IN THE SUPREME COURT OF IOWA

NO. 20-0575
BLACK HAWK COUNTY 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 IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY
THE HON. JOHN BAUERCAMPER, SENIOR JUDGE
FIRST JUDICIAL DISTRICT

DEFENDANTS-APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

Defendants-Appellees do not resist Plaintiff-Appellant's request that the Supreme Court retain this case. The case presents the issue whether a City ordinance is preempted by a state statute and is therefore appropriate for retention. *See* Iowa R.App.P. 6.1101(2)(a).

However, it must be noted that transfer to the Iowa Court of Appeals is also appropriate. Pursuant to Iowa R.App.P. 6.1101(3)(a) the issues presented can be resolved by the application of well established existing legal principles relating to express and implied preemption, as well as statutory construction. In addition, the adoption of the ordinance is specifically authorized by Iowa Code §216.19(1) and the exercise of such authority by a municipality is likewise well established by existing precedent.

STATEMENT OF THE CASE

A. Nature of the Case

This is a declaratory judgment action in which Plaintiff, the Iowa Association of Business and Industry (ABI) is seeking to invalidate City of Waterloo Ordinance No. 5522. This Ordinance guides the inquiry that employers, located within the City of Waterloo, can conduct with respect to a prospective employee's criminal history and the decisions they can make based on that history. ABI alleges that the ordinance violates Iowa Code

§364.3(12) because it somehow "exceeds or conflicts" with federal and state law and is therefore preempted under Iowa Const. art. III, §38A.

B. Course of Proceedings

On January 2, 2020 ABI filed its Petition for Declaratory Relief in the Iowa District Court for Black Hawk County asking the Court to enjoin Defendants, the City of Waterloo, the Waterloo Commission on Human Rights and City Attorney Martin M. Petersen (hereinafter collectively referred to as the City) from enforcing Ordinance No. 5522. (App. 8-11). ABI also asked the Court to declare that the Ordinance violated Iowa Code §364.3(12) and is therefore preempted. (App. 10-11).

The City filed an Answer and Affirmative Defenses to ABI's Petition on February 3, 2020. (App. 15-18). The City asserted, *inter alia*, that it had authority to enact the Ordinance pursuant to its "home rule" authority granted by Iowa Const. art. III, §38A. (App. 17).

On February 12, 2020 ABI filed a Motion for Summary Judgment and supporting Brief to declare that Ordinance No. 5522 violated Iowa Code §364.3(12) because it somehow "exceeds or conflicts" with federal and state law regarding employment hiring practices and is therefore, preempted under Iowa Const. art. III, §38A. (App. 19-20).

The City filed its Resistance to ABI's Motion and its own Motion for Summary Judgment with supporting Brief and Appendix on March 6, 2020. (App. 27-30). The City argued that the Ordinance is not expressly or impliedly preempted by Iowa law, in particular Iowa Code §364.3(12). (App. 28-29). Indeed, it is specifically authorized by Iowa Code §216.19(1) and any interpretation to the contrary would bring §216.19(1) into direct conflict with Iowa Code §364.3(12). (App. 28). The City further argued that the Ordinance does not exceed state or federal law and is perfectly consistent with the objectives of Title VII (42 U.S.C. §2000e *et seq*.) and the Iowa Civil Rights Act (Iowa Code Chapter 216) in reducing employment discrimination. (App. 28-29).

ABI filed a Resistance to the City's Motion and a Reply Brief in support of its Motion on March 24, 2020. (App. 56-71). The District Court conducted a telephone hearing on the pending motions on March 27, 2020. (App. 73). ABI and the City then filed Supplemental Briefs and Appendices in support of their respective Motions on April 3, 2020. (App. 75-90).

On April 4, 2020 presiding Judge John Bauercamper filed a Ruling denying ABI's Motion for Summary Judgment and granting the City's Motion. (App. 91-99). Judge Bauercamper concluded that Ordinance No. 5522 was properly adopted by the City pursuant to its "home rule" authority

as authorized by Iowa Const. art. III, §38A. (App. 98). Specifically, the Court held that Ordinance is consistent with the authority given to cities by Iowa Code §216.19(1)(c) to provide "broader or different categories of unfair and discriminatory practices" and ABI's preemption argument to the contrary brings this statute into direct conflict with §364.3(12). (App. 97-98). In addition, the Court concluded that the Ordinance did not violate §364.3(12) because its provisions do not conflict with state and federal employment law.[1] (App. 97-98). The Court noted that studies showing that criminal history considerations have a disparate impact on minorities, especially African Americans, support the conclusion that the Ordinance is consistent with state and federal civil rights law. (App. 97).

On April 6, 2020 ABI filed its Notice of Appeal of the District Court's Ruling. (App. 100-101).

[1] The City also argued that ABI did not have standing to sue. (App. 28). The District Court concluded that ABI has standing based on the fact that it has members doing business in the City and the Ordinance regulates their hiring practices. (App. 96). The City has not appealed the District Court's decision regarding ABI's standing. It is not an issue in the pending appeal.

STATEMENT OF THE FACTS

Shortly after taking his position as the Director of the Waterloo Commission on Human Rights (WCHR), Abraham Funchess (Director Funchess) began looking at ban the box, a/k/a fair chance initiative, ordinances as a means to reduce discrimination within his community. (App. 118).[2] The City is the most diverse ethnic/racial community in Iowa. (App.118). Approximately 16% of the total population in Waterloo is African American. (App. 118). Yet, the analysis conducted by Director Funchess

[2] ABI contends that a separate Statement of Facts is unnecessary because there are essentially no "adjudicative facts" relevant to decide the issues in the case. (ABI Brief p. 12 n. 3). An adjudicative fact is "[a] controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." *Rhoades v. State*, 848 N.W.2d 22, 31 (Iowa 2014) quoting *Black's Law Dictionary* 669 (9th Ed. 2009). "Legislative facts" on the other hand, are "generalized factual propositions, often consisting of demographical data and statistics compiled from surveys and studies, which aid the decision-maker in determining questions of policy and discretion." *Greenwood Manor v. Iowa Dept. of Public Health*, 641 N.W.2d 823, 836 (Iowa 2002). There are "adjudicative facts" which are relevant to the issues in this case, although they are generally undisputed. In particular, the research which Director Funchess and Attorney Wendland conducted to formulate the underlying basis for the Ordinance, and the process followed in adopting the Ordinance are important adjudicative facts to the resolution of this case. In addition, the legislative history of Iowa Code §364.3(12) is certainly a relevant adjudicative fact. Moreover, the District Court set forth specific findings of fact in support of its Ruling. (App. 91-93). Therefore, the City provides a separate Statement of Facts to address these important matters.

showed that there was an overrepresentation of minorities, particularly African Americans and Hispanics, in the criminal justice system. (App. 118).

