, this "close enough" theory is not legally sound. Section 364.3(12) does not just preempt an ordinance *to the extent* that its application *in a particular case* exceeds what would be legal under federal or state law. Instead, it declares that, if the ordinance exceeds state or federal law, then the entire thing is void. Indeed, section 364.3(12) prohibits cities from even *enacting* an ordinance whose regulation exceeds state or federal law. Iowa Code § 364.3(12) ("A city shall not adopt . . . an ordinance" that exceeds "the requirements of federal or state law relating to . . . hiring practices"). So close enough (even if it were truly "close") is not good enough; the ordinance is void.

Because Ordinance 5522, on its face, so clearly exceeds state and federal law when it comes to the regulation of hiring practices, this Court does not need to follow Waterloo and amici down the rabbit hole. It does not need to decide exactly where disparate-impact law stands under Title VII; it does not need to address who has the burden in a Title VII case, and what stage; and it does not need to analyze the extent to which *Wards Cove's* admonition to consider statistics from the relevant qualified labor market (as opposed to the general population) is still required. *But see Pippen v. State*, 854 N.W.2d 1, 37 (Iowa 2014) (Waterman, J., concurring) ("As the *Wards Cove* Court explained, if plaintiffs are allowed to use aggregated statistics alone to prove disparate impact, it is difficult for the Court to determine if the racial composition of hires is at odds with the relevant

qualified labor market.".). It can simply examine the text of Ordinance 5522 and see that, on its face, it exceeds Title VII's regulation of hiring practices.

But even a quick look at these issues shows that Ordinance 5522 exceeds existing state and federal law when it comes to the regulation of hiring practices. Consider *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007), which ACLU Amici cite as an example of what they believe the status of disparate-impact law to be. (ACLU Br. 34). It is indeed an example, but not for the proposition that ACLU Amici submit. Instead, the case shows one of the many ways that Ordinance 5522 exceeds Title VII.

In *El*, the plaintiff claimed that the Southeastern Pennsylvania Transportation Authority's policy of disqualifying applicants based on prior criminal convictions caused "a disparate impact on minority applicants because they are more likely than white applicants to have convictions on their records." *Id.* at 235. The Third Circuit was reviewing (and ultimately affirmed) the district court's grant of summary judgment in favor of the Transportation Authority, but in doing so was only considering the second step of a disparate-impact claim—whether the employer had shown that the policy serves a legitimate business interest. The court was not considering the first step—whether the plaintiff had actually met his burden to show, through statistical evidence, that the employer's criminal-history policy caused a disparate impact—because the district court ruled that the issue was not resolvable on summary judgment. *Id.* at 235 n.1.

In the district court, the plaintiff produced a report from a statistician who opined that the Transportation Authority's criminal-conviction policy disparately impacted minorities; the Transportation Authority, in turn, produced its own expert who opined that the plaintiff's expert's opinions were "fundamentally flawed because he failed to, *inter alia*, study those employees who were actually dismissed or disqualified because of a criminal conviction (instead assuming they would be dismissed on that basis), failed to weight the data which he used, and failed to use all of the data which was available to him." *El v. Se. PA Transp. Auth.*, 418 F. Supp. 2d 659, 669 (E.D. Pa. 2005). The district court found the defense expert's "criticisms persuasive," but because the Transportation Authority had withdrawn its *Daubert* challenge, the court concluded that "the matter of crediting the testimony of these expert witnesses is properly left to the jury." *Id.*

The very fact that the plaintiff had to produce expert testimony and the defendant was allowed to rebut that testimony at trial shows that Ordinance 5522 exceeds federal law. Under Ordinance 5522, the City of Waterloo does not need to prove that any individual employer's criminal history policy *actually* causes a disparate impact. In fact, Waterloo does even not need to identify a "policy" at all (something that is required under Title VII); it can punish an employer who made a *single* negative hiring decision based solely upon a specific arrest record, even if the rejected application was a non-minority. And under Ordinance 5522,

the employer has no ability to present its own evidence of a lack of disparate impact (as the Transit Authority was able to do in *El*).

