ELECTRONICALLY FILED MAY 07, 2021 CLERK OF SUPREME COURT

BEFORE THE IOWA SUPREME COURT

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No. 20-1323

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SITE A LANDOWNERS,
Plaintiffs-Appellants,
vs.
SOUTH CENTRAL REGIONAL AIRPORT AGENCY,
CITY OF PELLA, CITY OF OSKALOOSA,
Defendants-Appellees,
and
MAHASKA COUNTY, IOWA,
Defendant-Appellant.

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CITY OF PELLA and CITY OF OSKALOOSA
Plaintiffs-Appellees/Cross-Appellants,
vs.
MAHASKA COUNTY,
Defendant-Appellant/Cross-Appellee.

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CONSOLIDATED APPEAL FROM THE DISTRICT COURT
OF MAHASKA COUNTY (Case No. CVEQ088856)
Hon. Crystal Cronk
and
FROM THE DISTRICT COURT
OF MAHASKA COUNTY (Case No. EQEQ006593)
Hon. Shawn Showers

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APPELLANT'S PROOF REPLY BRIEF

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## ARGUMENT

### I. THE LANDOWNERS AGREE THAT THE COURT SHOULD RESOLVE THE SUBSTANTIVE ISSUES RAISED IN THIS CASE.

The Landowners have previously set forth why the district court erred in finding that they lacked standing and why none of their arguments are barred by *res judicata*. These arguments were not refuted by the Cities in their brief. Instead, the Cities join the Landowners and the County in requesting that this Court rule on the substantive legal issues presented by this case. As noted by the Cities, this case presents "substantial issues of first impression in the construction and operation of Chapter 28E." The Landowners agree and, therefore, will not repeat the arguments related to standing and *res judicata*, except to say that the Cities' concession on this point eliminates the question of the Landowners' standing given the accompanying admission that Site A (where Landowners' own and farm property) has been selected by SCRAA for the airport, and that SCRAA has acquired land within Site A for this purpose.

## II. THE 28E AGREEMENT IS ILLEGAL AND UNENFORCEABLE BECAUSE IT IRREVOCABLY DELEGATES THE COUNTY'S LEGISLATIVE POWERS.

### A. This Case Does Not Present A Question Of Joint Exercise Of Powers; It Presents A Question Of Compelled Exercise Of Allegedly Delegated Legislative Powers.

At the outset, it must be emphasized that the County has withdrawn from SCRAA and revoked the joint exercise of its respective powers from the 28E agreement. The Cities challenge the County's power to do this, and seek to compel the County to exercise its legislative powers against its will. This is the opposite of the intent of Chapter 28E, which is to be liberally construed to allow agencies "to cooperate" for "mutual advantage"—not to irrevocably submit one agency to the unilateral, disadvantageous control of another. Iowa Code §28E.1.

For this reason, this case does not present an issue of "jointly exercising" authorities under Chapter 28E as the Cities would suggest; rather, it presents an issue of an alleged prior delegation of authority by the County which the Cities now claim cannot be revoked. Recognizing this undisputed fact turns the Cities' analysis of Chapter 28E (and the underlying, counterfactual presumption of the

"joint" exercise of powers) on its head. At bottom, the Cities claim that the County has irrevocably delegated its powers to SCRAA, and by extension, the Cities, notwithstanding the County's wish to withdraw.

The Cities' position has been directly rejected in *Warren County Bd. of Health v. Warren County Bd. of Supervisors*, 654 N.W.2d 910, 915 (Iowa 2002), which held, "[o]f course, an agency is free to revoke or change a delegation of power, but this must be done by the same type of procedures that created the delegation." The Cities' brief skirts this proposition. While the Cities may later attempt to distinguish this case on other grounds, the Court made this pronouncement without reference to the statutory framework raised there (Iowa Code Chapter 137), citing instead federal case law for this broader legal principle. Notably, this same tenet of symmetrical adoption and revocation method is reflected in Iowa Code Chapters 330 and 330A, discussed below.