Director Funchess contacted the National Employment Law Project (NELP). (App. 119). He obtained their materials regarding fair chance initiatives. (App. 119). These materials showed, among other things, that a disproportionate number of African Americans were migrating through the criminal justice system nationwide. (App. 119). He also obtained data from the Black Hawk County Sheriff's Department showing that a disproportionate number of minorities, particularly African Americans, were being housed at the county jail at any given time, generally at 40-60% of the total jail population. (App. 119). He also reviewed information from the NAACP regarding their research into the employment of black/brown people and the disproportionate number of criminal convictions among such groups. (App. 119). He also looked at the Analysis of Impediments to Fair Housing Choice information. (App. 119, 127-140). Every five years, the Waterloo/Cedar Falls Home Consortium prepares an analysis of the status of minority groups in the area to satisfy the requirements of the 1974 Housing and Community Development Act in order to continue receiving HUD funds. (App. 119, 133-135). He also listened to personal anecdotes from minority community members who discussed the difficulty that they were encountering in

obtaining employment with a criminal record in the City. (App. 119). He also noted that many cities across the United States were enacting fair chance initiatives. (App. 119).

Director Funchess presented his findings to the WCHR which decided to propose a fair chance initiative ordinance for the City Council's consideration. (App. 119). He contacted Waterloo attorney Christopher Wendland (Attorney Wendland) to draft the Ordinance. (App. 119, 121). Attorney Wendland's firm, Clark, Butler & Walsh, had done work for the City for over 30 years. (App. 119, 121). One of its principal partners, James Walsh, had served as City Attorney. (App. 121).

Attorney Wendland conducted research to draft the Ordinance. (App. 121-122). He obtained materials from NELP, in particular their "Ban the Box Guide." (App. 122). He also looked at ordinances from other locations across the country. (App. 122). He prepared a spreadsheet comparing the relevant provisions of the ordinances which had been adopted by various cities. (App. 122, 125-126). He further consulted the Iowa Code, including Iowa Code §364.3(12). (App. 122). He attended meetings with City administration and community representatives to discuss the Ordinance. (App. 122). Based on these discussions, he prepared various drafts of the Ordinance. (App. 122).

The Ordinance was initially presented to the City Council on August 26, 2019 where it was received, placed on file, considered and passed for the first time. (App. 107). The Ordinance was subsequently amended and again received, placed on file, considered and passed on multiple occasions pursuant to the procedures prescribed by the City Code during City Council meetings in September and October 2019. (App. 111-112, 116). The Ordinance was adopted in final form at the City Council meeting on November 4, 2019. (App. 116). The Ordinance was amended on March 9, 2020 to change the definition of "employer." (App. 198).

The principal purpose of the Ordinance is to give minorities, in particular African Americans, a better chance to find employment. (App. 112, 119-120, 123). Specifically, the Ordinance is designed to encourage employers to utilize due diligence in evaluating prospective employees and thereby reduce discriminatory hiring practices. (App. 120, 123). Waterloo has the highest percentage of African Americans in its total population of any city in Iowa. (App. 120). A disproportionate number of persons in the criminal justice system are African Americans. (App. 120, 123). Consequently, the consideration of criminal history during the hiring process has a disproportionate effect on African Americans living in the City. (App. 120, 123). Also, criminal history can be used as a proxy for discrimination. (App.

120). Therefore, by shifting the employer's focus away from an applicant's criminal history, the Ordinance will give minority applicants a better chance to be employed. (App. 120, 123).

The Ordinance provides that an employer[3] cannot include a criminal record inquiry on an employment application, *i.e.* a so-called "box" asking if the applicant has been charged or convicted of a crime. Ordinance No. 5522 §B1 (App. 104, 122). An employer who employs more than 15 employees cannot make any inquiry regarding an applicant's criminal history during the initial hiring process, which essentially runs from the time that the employee inquires about a position and ends with a conditional offer of employment. *Id*. (App. 104, 122). In addition, the Ordinance provides that an employer employing more than the requisite 15 employees, cannot make any adverse

[3] "Employer" is defined by the Ordinance as any person, partnership, company, corporation, labor organization, or association which regularly employs four or more persons within the City of Waterloo, including the City of Waterloo. Ordinance No. 5542 §A(6) (amended by Ordinance No. 5547). (App. 198). The following persons or entities are not "employers" within the meaning of the Ordinance: (a) the United States or any of its political subdivisions, (b) the State of Iowa or any of its political subdivisions, other than the City of Waterloo, and (c) employers who are required by federal or state law to make an inquiry regarding criminal history on an application or an interview. *Id*. (App. 198). The Ordinance, as originally adopted on November 4, 2019 defined "employer" as a person or entity employing one or more persons. *Id*. (App. 198). However, the Ordinance was amended on March 9, 2020 to change the definition of "employer" to a person or entity employing four or more persons. *Id*. (App. 198).

hiring decision based upon the following: (1) the applicant's arrest/criminal history which has not resulted in a conviction; (2) criminal records or convictions which have been expunged or legally nullified; and (3) criminal records or convictions without a legitimate business reason. Ordinance No. 5522 §B(2-4) (App. 104-105, 122). The Ordinance elaborates on the third criterion by explaining what it means to have a legitimate business reason. *Id.* at §A(10) (App. 104, 122). This can be summarized as criminal conduct that has a direct/substantial bearing on the fitness or ability to perform a particular job; the applicant's criminal background poses an unreasonable risk of harm to property, safety, or business reputation/assets; positions working with children or disabled/vulnerable adults where the applicant was convicted for a crime against such individuals; and situations in which the employer must comply with federal or state requirements regarding an applicant's criminal history. *Id*. (App. 104, 122).

The Ordinance attempts to reduce employment discrimination in two general ways. (App. 123). First, it delays consideration of an applicant's criminal history until a conditional offer of employment is made. Ordinance No. 5522 §B(1) (App. 104, 123). The Ordinance does not prevent the employer from conducting a criminal background check or otherwise inquiring about criminal history; rather, it postpones this inquiry toward the

end of the application process. (App. 123). The goal is to encourage employers to take other factors into consideration which may lead them to hire an applicant who otherwise might not be hired due to their criminal history. (App. 123). Since minorities, particularly African Americans, have a disproportionate number of criminal convictions, such practices should increase the number of minority hirings. (App. 123).