Imagine if the EEOC did that. If it considered the same general statistics and "anecdotes" that Waterloo did (see Waterloo Br. 17), enacted a rule that says Waterloo employers violate Title VII if they ask about criminal history on an application or reject an applicant because of a criminal conviction, and *then* showed up to Court and declared that there is no need to put on proof of actual disparate impact. Imagined if the EEOC just decided, for all time and for all employers, that, regardless of the circumstances, doing what Ordinance 5522 forbids is a violation of Title VII. If that happened—if the EEOC made that claim—the court would dismiss the case outright and probably sanction the EEOC. *C.f. E.E.O.C. v. Peoplemark, Inc.*, No. 1:08-CV-907, 2011 WL 1707281, at *3 (W.D. Mich. Mar. 31, 2011) (ordering the EEOC to pay $751,942 in attorney fees because it continued to prosecute a Title VII case based on the consideration of criminal history, even after the EEOC learned that the employer had hired several African-Americans with felony convictions).

As strange as that sounds, that is what Waterloo is doing. By claiming that that Ordinance 5522 "mirrors" Title VII (Waterloo Br. 24), Waterloo is arguing it can simply review general statistical evidence about crime rates and race, listen to a few anecdotes, and then create a blanket rule where every employer who asks about criminal history on an application is illegally discriminating based on

race. That is so plainly wrong, and it so bluntly makes the point that Ordinance 5522 goes beyond Title VII.[3]

Waterloo also argues that Ordinance 5522 should be saved because it mirrors "particular EEOC guidance." (Waterloo Br. 30 n.5). That is *not* true—Ordinance 5522 also goes beyond EEOC Guidance—but even so, that EEOC guidance is not the law. It says so, right in the document: "The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law *or agency policies*." EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act* (2012) (hereinafter, EEOC Guidance), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions.

[3] The fact that Ordinance 5522 prohibits hiring practices without requiring proof of disparate impact shows, on the face of the statutes, that Ordinance 5522 exceeds Title VII. But it's worth noting, given Waterloo's broad and anecdotal claims about disparate impact and criminal history, that some studies have shown that "ban the box" ordinances like Waterloo's actually result in an increase in discrimination on the basis of race. See Agan, Amanda, and Sonja Starr. 2018. *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, Quarterly Journal of Economics, 133., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795; Doleac, Jennifer L., and Benjamin Hansen. 2018. *The unintended consequences of "ban the box": Statistical discrimination and employment outcomes when criminal histories are hidden*. Working paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812811.

The ACLU Amici also misuse the EEOC Guidance to claim that Ordinance 5522 does not exceed Title VII. Citing a portion of the Guidance where the EEOC is simply discussing how it will conduct an investigation, ACLU Amici claim that a plaintiff in a Title VII case, "must establish *merely* a prima facie case of disparate impact before the burden shifts to the defendant, who may then attempt to *disprove* disparate impact through more specific applicant pool data." (ACLU Br. 37 n.37) (emphasis added). That is *not* the law; "[t]he ultimate burden of proving that discrimination against a protected group *has been caused* by a specific employment practice remains with the plaintiff *at all times*." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (cleaned up).[4] But even if that were the law, Ordinance 5522 does not give employers that same option. The ordinance's prohibitions apply *regardless* of whether a specific

[4] The burden of production (not to be confused with the ultimate burden of persuasion) does shift to the employer to show business necessity once the plaintiff has established a prima facia case that the policy causes an actual disparate impact. *Wards Cove*, 490 U.S. at 659. But there is no burden-shifting to the defendant on the issue of causation, regardless of whether the statistical evidence is specific or general. The burden of production and persuasion on that point is always with the plaintiff. *Id.* In its Guidance, the EEOC is not making a legal claim to the contrary. It is simply stating that, during its investigation, "[a]n employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact," and that the "Commission will assess" this evidence. EEOC Guidance.

employer's inquiry into and consideration of criminal history causes a disparate impact.