Thus, the Cities' distinction does not escape the bigger point, which is, assuming municipalities can delegate the authority at issue (which is a separate contested issue addressed below), they nonetheless must retain the right to revoke that delegation by the

same means they were delegated. This fact alone distinguishes all of the cases cited by Cities where individuals or companies were challenging an intergovernmental agreement, as opposed to a member of the agreement.[1]

The "people have a right to retain control of political policy decisions by replacing a legislature which has acted against their interest with a new legislature which can repeal unpopular laws." 1977 Iowa Op. Att'y Gen. 106 (1977). The people of Mahaska County have spoken and elected the Current Board, replacing the Ousted Board, in order to repeal the unpopular 28E Agreement. The provisions of the 28E agreement foreclosing this right are illegal and unenforceable. "Liberty requires accountability." *Clarke Cnty. Reservoir Comm'n v. Abbot*, 862 N.W. 2d 166, 176 (Iowa 2015) (*quoting DOT v. Ass'n of Am. R.R.,* 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring)).[2] Here, the Cities purport to exercise the controlling votes over the County's powers under the 28E agreement, yet are not accountable to the County's voters, thus violating this separation of powers.

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[1] *Pub. Hosp. Dist. No. 1 of King Cnty. v. Univ. of Wash.*, 327 P.3d 1281 (Wash. App. Ct. 2014) is also distinguishable because the agreement did not permit exercise of the governmental entity's legislative and police powers without its consent.

[2] For example, one of the reasons the Iowa Supreme Court held that a 28E agreement was invalid where it included a private entity was that "[p]rivate entities are not accountable to voters." *Id.*

The County entered into the 28E agreement by a majority vote resolution, and must be able to withdraw in the same manner. The 28E Agreement violates this requirement by conditioning the County's right to end its delegation on the consent of both Cities, and is therefore illegal.

### B. The County's Legislative Powers Cannot be Delegated to SCRAA or the Cities Through Iowa Code Chapter 28E.

The Cities incorrectly view Iowa Code Chapter 28E as a blank check for the delegation (or, as they call it, "joint exercise") of whatever powers they share with a contracting governmental unit. This Court has already ruled that "[28E] *must* be interpreted with reference to the power or powers which the contracting governmental units already have." *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970) (emphasis added). Thus, the Cities' argument ultimately misses the mark because it fails to meaningfully analyze the statutory sources of the powers to be exercised, and their accompanying limitations. *Id.* at 454 ("if chapter 28E is examined without reference to the powers granted the various governmental units by other legislation, the factors constituting sufficient guidelines might well be said to be

insufficient.”).[3] Here, the operative statutory sources of power for purposes of the 28E agreement include Iowa Code Chapter 6A (eminent domain), and Iowa Code Chapters 330 and 330A (airports and aviation authorities), which are addressed in turn below.

### 1. The 28E agreement exceeds the eminent domain authority delegated under Iowa Code Chapter 6A.

The Cities argue that they can, through the 28E agreement, compel the County to “jointly exercise” its eminent domain authority to condemn land outside their boundaries for the proposed airport. First, as noted above, this would not be a “joint” exercise of the County’s eminent domain authority since what the Cities really seek is to compel the County to use this power against its will. *See Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015) ("[o]nly the legislature has the authority to delegate the power of eminent domain, and the members of the [28E entity] cannot grant or delegate their own powers of eminent domain to the [28E entity] but, rather, may only exercise their individual powers jointly.") (citing *Barnes*, 341, N.W.2d at 768).

[3] This authority also directly contradicts the Cities’ preemption argument and analysis.

Even if the County could delegate its eminent domain powers (such that the power need not be exercised "jointly"), such delegation would necessarily be circumscribed by Iowa Code Chapter 6A, which is the source of municipalities' eminent domain authority.

> The sovereign power to take private property from citizens without their consent is limited by our State and Federal Constitutions and legislative enactments. Property owners are entitled to strict compliance with legal requirements when a government entity wields the power of eminent domain. These legal requirements help protect against abuse of the eminent domain power. We strictly construe statutes delegating the power of eminent domain and note the absence of a clear legislative authorization for a joint public-private entity to condemn private property.

*Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 168 (Iowa 2015)

Under Chapter 6A, the legislature conferred "the right to take private property for public use" to counties and cities, but only "for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon [them]." Iowa Code §6A.4(1) and (6). To this end, Iowa Code §6A.22 provides "limitations on exercise of [eminent domain] power," stating at subsection 2(c)(2):

The use of eminent domain authority to acquire private property in the unincorporated area of a county for use as an airport, airport system, or aviation facilities is prohibited, notwithstanding any provision of the law to the contrary, if the property to be condemned is located outside the geographic boundaries of the city or county operating the airport, airport system, or aviation facilities or outside the geographic boundaries of the member municipalities of the commission or authority. However, an acquiring agency may proceed with condemnation of property under these circumstances if the board of supervisors of the county where the property for which condemnation is sought is located holds a public hearing on the matter and subsequent to the hearing approves, by resolution, the condemnation action. This subparagraph does not apply if any of the following conditions is met:

(a) The property to be condemned is for an improvement to an existing airport, airport system, or aviation facilities if such improvement is required by federal law, regulation, or order or if such improvement is included in an airport layout plan approved by the federal aviation administration for the existing site of the airport, airport system, or aviation facilities.

(b) The property to be condemned has been zoned by a city or county for use as an airport, airport system, or aviation facilities.

(c) The property to be condemned is for a proposed airport, airport system, or aviation facilities that as of July 1, 2006, were designated in the federal aviation

> administration national plan for integrated airport services, and the property to be condemned is located within the county where at least one of the cities that will participate in operation of the proposed airport, airport system, or aviation facilities is located.

In short, this section "prohibits" eminent domain for an "airport" in the "unincorporated area of a county"[4] without the county's cooperation if the airport is either (a) outside the area of the "city or county operating" the airport or (b) "outside the geographic boundaries of the member municipalities of the commission or authority." The 28E agreement violates this prohibition in both respects.

**First, the airport is outside the boundaries of the city or county operating it.** Under the 28E Agreement, SCRAA, not the County, operates the proposed regional airport and purports to make condemnation decisions. (28E Art. IV § 1, Art. X § 1). SCRAA is not a city or county and admits it is separate from them. (28E Art. II § 2). Iowa Code §6A.4(1), (6) and (22) does not authorize the County to delegate its eminent domain authority to an entity like SCRAA, and thus any such delegation would be void. *Clarke Cnty.*, 862 N.W.2d at

[4] It is undisputed that Site A is in the unincorporated area of Mahaska County and that the Cities, through SCRAA, claim eminent domain authority for the proposed airport.

176 (prohibiting delegation of eminent domain powers absent clear statutory authority).

Alternatively, it would be the Cities, or one of them, that is effectively "operating" the airport. Pella alone is designated the Coordinating Agency under the 28E agreement and granted the sole power to, among other things, (a) "employ all employees needed for the operation of the Airport Facility," (b) "manage all personnel and contract employees of the Airport Facility,"(c) "keep and maintain all books and financial records of the Airport Facility and shall pay all bills of the Airport Facility," and (d) "establish and maintain appropriate funds and accounts" for the airport. (28E Agreement Art. IV § 2). Thus, if Pella is deemed to operate the airport, Site A is outside its boundaries, prohibiting Pella from condemning land within Site A for this purpose, absent County cooperation.

Otherwise, it is the Cities together that would in-fact be the airport "operators" because, by the terms of the 28E agreement, they are entirely responsible for funding the airport's operating budget and control five of the board's six votes. (Art.VIII §4). What cannot be seriously claimed is that the County, with its lone board vote and lack

of administrative power or responsibility over the airport, is an "operator."

As the airport operators, SCRAA and the Cities (either directly, or through the cat's paw of SCRAA) are both prohibited from exercising eminent domain over unincorporated county land for an airport outside their boundaries, without the County's willing cooperation. Iowa Code §6A.22.2.c.(2). The fact that the Cities admit the 28E agreement purports to circumvent this requirement of the County's willing cooperation is fatal to the alleged legality of the agreement.

**Second, SCRAA is not an "airport" "commission" or "aviation facilities" "authority."** Iowa Code §6A.22.(2)(c)(2) alternatively prohibits the condemnation of land outside the member boundaries of an "airport" "commission" or "aviation facilities" "authority" without county cooperation. Not coincidentally, this terminology directly mirrors Iowa Code Chapters 330 and 330A, which likewise employ the terms "airport" "commission" and "aviation facilities" "authority," respectively.