Second, the employer can only consider criminal history if it is relevant to the hiring decision. (App. 123). The Ordinance attempts to eliminate irrelevant factors such as the fact that the applicant has not been yet convicted of a criminal offense and is presumed innocent; his or her criminal conviction has been nullified; and/or the conviction bears no reasonable relationship to the job. (App. 123). Nevertheless, despite the fact that the applicant may fall within the foregoing categories, he or she can still be turned down for the job based on other legitimate business reasons. (App. 123).

The Ordinance has been specifically identified as a civil rights law designed to reduce employment discrimination. In Section B of the Ordinance, it states that the practices which are addressed by the Ordinance are "unlawful discriminatory practice(s)" in employment. Ordinance No. 5522 §B (App. 104). The Ordinance has also been classified in Title 5 of the Waterloo City Code, entitled Police Regulations, and specifically classified in

Chapter 3, entitled Human Rights. Ordinance No. 5522 Preamble (App. 103). The Ordinance is titled as the "Unfair Use of Criminal Record in Hiring Decisions." *Id*. (App. 103). During the City Council meeting on September 3, 2019 City Council member Pat Morrissey identified the passage of the Ordinance as a civil rights issue. (App. 112).

The Ordinance went into effect on July 1, 2020. Ordinance No. 5522 §F (App 105).

SUMMARY OF THE ARGUMENT

The District Court correctly determined that Ordinance No. 5522 was properly adopted by the City pursuant to its "home rule" authority under Iowa Const. art. III, §38A. The Ordinance is presumed to be valid and constitutional. The burden is on ABI to show that it is preempted. ABI did not meet this burden.

There is nothing in Iowa Code §364.3(12) which expressly preempts Ordinance No. 5522. Indeed, as the District Court correctly concluded, the Ordinance is specifically authorized by Iowa Code §216.19(1) which allows cities to enact ordinances restricting broader or different categories of discriminatory practices. This is confirmed by the legislative history underlying the adoption of §364.3(12) in 2017 when the Legislature abandoned efforts to rescind §216.19(1). Contrary to ABI's argument, the

District Court's correct reading of §216.19(1) will not make §364.3(12) meaningless. Indeed, ABI's overbroad interpretation of §364.3(12) would render §216.19(1) a nullity.

ABI is really relying on implied preemption, as the structure of §364.3(12) requires a comparison between the scope of the Ordinance with the scope of federal and state law. However, the fact that the Ordinance is directly authorized by §216.19(1) negates the implied preemption argument as well. Furthermore, the District Court correctly determined that ABI's construction of §364.3(12) will bring it into direct conflict with §216.19(1). Fortunately, the Ordinance can be read harmoniously with §364.3(12) because it does not exceed federal and state law. The Ordinance mirrors federal restrictions on the use of criminal history during the hiring process. Since the Ordinance is equivalent to federal civil rights law, it is necessarily equivalent to Iowa law. Nevertheless, the Ordinance is perfectly consistent with the objectives of the Iowa Civil Rights Act in eliminating employment practices that have a disparate impact.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ORDINANCE NO. 5522 IS NOT PREEMPTED BY IOWA CODE §364.3(12)

A. Error Preservation

Pursuant to Iowa R. App. P. 6.903(2)(g)(1) the City states that ABI has properly preserved the issues presented for appellate review.

B. Standard of Review

Pursuant to Iowa R. App. P. 6.903(2)(g)(2) the City states that the standard of review of the issues presented is for correction of errors of law. The standard of review for district court rulings on summary judgment is for correction of errors on law. *Kistler v. City of Perry, Iowa*, 719 N.W.2d 804, 805 (Iowa 2006); *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 806 (Iowa 2018). Likewise, a district court's determination of whether a local ordinance is preempted by state law is a matter of statutory construction and is thus reviewable for corrections of errors at law. *Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010); *Lewis v. Jaeger*, 818 N.W.2d 165, 175 (Iowa 2012).

C. Preemption in General

In 1968, the Iowa Constitution was amended to provide municipal governments with limited powers of home rule. Iowa Const. art. III, §38A. This amendment provides in relevant part that municipal corporations are

granted home rule power and authority, not inconsistent with the laws of the General Assembly to determine their local affairs and government, except that they do not have the power to levy any tax unless expressly authorized by the General Assembly. *Id*. The home rule amendment grants cities "broad authority" to regulate matters of local concern, subject to preemption by laws of the General Assembly. *City of Des Moines v. Gruen*, 457 N.W.2d 340, 341 (Iowa 1990); *Goodenow v. City Council of Maquoketa, Iowa*, 574 N.W.2d 18, 26 (Iowa 1998).

Under legislative home rule, the Legislature still retains the power to preempt a municipality from exercising certain police powers. *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008); *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010). A local government's exercise of power must not be inconsistent with the laws of the General Assembly. *Iowa Grocery Industry Ass'n. v. City of Des Moines*, 712 N.W.2d 675, 678 (Iowa 2006) (quoting Iowa Const. art. III, §38A). However, as long as an exercise of police power over local affairs is not inconsistent with the laws of the General Assembly, municipalities may act without express legislative approval or authorization. *Seymour*, 755 N.W.2d at 538; *Hensler*, 790 N.W.2d at 584. The purpose of the home rule amendment is to give local

government the power to pass legislation over its local affairs subject to the superior authority of the Legislature. *Hensler*, 790 N.W.2d at 584.

A municipality may enact an ordinance on matters which are also the subject of state statutes, unless the ordinance invades an area of law reserved by the Legislature to itself. *Gruen*, 457 N.W.2d at 342-43; *Goodenow*, 574 N.W.2d at 26. In addition, a municipality may set standards more stringent than those imposed by state law unless state law provides otherwise. Iowa Code §364.3(3); *Sioux City Police Officers Ass'n. v. City of Sioux City*, 495 N.W.2d 687, 693 (Iowa 1993); *Goodenow*, 574 N.W.2d at 26.

Ordinances are presumed constitutional. *Wettach v. Iowa Board of Dental Examiners*, 524 N.W.2d 168, 171 (Iowa 1994); *Goodenow*, 574 N.W.2d at 22. An ordinance is presumed to be reasonable and valid, and the burden is upon one who attacks it to show that it is not. *Incorporated Town of Carter Lake v. Anderson Excavating & Wrecking Co.*, 241 N.W.2d 896, 901 (Iowa 1976). Evidence of invalidity must be clear. *Id*. When the reasonableness of a city's ordinance is questioned, the ordinance will be presumed reasonable, unless the contrary appears in the face of the ordinance or is established by proper evidence. *Goodenow*, 574 N.W.2d at 22.