At this point, it's worth pointing out what might have gotten lost: We are so far down the rabbit hole that the Mad Hatter's tea party is in sight. As complicated as Waterloo and the amici want to make this, Ordinance 5522 clearly exceeds Title VII and the ICRA when it comes to restricting the use and consideration of criminal history in the hiring process. That is *exactly* why Waterloo passed the ordinance: to go beyond Title VII and the ICRA when it comes to limiting inquiry into and consideration of criminal history. That is the point.

Because no federal or state law prohibits the hiring practices that Ordinance 5522 does, it necessarily "exceeds" federal and state requirements of hiring practices and is thus preempted by section 364.3(12).

IV. The Iowa Civil Rights Act's anti-preemption clauses do not authorize the regulations in Ordinance 5522 or trump the express preemption language in section 364.3(12).

Waterloo and ACLU Amici continue to claim Iowa Code section 216.19(1)(c), which states what the ICRA does not do, somehow trumps the specific and express preemption language in section 364.3(12). As noted in ABI's opening brief, that is not the case. Section 216.19(1)(c) merely states what the ICRA itself does not preempt; that section does not authorize cities to enact broader ordinances that create broader anti-discrimination categories.

According to Waterloo, ABI's argument is a "strained" one. (Waterloo Br. 31). "Obviously," says Waterloo, "§ 216.19(1) cannot be read so narrowly" as to "merely indicate[] that there is nothing in the ICRA itself prohibiting a municipality from enacting an ordinance which addresses broader or different categories of discriminatory employment practices." (Waterloo Br. 32.). Whatever might be obvious to Waterloo, that is *literally* what the ICRA says: "Nothing *in this chapter* shall be construed as indicating . . . [l]imiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices." Iowa Code § 216.19(1)(c).

That expression by the legislature, that the ICRA itself does not preempt cities from creating different categories of discrimination, makes sense in light of the statutory home-rule scheme. Iowa Code section 364.3(3)(a) states that a city "may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." When section 216.19(1)(c) says that the ICRA *itself* does not prohibit cities from enacting broader categories of discriminatory practices, it is merely saying that the ICRA is not a "state law that provides otherwise," within the meaning of section 364.3(3). Or said another way, the ICRA's drafters were merely making clear that the ICRA itself was not impliedly prohibiting cities from enacting broader categories of discriminatory practices. But section 364.3(12) *expressly* preempts

all city ordinances that regulate hiring practices to a greater degree than federal or state law. And there is no discrimination exception in that statute.

Despite the fact that the statutory text does not create an exception for ordinances that regulate hiring practices as a means to prevent discrimination, Waterloo and the ACLU Amici tell the Court that the legislative history of section 364.3(12) shows that "intent," because an earlier draft of the bill also deleted the ICRA's anti-preemption provisions.

That history cannot carry the weight Waterloo and ACLU wish it could. The intent of the legislature is first (and best) determined "by the words of the statute itself" (*Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 197 (Iowa 2010)), because legislative history, even if seemingly clear, "cannot be used to defeat the plains words of a statute." *Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981). Because Ordinance 5522 regulates hiring practices to a greater degree than federal law and state law—without exception—and because section 364.3(12) preempts any ordinance that regulates hiring practices to a greater degree than federal *or* state law, Ordinance 5522 is preempted. Whatever the legislature intended by deciding *not* to repeal the ICRA's anti-preemption provisions, the words of section 364.3(12)—the statute that the legislature did enact—are clear on this issue.