This construction contemplates that cities or counties may only condemn land for a joint airport beyond their respective boundaries

through a "commission" or "authority" properly formed under Iowa Code Chapters 330 or 330A.[5] Noticeably absent from section 6A.22 is what the Cities are arguing, *i.e.*, that they have a previously unrecognized condemnation power through Chapter 28E to compel the County to condemn land for a joint airport outside the Cities' boundaries, without respect to the powers and restrictions imposed by Chapters 330 or 330A.

Indeed, Iowa Code sections 6A.4(1) and 6A.4(6) limit the delegation of eminent domain authority to "public purposes which are reasonable and necessary *as an incident to the powers and duties conferred upon [them].*" (Emphasis added). The powers and duties of cities and counties to jointly create airports are conferred upon them pursuant to Iowa Code Chapters 330 and 330A. Contrary to the Cities' argument, Iowa Code Chapter 28E is not an independent source of eminent domain authority for cities to create airports or compel the condemnation of land outside their boundaries for that purpose. Thus, section 6A.22 prohibits condemnation for the regional airport, unless the Board of Supervisors independently approves it by resolution after a public hearing. Iowa Code

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[5] As discussed below, Chapters 330 and 330A—not Chapter 28E—are the source of the City's and County's authority to create joint airports.

§6A.22(2)(c)(2). Chapter 28E cannot circumvent that independent approval requirement and the Supervisor's approval authority cannot be delegated through a 28E agreement. *Barnes v. Dept. of Housing & Urban Develop.*, 341 N.W.2d 766, 768 (Iowa 1983).[6]

Because the 28E Agreement purports to appropriate the County's eminent domain authority in a way that expressly contradicts Chapters 6A, 330, and 330A, it is illegal and void.

**2. The 28E agreement exceeds the delegated joint airport authority under Iowa Code Chapters 330 and 330A.**

The Cities argue that, because they have authority to create an airport within their boundaries, they may enter into a 28E agreement to create a joint airport outside their boundaries under whatever terms they agree to, irrespective of the chapters that are the source of this authority. But the enactment of Chapters 330 or 330A necessarily preempts the Cities' suggestion that they can, through their ordinances adopting the 28E agreement, rewrite these laws. *See Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 502 (Iowa 1998) (stating

[6] The other exceptions in section 6A.22(2)(c)(2)(a)–(c) do not apply because this does not relate to an existing airport, Site A has not been zoned for airport use, and the proposed regional airport was not designated in a FAA national plan for integrated airport services as of July 1, 2006.

where "ordinances revise the state regulatory scheme and, by doing so, become irreconcilable with state law," they fail).

Further, and relatedly, the Cities' position contradicts this Court's pronouncement that 28E "must be interpreted with reference to the power or powers which the contracting governmental units already have. The pre-existing powers contain their own guidelines." *Goreham*, 179 N.W.2d at 155. For example, this Court applied this analysis in *Barnes v. Department of Housing and Urban Development*, 341 N.W.2d 766 (Iowa 1983) to determine whether a regional housing authority formed under Chapter 28E, instead of the substantive housing law found under Iowa Code Chapter 403A, was nonetheless bound to follow the requirements of the substantive Code chapter. This Court answered yes, stating,

> While chapter 28E is broad enough to encompass joint exercise of powers with regard to housing, it does not purport to be a housing law. The substantive housing law is found in chapter 403A.
>
> ***
>
> Chapter 28E, under which NIHRA [(the entity at issue)] was formed, does not confer any additional powers on the cooperating agencies; it merely provides for their joint exercise.

*Id.* at 767.

The same analysis applies here: while Chapter 28E is broad enough to encompass joint exercise of powers with regard to airports, it does not purport to be an airport law. The substantive airport law is found in Chapters 330 and 330A. In enacting Iowa Code Chapters 330 and 330A, the Legislature granted municipalities the authority to create regional airports with other agencies. Chapter 28E, under which SCRAA was formed, does not confer any additional powers on the cooperating agencies; it merely provides for their joint exercise.[7]

The Cities agree their 28E Agreement does not comply with either Chapter 330 or 330A. Indeed, it is the absence of the safeguards provided in those Chapters—namely, withdrawal from the joint airport venture through the same means by which it was entered—that has led to the stalemate we have here. The Cities's fallback position—that Iowa Code Chapter 28E gives them a legislative blank check to contract around these statutes' restrictions—was addressed above and is of no avail to them.