In order to determine whether municipal action is permitted or prohibited by the Legislature, courts have developed the doctrine of

preemption. *Seymour*, 755 N.W.2d at 538; *Hensler*, 790 N.W.2d at 585. The preemption doctrine dictates that municipalities cannot act if the Legislature has directed otherwise. *Id.* The Iowa Supreme Court has recognized three types of preemption: express preemption, implied-conflict preemption and implied-field preemption. *Id.*

The City enacted Ordinance No. 5522 pursuant to the aforementioned home rule authority granted to it by the Iowa Constitution. ABI claims that the Ordinance is somehow preempted by Iowa Code §364.3(12). However, ABI cannot overcome the strong presumption in favor of the Ordinance under any of the foregoing theories of preemption.[4]

D. Express Preemption

Express preemption applies when the Legislature has specifically prohibited local action in a given area. *Seymour*, 755 N.W.2d at 538; *Mall Real Estate, LLC v. City of Hamburg*, 818 N.W.2d 190, 195 (Iowa 2012).

[4] Implied-field preemption occurs when the Legislature has "so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law." *City of Davenport v. Seymour*, 755 N.W.2d at 539. However, ABI does not argue that Ordinance No. 5522 is preempted under the doctrine of implied-field preemption. It is clear that the Legislature did not intend to occupy the field regulated by the Ordinance. As noted, the underlying purpose of the Ordinance is to prevent discrimination in employment. The Legislature has expressly stated that nothing in the ICRA will be construed as indicating any intent to occupy this field. Iowa Code §216.19(1)(a). Therefore, the City will limit its discussion to the theories of express and implied-conflict preemption.

Express preemption is consistent with the notion that limitations on a municipality's power over local affairs are not implied; they must be imposed by the Legislature. *Id*.

Ordinance No. 5522 is not expressly preempted. ABI's reliance on Iowa Code §364.3(12) is misplaced. There is nothing in the statute which expressly negates the Ordinance. There is no statutory language specifically stating that a municipality cannot adopt an ordinance regulating the consideration of criminal history in making employment decisions. For example, the statute does not state that cities are prohibited from enacting an ordinance which prohibits a criminal record inquiry on a job application.

The opposite is true. As the District Court correctly concluded, the Ordinance is consistent with the authority given to cities by the Iowa Civil Rights Act (ICRA), codified at Iowa Code §216.19(1) which in relevant part provides as follows:

> 1. All cities shall, to the extent possible, protect the rights of the citizens of this state secured by the Iowa Civil Rights Act. Nothing in this chapter shall be construed as indicating any of the following:
>
> a. An intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.

***

> c. Limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.

(App. 98). Ordinance No. 5522 has been specifically identified as a civil rights law designed to reduce employment discrimination. (App. 103-104, 120, 123). The theory behind the Ordinance is that a disproportionate number of persons prosecuted by the criminal justice system belong to minority groups, in particular African Americans. (App.120, 123). Consequently, the consideration of criminal history during the hiring process will have a disproportionate effect on these minorities living within the City. (App. 120, 123). In addition, criminal history can be used as a proxy for discrimination. (App. 120). The City is thus authorized by Iowa Code §216.19(1)(c) to address this form of employment discrimination even if it involves the restriction of "broader or different categories of unfair or discriminatory practices" than provided by state or federal law. Iowa Code §216.19(1)(c).[5]

[5] As will be shown, the Ordinance does not actually restrict broader or different categories of discriminatory practices than state or federal law. It mirrors federal law, in particular EEOC Guidance, with respect to the consideration of criminal history during the hiring process. It is also perfectly consistent with the ICRA's prohibition of discriminatory employment practices which have a disparate impact on minorities.

Furthermore, in the process of enacting Iowa Code §364.3(12) the Legislature specifically intended to allow cities to continue to attack discriminatory practices in this fashion. ABI argues that when Iowa Code §364.3(12) was enacted, it "broadly" preempted municipal regulation of the employer/employee relationship. (ABI Brief p. 13). However, an examination of the legislative history of §364.3(12) reveals otherwise. In the original version of House File 295 (now codified in §364.3) the bill specifically deleted subsections a and c of §216.19(1) thereby taking away the power of cities to adopt ordinances providing for broader or different categories of discriminatory practices. (App. 145). However, Amendment H-1107 to House File 295 eliminated these provisions of the original bill relating to §216.19(1) and thus the statute remains intact and is still good law today. (App. 141, 145, 150).[6] Therefore, the Legislature clearly intended to allow cities to continue to enact ordinances to address discriminatory employment practices even if the requirements are broader, *i.e.* more restrictive than state statutes. In essence, the legislative history of §364.3(12) is fatal to ABI's argument.

[6] Amendment H-1107 was adopted on March 9, 2017. (App. 141). The final version of House File 295 contained no reference to §216.19(1). (App. 152-156). There is nothing in the codification of House File 295, Iowa Code §364.3, that references §216.19(1). Iowa Code §364.3 *et seq.*

ABI attempts to escape the express language of §216.19(1) by making the rather strained argument that the statute merely indicates 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. (ABI Brief pp. 19-20). This overly narrow interpretation of §216.19(1) opens the door for ABI to then argue that another statute, §364.3(12), does just that, by prohibiting a city from regulating any employment practice, discriminatory or otherwise, in excess of federal or state law, *i.e.* "broader or different." (ABI Brief pp. 19-20). In essence, the Legislature "giveth and then taketh away." Obviously, §216.19(1) cannot be read so narrowly. It would render the statute a nullity. It would simply take away the ability of cities, explicitly granted by §216.19(1)(c), to prohibit broader or different categories of discriminatory employment practices. While a municipality may still have the power to address other forms of discrimination such as housing, ABI's circumscribed reading of §216.19(1) would essentially "gut" local government efforts to fight discrimination by taking away the power to regulate employment discrimination. If the Legislature had intended such broad sweeping changes to §216.19(1), it would have clearly said so. However, as noted, it did just the opposite by

withdrawing the provisions in House File 295 which rescinded §216.19(1) when §364.3(12) was enacted.

Indeed, contrary to ABI's argument, the Legislature has expressly stated that the ICRA should not be read so narrowly. "This Chapter [the ICRA] shall be construed *broadly* to effectuate its purposes." Iowa Code §216.18(1) (emphasis added). The Iowa Supreme Court has specifically acknowledged this "legislative directive" to construe the ICRA broadly. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm.*, 895 N.W.2d 446, 462 (Iowa 2017). Likewise, the Legislature has directed municipalities to broadly apply the provisions of the ICRA. "All cities shall, *to the extent possible*, protect the rights of the citizens of this state secured by the [ICRA]." Iowa Code §216.19(1) (emphasis added).