But even so, the legislative history is also not nearly clear enough for the Court to carve some kind of anti-discrimination exception into 364.3(12)'s

express terms. Indeed, we really have no idea why the legislators who voted for the amendment to remove the repeal language did so, but we can conceive of reasons that have nothing to do with an intent to allow Waterloo to do what it's doing here. For starters, if the ICRA regulates much more than hiring practices. Indeed, the ICRA forbids some types of discrimination—like housing discrimination—that have nothing to do with employment at all, and certainly have nothing to do with hiring practices. Thus, deleting those provisions from the ICRA would have, or at least could have, had a preemptive effect that went well beyond the terms of section 364.3(12). Indeed, by deleting the ICRA's anti-preemption provisions, courts may well have assumed that the legislature intended to preempt the entire field of discrimination law, meaning that cities could not enforce an ordinance that expressly prohibits race or sex discrimination. By deciding not to do that, the legislature was in no way signaling that it was allowing cities to regulate hiring practices merely by calling those practices discriminatory.

Also, a legislator who had nothing in his or her mind *but* wanting to preempt ban-the-box ordinances like Waterloo's could have easily read the express language of section 364.3(12), been satisfied that the statute did exactly that, and thus had no concerns about removing the repeal of the ICRA provisions from the bill. We would not know, of course, because there was no

reason for that legislature to rise up and say so. The plain language of section 364.3(12) does enough speaking.

That is the danger of relying on legislative history: it rewards only those who stand up and express intent that is not already expressed in the words of the statute, and it ignores those who vote not on some hidden agenda but on the plain meaning of the words in the bill. As anyone who has worked in the legislative process can tell you, "legislative history" can easily be manipulated in the hopes that a court, someday, will do just what Waterloo and ACLU Amici are asking this Court to do: decide the case on something other than the words of the text that the legislature voted on and approved. This Court should decline the invitation.

V. The doctrine of constitutional avoidance is not appropriate, nor needed, in this preemption case.

The NAACP also asks the Court to apply the cannon of constitutional avoidance to interpret section 364.3(12) to *not* preempt Ordinance 5522. That argument fails. The "canon of constitutional avoidance does not supplant traditional modes of statutory interpretation" (*Boumediene v. Bush*, 553 U.S. 723, 787 (2008)) and, as explained above, applying those traditional modes of statutory interpretation shows that Ordinance 5522 is preempted.

But even so, the doctrine of constitutional avoidance does not apply in this situation—where the issue is whether a city ordinance is preempted by an

act of the legislature. Under the canon of constitutional avoidance, the judicial branch, "out of respect for [the legislative branch]," assumes that the legislature intends to legislate within its "constitutional limitations," and thus, to the extent possible, will interpret statutes to avoid ruling that the legislature has exceeded its power. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The doctrine is borne out of separation-of-powers concerns between co-equal branches of government: the legislature and the judiciary. *Id.*

Here, the question is not whether the Iowa legislature was legislating within its constitutional limits; indeed, regardless of the interpretation, Iowa Code section 364.3(12) is clearly constitutional. Instead, this Court is being asked to decide the extent to which the legislature used its power to preempt local ordinances. While the legislature's preemptive power comes from the Constitution, it is not a constitutional issue to which the avoidance canon applies. It's simply a matter of statutory interpretation. Indeed, if constitutional avoidance applied to preemption cases, the doctrine of implied preemption (of assuming that the legislature intended to preempt local law *even though* the legislature did not expressly say so) would not exist.

In sum, constitutional avoidance is a red herring, and applying it here would defeat the very purpose of the doctrine: to show respect for the legislature.

CONCLUSION

Ordinance 5522 regulates hiring practices, as Waterloo concedes. Under section 364.3(12), a city's regulation of hiring practices cannot exceed state or federal law. Because Ordinance 5522's regulation of hiring practices does exceed state and federal law—indeed, that was Waterloo's point—the statute is preempted and void.

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PROOF OF SERVICE

I hereby certify that on the 15th day of September, 2020, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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/s/ Lori McKimpson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 5,313 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

Dated: September 15, 2020

/s/ Lori McKimpson

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