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[7] Here again, it must be remembered that this is not a case of "cooperating agencies" or the "joint" exercise of powers—the Cities seek to usurp the County's legislative powers under the guise of a 28E "agreement" that they refuse to release the County from.

### 3. The Cities' argument would illegally usurp the County's other legislative powers.

In addition to eminent domain and airports, road and zoning decisions within the County's boundaries must also be made by the Supervisors. Iowa Code §§ 306.4(2), 306.16, 335.3, 335.6. These are all legislative decisions under the County's exclusive purview. *Residential & Agric. Advisor Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 40 (Iowa 2016) (zoning determinations are legislative); *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005) (eminent domain is legislative function); *Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 43 (Iowa 1991) (street decisions are legislative); *Ermels v. City of Webster City*, 71 N.W.2d 911, 913 (1955) (condemning for airports is legislative decision); *Rehmann v. City of Des Moines*, 215 N.W. 957, 959 (Iowa 1927) (permitting decisions are legislative). As shown above, Chapter 28E is a vehicle for the *joint* exercise of powers, not the irrevocable delegation of members' legislative functions to other members. The Cities' argument violates this maxim and thus must be rejected.

## III. THE 28E AGREEMENT IS VOID BECAUSE ITS TERM IS INDEFINITE.

The Cities contend that the 28E Agreement complies with the statutory requirement of stating its duration by referencing the life of the airport facility. Iowa Code § 28E.5(1). This is a mere tautology, effectively claiming the airport and SCRAA "last as long as they last." Such a definition is inconsistent with the plain meaning of the term duration. *See Merriam Webster's Dictionary* (defining "duration" as "the time during which something exists or lasts"). The Cities attempt to capitalize on this self-serving definition to prevent the County from ever terminating the agreement without the consent of both Cities. This is presumably the very situation the Legislature intended to avoid by requiring that each 28E agreement "specify" its "duration." Therefore, the 28E Agreement violates Iowa Code § 28E.5(1) and is void.

## IV. THE 28E AGREEMENT VIOLATES THE LANDOWNERS' RIGHT TO EQUAL PROTECTION.

The Cities seek to usurp the County's eminent domain authority (and other legislative powers), and use it to take the Landowners' property and livelihood, despite the fact their elected representatives vehemently oppose the Cities' attempt to do so and have actively withdrawn from the 28 agreement which purported to grant that

authority. To support their position, the Cities incorrectly claim that "[i]t is well-established that the 'one person, one vote' standard does not apply to government-related boards filled through appointment." Cities' Proof Br. 65.

"The personal right to vote is a value in itself, and a citizen is . . . shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). Contrary to the Cities' argument, appointed boards are *not* immune from Equal Protection considerations. *Id.* For example, in *Heite v. Camden-Wyoming Sewer & Water Auth.*, No. CIV. A. 12089, 1992 WL 29816, at *1 (Del. Ch. Feb. 14, 1992), the court upheld a challenge to the validity of the distribution of voting power on the board of directors of a sewer and water authority that was jointly formed by two towns to provide municipal water and sewerage services to their respective residents. There, the court analyzed whether the authority was a governmental entity (it was), and whether its members were "in effect elected" (they were, because "[w]hen residents … elect[ed] their respective town council members, the elections decide[d] each municipality's representatives on the Authority's board"). *Id.* at *6.

Such is the case here with SCRAA: it is a governmental entity (albeit, one that is subject to an illegal 28E agreement), and the residents' elected officials appoint their respective SCRAA representatives as a result of the agency members' general elections. Thus, the Equal Protection analysis applies here, and the 28E agreement clearly and illegally violates this protection by granting the Cities disproportionate representation to the Landowners' detriment.

The Cities claim they are entitled to more representation—and by extension, more control over the County's legislative functions—because they are contributing more financially to the airport. This is, in essence, a "one dollar, one vote" argument. The Cities cite no authority for this particular proposition. A citizen's right to vote and be represented should not be infringed because another city has agreed to provide more money for a project, particularly as in this case, where the project will involve the involuntary taking of the voter's property and the involuntary exercise of their representative government's legislative functions. The 28E agreement is illegal because it violates the Equal Protection Clause.

## **CONCLUSION**

The District Court's decision must be reversed and the Agreement deemed void and unenforceable.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2021, I electronically filed the foregoing Appellants' Proof 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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## 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 4534 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 Georgia 14 pt.

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