ABI further argues that the District Court's interpretation of §216.19(1)(c) will render §364.3(12) meaningless. (ABI Brief p. 20). However, the District Court's correct and narrower construction of §364.3(12), still leaves plenty of room for the statute to operate and limit local governmental laws which address employment practices outside the scope of §216.19(1). For example, Iowa Code §92.3 provides that no person under 14 years old shall be hired to work except in the occupations listed in Iowa Code §92.1 such as delivering newspapers. Consequently, if a city passed a more

restrictive ordinance raising the age to 15, it would clearly violate §364.3(12). Likewise, Iowa Code §91D.1(1)(a) sets the state minimum wage at $7.25 per hour. If a city set the minimum wage at $10.00 per hour, it would obviously exceed state law in violation of §364.3(12).

Furthermore, contrary to ABI's argument, the District Court's reading of §216.19(1)(c) will not enable a city to regulate any employment practice by simply labeling it as "discriminatory." (ABI Brief pp. 20-21). To use ABI's example, a city cannot pass an ordinance prohibiting employers from asking where an applicant went to school on the basis that it discriminates against the applicant's educational background. (ABI Brief p. 20). Such an arbitrary prescript would violate the constitutional right to substantive due process. Substantive due process requires, at a minimum, that there is a "reasonable fit" between the legislative body's purpose and the means chosen to advance that purpose. *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012). In other words, assuming strict scrutiny does not apply, the ordinance must still be rationally related to a legitimate governmental interest. *Baker v. City of Iowa City*, 867 N.W.2d 44, 56 (Iowa 2015). In *Baker*, the Supreme Court upheld a City of Iowa City ordinance prohibiting employers from discriminating on the basis of marital status. *Id*. The Court concluded that the ordinance did not violate substantive due process because Iowa City had

a legitimate interest to eradicate employment discrimination and the ordinance furthered that interest. *Id*. However, the ordinance in the example cited by ABI does not further such an interest. An ordinance which prohibits an employer from asking a job candidate where he or she went to school is not rationally related to a legitimate municipal interest in preventing employment discrimination. An applicant, who for example graduated from the University of Northern Iowa, is not in a class of individuals who needs protection from employment discrimination. In contrast, Ordinance No. 5522 targets discriminatory practices which affect a recognized protected class, African Americans.

In *Bellino Fireworks, Inc. v. City of Ankeny, Iowa*, 332 F.Supp.3d 1071 (S.D. Iowa 2018) the U.S. District Court for the Southern District of Iowa addressed an analogous statutory scheme and concluded that there was no express preemption. In 2017 the Governor of Iowa signed into law Senate File 489 amending the Iowa Code to allow for the possession and sale of consumer fireworks in Iowa. 2017 Iowa Legis. Serv., Ch. 115 (SF 489) (West) (codified at Iowa Code §100.1(4), et al.). In addition, as part of House File 295, the Legislature also adopted a law prohibiting cities from enacting ordinances which set standards or requirements regarding the sale or marketing of consumer merchandise that are "different from or in addition to

any requirements established by a state law." HF 295 §3 (codified at Iowa Code §364.3(3)(c)). However, another statute, Iowa Code §364.2(6), authorized Iowa cities to adopt ordinances which prohibited or limited the use of consumer fireworks. In *Bellino*, the federal district court upheld the City of Ankeny's ordinance allowing the sale of fireworks only in heavy industrialized zones. *Bellino*, 332 F.Supp.3d at 1085. The Court held that neither Senate File 489 nor House File 295 expressly preempted Ankeny's ordinance despite the fact that Senate File 489 specifically allowed the sale of consumer fireworks in Iowa and House File 295 specifically prohibited cities from regulating the sale of consumer merchandise with restrictions in excess of state law. *Id*. Likewise, despite the language in §364.3(12) limiting the power of a municipality to enact a statute in excess of state law with respect to hiring practices, there is nothing specifically in the statute which prohibits Ordinance No. 5522 and in addition, the Ordinance is expressly authorized by §216.19(1)(c).

E. Implied-Conflict Preemption

1. General Principles

This is the branch of preemption which ABI is really relying upon in its efforts to negate Ordinance No. 5522. However, ABI cannot overcome the stringent burden to show such preemption.

Implied-conflict preemption occurs when a local ordinance prohibits an act permitted by a statute or permits an act prohibited by a statute. *Gruen*, 457 N.W.2d at 342; *Seymour*, 755 N.W.2d at 538; *Hensler*, 790 N.W.2d at 585. The theory of this branch of implied preemption is that even though an ordinance may not be expressly preempted by the Legislature, the ordinance cannot exist harmoniously with a state statute because the ordinance is "diametrically in opposition to it." *Seymour*, 755 N.W.2d at 538. In applying the implied preemption analysis, the Iowa Supreme Court presumes that the municipal ordinance is valid. *Seymour*, 755 N.W.2d at 539 (citing *Iowa Grocery*, 712 N.W.2d at 680). The cumulative result of these principles is that for implied preemption to occur based on a conflict with state law, the conflict must be "obvious, unavoidable, and not a matter of reasonable debate." *Seymour*, 755 N.W.2d at 539. In order to qualify for this branch of implied preemption, a law must be "irreconcilable" with state law. *Gruen*, 457 N.W.2d at 342; *Seymour*, 755 N.W.2d at 539. The legal standard for conflict preemption's application is "demanding." *Seymour*, 755 N.W.2d at 539. In considering a claim that a city ordinance violates home rule powers, the Court interprets state law in such a manner as to render it harmonious with the ordinance. *Gruen*, 457 N.W.2d at 342; *Sioux City Police Officers Association*, 495 N.W.2d at 694; *Seymour*, 755 N.W.2d at 539.

Although §364.3(12) uses express language in stating that a city shall not adopt an ordinance that exceeds or conflicts with state or federal law relating to employment practices, the statute still requires courts to engage in an implied-conflict preemption analysis to determine if the ordinance violates these limitations. This is not a case involving express preemption, where "the specific language used by the Legislature ordinarily provides the courts with the tools necessary to resolve any remaining marginal or mechanical problems in statutory interpretation." *City of Davenport v. Seymour*, 755 N.W.2d at 538. One cannot simply look at the wording of an ordinance and §364.3(12) to determine if the ordinance is preempted. Rather, the statute requires the decision-maker to first engage in a challenging analysis to determine what state and federal law provide in the area regulated by the ordinance. Then the scope of the ordinance must be scrutinized to determine if it exceeds or conflicts with this law. In essence, whether directed by the doctrine of preemption or the statute, an implied-conflict preemption analysis must in fact be conducted.

ABI argues that Ordinance No. 5522 conflicts with and is thus invalid pursuant to Iowa Code §364.3(12) because it creates a broader category of discriminatory practices than state and federal law, in particular the ICRA and Title VII. (ABI Brief pp. 14-21). Yet, as noted, Iowa Code §216.19(1)(c)

directly authorizes cities to enact ordinances prohibiting broader or different categories of discriminatory practices. This alone is fatal to ABI's argument regarding implied preemption just as it was with respect to express preemption.

Furthermore, ABI's overbroad interpretation of §364.3(12) violates fundamental principles of statutory construction. ABI's interpretation throws the Ordinance into direct conflict with §364.3(12) when it is the Court's task to try to reconcile the two pieces of legislation. *See Seymour*, 755 N.W.2d at 539 (the court should interpret state law in such a manner as to render it harmonious with the ordinance). Even more egregious, and as the District Court correctly concluded, ABI's interpretation throws §364.3(12) into direct conflict with §216.19(1). (App. 97). The Legislature did not intend for this conflict to occur because it rescinded the provisions of House File 295 (codified at §364.3(12)) which repealed §216.19(1)(c). (App. 141, 145, 150).

"According to the principles of statutory construction, if two statutes conflict, courts must attempt to harmonize them in an effort to carry out the meaning and purpose of both statutes." *Kelly v. State*, 525 N.W.2d 409, 411 (Iowa 1994); *see also Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 903 (Iowa 1996) (Iowa Code §4.7 requires courts to first attempt to harmonize two conflicting statutory provisions).

Fortunately, Ordinance No. 5522 can easily be reconciled with Iowa Code §364.3(12) because the Ordinance does not exceed federal or state civil rights laws, specifically Title VII and the ICRA. Therefore, this Court does not have to go down the dangerous path advocated by ABI to negate the Ordinance by throwing §364.3(12) into conflict with §216.19(1).

2. Federal Law

The District Court found that criminal history considerations have been shown to have a disparate impact on minority groups, especially African Americans, as shown by the studies which formulated the basis for Ordinance No. 5522. (App. 97). Therefore, as the Court correctly decided, these findings support the conclusion that the Ordinance does not conflict with state or federal law. (App. 97).

ABI admits that federal law restricts the consideration of criminal history during the hiring process which has a discriminatory impact upon minorities. (ABI Brief pp. 15-16). However, despite the fact that this is the obvious goal of the Ordinance, ABI resorts to a hypertechnical argument that the Ordinance exceeds federal law because it imposes "blanket" (actually uniform) restrictions which could regulate some hiring practices that are not discriminatory in every circumstance. (ABI Brief p. 16). With respect to criminal record exclusions, ABI overlooks the fact that 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. (App. 105, 123). In addition, with respect to criminal record inquiries, ABI overlooks the fact that the Ordinance does not prohibit criminal background checks but merely delays them until a conditional offer of employment is made so that the applicant is not excluded based solely upon the consideration of criminal history. (App. 104,123). Title VII and other federal civil rights authority also restrict such discriminatory practices. Therefore, Ordinance No. 5522 does not exceed and is consistent with federal law. It actually mirrors those requirements.

First, Ordinance No. 5522 provides that an employer (employing more than fifteen persons) must have a legitimate business reason to make an adverse hiring decision based on criminal history. Ordinance No. 5522 §B(4) (App. 104-105). That is precisely what federal law provides. In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit held that it was discriminatory under Title VII for an employer to follow a policy of disqualifying any applicant with a conviction for any crime other than a minor traffic offense. *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975). The employer's decision must be justified by "business

necessity." *Id*. at 1296. The court could not conceive of any business necessity that would automatically disqualify a convicted individual. *Id*. at 1298. In the second *Green* decision, the Eighth Circuit identified three factors that were relevant to assessing whether an exclusion based on criminal history is job related for the position in question and thus consistent with business necessity: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought. *Green v. Missouri Pacific Railroad Co*., 549 F.2d 1158, 1160 (8th Cir. 1977).

The EEOC's *Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions* builds on longstanding court decisions and specifically cites *Green v. Missouri Pacific Railroad Co.* in summarizing the requirements imposed by Title VII with respect to the consideration of an applicant's criminal record during the hiring process. *EEOC Enforcement Guidance* No. 915.002 §V(B)(1) (4/25/2012) (App. 166). The EEOC concludes that national data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. *Id*. at §I (App. 159). "To establish that a criminal conduct exclusion that has disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively

link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." *Id*. at §V(B)(4) (App. 168). This is precisely what the Ordinance requires. It even identifies many of the same factors set forth in the second *Green* case.

Second, the Ordinance provides that an employer (employing more than fifteen persons) cannot make an adverse hiring decision based solely on the applicant's record of an arrest or pending criminal charges that have not yet resulted in a conviction. Ordinance No. 5522 §B(2) (App. 104-105). The EEOC also prohibits the consideration of an applicant's arrest, standing alone. The fact of an arrest alone does not establish that criminal conduct has occurred because many arrests do not result in criminal charges or the charges are dismissed, and even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty. *EEOC Enforcement Guidance* No. 915.002 at §V(B)(2) (App. 167). "Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity." *Id*. (App. 167). "Therefore, an exclusion based on an arrest, in and of itself, is not job related and consistent with business necessity." *Id*. (App. 167). The EEOC Guidance further provides that although an arrest record standing alone may not be used to deny employment, an employer may make an employment

decision based on the conduct underlying the arrest. *Id*. (App. 167). Likewise, there is nothing in the Ordinance which prohibits an employer from considering an applicant's past conduct, even if it results in an arrest. Just like the EEOC guidance, the Ordinance only provides that the arrest, standing alone, shall not formulate the basis for an adverse hiring decision. Ordinance No. 5522 §B(2) (emphasis added) (App. 105, 123).

Third, the Ordinance provides that an employer (employing more than fifteen persons) cannot make an adverse hiring decision based on any criminal records which have been lawfully erased or expunged, which are the subject of an executive pardon, or which were otherwise legally nullified. Ordinance No. 5522 §B(3) (App. 104-105). The EEOC's enforcement guidance does not specifically address whether this type of applicant can be excluded from employment. However, the EEOC cautions against the overuse of criminal background checks because there may be an error in the record and specifically cites as an example, a database which may continue to report a conviction that was later expunged. *EEOC Enforcement Guidance* No. 915.002 at §V(B)(3) (App. 168). Therefore, the strong implication is that an applicant should not be rejected based on an expunged record. Furthermore, it certainly would be inconsistent with "business necessity" to refuse to hire an applicant whose conviction has been legally nullified.

Fourth, the Ordinance provides that it shall be an unlawful discriminatory practice for an employer (employing more than four persons) to include a criminal record inquiry on an application. Ordinance No. 5522 §B (App. 104, 123, 198). The Ordinance further provides that it shall be an unlawful discriminatory practice for an employer (employing more than fifteen persons) to make an inquiry regarding the criminal history of an applicant during the application process which starts with the employee's expression of interest in the position and ends with a conditional offer of employment. Ordinance No. 5522 §B(1) (App. 104). The EEOC does not make it per se illegal to ask questions about an applicant's criminal background or to conduct a criminal background check. However, neither does the Ordinance. It merely postpones the inquiry to the end of the hiring process. The Ordinance forces the employer to consider other factors which the employer is required to do anyway. As noted, the employer cannot refuse to hire an applicant based solely upon criminal history. *Green v. Missouri Pacific Railroad Co.*, 523 F.2d at 1297-98. The decision must be consistent with business necessity. *Id*. at 1298. In fact, the Ordinance follows EEOC guidance to the letter. "As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be

limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." *EEOC Enforcement Guidance* No. 915.002 at §V(B)(3) (App. 168).

ABI argues that the limits imposed by Title VII apply only in the context of a specific civil action where it can be shown to a trier of fact that the consideration of criminal history by the defendant employer caused disparate treatment of a protected class. (ABI Brief pp. 16-18). Ordinance No. 5522 operates in a different context in the form of a legislative restriction which imposes a civil fine upon an employer operating within the City. However, the Ordinance is still consistent with and not in excess of federal law because, as has been extensively shown, it attacks the same discriminatory employment practices for the exact same reasons as Title VII. It just uses a different tool or remedy. There is nothing in Title VII or any other federal law which provides that a state or local government, such as the City, cannot regulate the same discriminatory employment practices in a different manner.

The only applicable federal restriction is the constitutional due process requirement that the ordinance be rationally related to a legitimate governmental interest. *See Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (in order to prove a due process violation, the challenging party must prove that the ordinance is not rationally related to a legitimate

governmental interest). There is no dispute that WCHR Director Funchess conducted extensive research and determined that criminal record exclusions have a discriminatory impact on minorities, especially African Americans, within the City, which is the most ethnically diverse city in Iowa. (App. 119-120). Attorney Wendland then crafted Ordinance No. 5522 to address this problem, imposing restrictions on the consideration of criminal history that closely parallel Title VII. (App. 103-105, 123). Therefore, there is no question that the Ordinance meets the due process standard.

Realizing, perhaps, that employing a different methodology does not place the Ordinance beyond the scope of federal law, ABI specifically argues that any disparate impact caused by the use of criminal history during the hiring process must be strictly measured by comparing the effect on the qualified applicant pool with each employer's particular workforce. (ABI Brief pp. 16-17). Therefore, according to ABI, Ordinance No. 5522 exceeds federal law because it does not require this precise measurement for determining whether an employer violates the Ordinance. (ABI Brief p. 18). ABI's argument is deficient for the following reasons.

First, the U.S. Supreme Court has clearly stated that there is no requirement that a "statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."

Dothard v. Rawlinson, 433 U.S. 321, 330, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Furthermore, the controlling federal authority in Iowa, the Eighth Circuit, recognizes that three different kinds of statistical comparisons may generally be used to establish whether a challenged employment practice has a disproportionate impact upon a protected class in violation of Title VII. *Green v. Missouri Pacific Railroad Co.*, 523 F.2d at 1293-94. Two of these procedures involve the use of general population figures. *Id*. The first examines whether members of a protected class in a specified geographical area are excluded by the employment practice in question at a substantially higher rate than the non-protected class. *Id*. Another involves comparing the composition of the employer's workforce with the composition of the population at large. *Id*. The only procedure which does not rely on general population data focuses on a comparison of the unprotected v. protected job applicants actually excluded by the employment practice. *Id*. In addition, as previously noted, the EEOC has concluded that national data shows that criminal record exclusions have a disparate impact on race and natural origin, which provide a basis to further investigate potential Title VII violations involving such exclusions. *EEOC Enforcement Guidance* No. 915.002 §I

(4/25/2012). (App. 159).[7]

Second, as noted, WCHR Director Funchess conducted an extensive investigation into the effect of criminal record inquiries upon employment opportunities for minorities. (App. 119-120). The fact that he relied in part on national data and general population statistics was appropriate in the context of formulating a city ordinance. The criteria for a specific plaintiff's discrimination claim against a specific employer, where substantial compensatory damages and attorney's fees could be awarded, may, depending on the factual circumstances presented, be a comparison of the qualified applicant pool and the employer workforce, as argued by ABI. However, Ordinance No. 5522 is attempting to reduce the discriminatory impact of such criminal history considerations across the entire population of the City.

[7] *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), cited by ABI, does not hold to the contrary. In striking down the irrational comparison between the racial makeup of the cannery (unskilled) workers with the noncannery (skilled) workers, the U.S. Supreme Court only stated that "generally" the comparison between the racial composition of the qualified persons in the labor market and the persons holding at issue jobs is the proper basis for a disparate impact inquiry. *Id*. at 650-51. However, courts still recognize that general population statistics can be used to measure disparate impact. For example, in a recently decided case, cited by ABI, a federal district court stated: "It is true that, in some circumstances, general population statistics will suffice to show that a particular policy has a disparate impact." *E.E.O.C. v. Freeman*, 126 F.Supp.3d 560, 569 (D.Md. 2015) *citing Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32, 91 S.Ct. 849, 28 L.Ed. 158 (1971).

Therefore, the use of broader statistics was a much better way to measure this effect and fulfilled the City's obligation to have a rational basis for the Ordinance. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (where a law neither implicates a fundamental right nor involves a suspect or quasi-suspect classification, the law must only be rationally related to a legitimate government interest).

Finally, ABI's reliance on the Fair Credit Reporting Act (FCRA) is misplaced. (ABI Brief p. 15). First, there is nothing in the FCRA which is inconsistent with the Ordinance's provisions that employers employing more than 15 employees cannot make adverse hiring decisions based on an arrest alone; convictions which have been legally nullified; and convictions that are not rationally related to a legitimate business reason. (App. 104-105, 122). In fact, federal law on criminal background checks, also restricts such employment practices which have a discriminatory impact. In the publication cited by ABI, summarizing federal law on background checks, *Background Checks What Employers Need to Know* (ABI Brief p. 15 n. 4), employers are specifically cautioned to take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, religion, disability, and age. *Background Checks What Employers Need to Know*,

https://www.eeoc.gov/eeoc/publications/backgroundchecksemployers.cfm. "For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee." *Id*. This is directly in line with the Ordinance's efforts to avoid the misuse of criminal history during the hiring process which has a disparate impact on minorities.

Second, there is nothing in the Ordinance which exceeds the FCRA in the manner in which criminal background checks are conducted. ABI asserts that neither the FCRA nor any other federal statute or regulation make it illegal to ask questions regarding an applicant's criminal background or to conduct a background check. (ABI Brief p. 15). However, as noted, neither does Ordinance No. 5522. By removing a criminal record inquiry on an application form and directing an employer to conduct a criminal background check after a conditional offer is made, the Ordinance merely delays the consideration of the applicant's criminal history. As WCHR Director Funchess stated, the Ordinance is designed to encourage employers to use "due diligence" in evaluating prospective employees rather than focusing exclusively on the applicant's criminal background which disadvantages

minorities, particularly African Americans. (App. 120). As previously noted, the Ordinance thus follows EEOC guidance which recommends that employers not ask about criminal convictions on job applications. *EEOC Enforcement Guidance* No. 915.002 §V(B)(3) (App. 168).

The FCRA actually goes much further than Ordinance No. 5522 in restricting hiring decisions based on criminal history. It imposes a myriad of onerous, albeit different, restrictions on criminal record inquiries. The FCRA requires the employer to inform the applicant that a criminal background report may be obtained and used in the decision making process. 15 U.S.C. §1681b(b)(2)(A)(i). The employer must then obtain the applicant's written permission to do the background check.[8] 15 U.S.C. §1681b(b)(2)(A)(ii). Before taking adverse employment action, the employer must give the applicant a notice which includes a copy of the background report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." 15 U.S.C. 1681b(b)(3)(A)(ii). The notice then gives the applicant the opportunity to review the report and explain any negative information. *Background Checks What Employers Need to Know*, *supra*. Clearly, it is the FCRA which exceeds the scope of Ordinance No. 5522, not vice versa.

[8] The employer may reject the applicant if he or she does not provide consent. *Background Checks, Tips for Job Applicants and Employees*, at 3, federaltradecommission/consumer.ftc.gov.

3. State Law

The fact that Ordinance No. 5522 mirrors the requirements of Title VII, in essence means that the Ordinance does not exceed any requirements under Iowa law regarding the consideration of criminal history in employment. Any state law that permits an act that is unlawful under Title VII is preempted by the federal statute. 42 U.S.C. §2000e-7. Consequently, all Iowa law regulating the use of an applicant's criminal history in making employment decisions must impose equivalent restrictions as Title VII or it is preempted. As noted, Ordinance No. 5522 is consistent with the requirements imposed by Title VII and thus, a *fortiori*, is consistent with state law. In other words, by being consistent with federal law, the Ordinance does not exceed state law and does not violate Iowa Code §364.3(12) as alleged by ABI.

Nevertheless, a substantive examination of Iowa civil rights law, in particular, the ICRA, reveals that it is perfectly consistent with Ordinance No. 5522.

The ICRA also seeks to prevent discrimination in employment. It is modeled after Title VII. Title VII's "central statutory purposes [are] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The

ICRA was enacted to serve the same purposes: it was "passed in 1965 in an effort to establish parity in the workplace and market opportunity for all." *Vivian v. Madison,* 601 N.W.2d 872, 873 (Iowa 1999). In its interpretation of the ICRA, the Iowa Supreme Court has borrowed the framework of the analysis from U.S. Supreme Court decisions which applied it to Title VII. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission,* 453 N.W.2d 512, 516 (Iowa 1990). Thus, under the ICRA there are the same two principal ways to prove employment discrimination: disparate impact and disparate treatment. *Id*. Disparate impact prohibits employer practices "that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another." *Id*. (quoting *Int'l. Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)).

As previously noted, the consideration of criminal history has a disparate impact upon minority groups, in particular African Americans, because a disproportionate number of people in these protected classes have criminal convictions. The objectives of Ordinance No. 5522 in attempting to regulate the consideration of criminal history during the hiring process are perfectly consistent with the ICRA objectives to avoid employer actions that have a disparate impact upon protected groups. Therefore, as the District Court correctly concluded, the Ordinance does not exceed or conflict with the

relevant state law, the ICRA, and thus does not violate Iowa Code §364.3(12). (App. 97-98). In essence, the Ordinance can be read harmoniously with the statute.

To "exceed" Iowa law, the Ordinance must set forth a standard or bar that is more stringent than an explicit expression of policy by the Iowa Legislature. As the District Court correctly noted, "[a]ny limits on the authority of a city must be clearly imposed, not implied." (App. 97, Ruling p. 7 *citing Sioux City Police Officer's Ass'n. v. City of Sioux City*, 495 N.W.2d 687 (Iowa 1993). The absence of an express prohibition of a specific discriminatory practice in the ICRA was critical to the Iowa Supreme Court's decision to uphold the constitutionality of an Iowa City ordinance prohibiting discrimination on the basis of marital status in *Baker v. City of Iowa City*, 750 N.W.2d 93 (Iowa 2008). The Court noted that there was no express indication in the ICRA that the Legislature made a policy decision to allow employment and housing decisions to turn on a person's marital status. *Baker*, 750 N.W.2d at 102. The Court held that this variation between the local Iowa City ordnance and state statute fell within the regulatory latitude that the Legislature bestowed on cities in Iowa Code §216.19(1)(c) to enact ordinances that prohibit broader or different categories of unfair discriminatory practices. *Id*. Discrimination on the basis of marital status is

a class of discriminatory practices. *Id.* Therefore, the City had the authority under §216.19(1)(c) to prohibit such conduct. *Id.* Because Iowa City's ordinance prohibiting discrimination in employment and housing on the basis of marital status was not inconsistent with state law, the ordinance was within the City's home rule authority. *Id.*

Likewise, there is no express indication in the ICRA that the Legislature made a policy decision to allow employment decisions to turn on a person's criminal status. Therefore, Ordinance No. 5522 falls within the regulatory latitude that the Legislature gave to cities in §216.19(1)(a). In other words, it is not inconsistent with any state law and the Ordinance is within the City's home rule authority.[9]

CONCLUSION

For all the foregoing reasons, the City respectfully requests that the District Court's Ruling denying ABI's Motion for Summary Judgment and granting the City's Motion for Summary Judgment be affirmed.

[9] In *Bellino Fireworks v. City of Ankeny, Iowa*, the court held that the City of Ankeny's ordinance restricting the sale of fireworks to heavy industrial zones did not conflict with the analogous statutory scheme in that case and thus was also not preempted by implied conflict preemption. Bellino, 332 F.Supp.3d at 1085-86.

ORAL ARGUMENT STATEMENT

The City does not request oral argument.

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CERTIFICATE OF FILING AND SERVICE

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