BEFORE THE IOWA SUPREME COURT

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No. 20-1323

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

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**CITY OF PELLA, IOWA and CITY OF OSKALOOSA, IOWA**,
Plaintiffs-Appellees,
vs.
**MAHASKA COUNTY, IOWA**,
Defendant-Appellant.

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CONSOLIDATED APPEAL FROM THE DISTRICT COURTS
OF MAHASKA AND WASHINGTON COUNTY
HON. SHAWN SHOWERS / HON. CRYSTAL CRONK

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# APPELLANT MAHASKA COUNTY'S PROOF BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

## STATEMENT OF THE ISSUES

I. ERROR PRESERVATION AND STANDARD OF REVIEW

*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393 (Iowa 1988)
*IBP, Inc. v. Burress*, 779 N.W.2d 210 (Iowa 2010)
*Barnes v. Iowa Dept. of Transp., Motor Vehicle Div*.,
385 N.W.2d 260 (Iowa 1986).
*Otterberg v. Farm Bureau Mut. Ins.,* 696 N.W.2d 24 (Iowa 2005)
*Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974)
*Mead v. Lane*, 203 N.W.2d 305 (Iowa 1972)
*Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335 (Iowa 1975).
*Weizberg v. City of Des Moines*, 923 N.W.2d 200 (Iowa 2018)

II. WHETHER UNLAWFUL PUBLIC CONTRACTS MUST BE STRUCK AND WHETHER THEIR ILLEGALITY CAN BE RAISED ANY TIME

*Erickson v. City of Cedar Rapids*, 185 N.W. 46 (Iowa 1921)
*City of Humboldt v. Knight*, 120 N.W.2d 457 (Iowa 1963)
*Kane v. City of Marion*, 104 N.W.2d 626 (1960)
*Denver & S.L. Ry. Co. v. Moffat Tunnel Imp. Dist.*, 35 F.2d 365
(D. Colo. 1929), modified, 45 F.2d 715 (10th Cir. 1930)
*Trees v. Kersey*, 56 P.3d 765 (Idaho 2002)
*California Pac. Bank v. Small Bus. Admin*., 557 F.2d 218 (9th Cir. 1977)
*I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp*.,
600 F. Supp. 92 (S.D. Fla. 1984)
*Murphy v. Rochford*, 371 N.E.2d 260 (Ill. Ct. App. 1977)
*Laos v. Soble*, 503 P.2d 978 (Ariz. Ct. App. 1972).
*McMullen v. Hoffman*, 174 U.S. 639 (1899).
*Lewis Consol. Sch. Dist. of Cass Cty. v. Johnston*,
256 Iowa 236, 127 N.W.2d 118 (1964)
*Sierra Club Iowa Chapter v. Iowa Dept. of Transp*.,
832 N.W.2d 636 (Iowa 2013)
*Reynolds v Dittmer*, 312 N.W.2d 75 (Iowa Ct. App. 1981)
*Cripps v. Life Ins. Co. of N. Am*., 980 F.2d 1261 (9th Cir. 1992)

III. WHETHER THE 2012 28E AGREEMENT VIOLATES CHAPTERS 330 AND 330A

Iowa Code Chapters 330 and 330A
Iowa Code Ann. § 330A
*Town of Mapleton, in Monona Cty. v. Iowa Light, Heat & Power Co*., 216 N.W. 683 (Iowa 1927)
*Barnes v. Dep't of Housing & Urban Dev*., 341 N.W.2d 766 (Iowa 1983)
Iowa Code Chapter 403A
*Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449 (Iowa 1970)
*Lewis Consol. Sch. Dist. of Cass Cty. v. Johnston*, 256 Iowa 236, 127 N.W.2d 118, 122 (1964)
*Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166 (Iowa 2015)
Iowa Code § 4.7
*Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011)
*Goodell v. Humboldt Cty*., 575 N.W.2d 486 (Iowa 1998)
*Main Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020)
*Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23 (2003)
*McMurry v. Bd. of Supervisors of Lee Cty*., 261 N.W.2d 688 (Iowa 1978)
Iowa Const. art. III, § 39A
*City of Des Moines v. Gruen*, 457 N.W.2d 340 (Iowa 1990)
*City of Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983)
*Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995)
*Pearson v. Robinson*, 44 Iowa 413 (1876)
*Miller v. Marshall Cty*., 641 N.W.2d 742 (Iowa 2002)
*Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648 (Iowa 1984)
*City of Iowa City v. Westinghouse Learning Corp*., 264 N.W.2d 771 (Iowa 1978)

IV. WHETHER THE CITIES SEEK TO RE-WRITE DELEGATION OF EMINENT DOMAIN, ROAD RELOCATION AND ZONING POWERS

Iowa Code Chapters 330 and 330A
*Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180 (Iowa 2005)
*Ermels v. City of Webster City*, 71 N.W.2d 911 (1955)
*Residential & Agric. Advisor Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24 (Iowa 2016)
*Rehmann v. City of Des Moines*, 215 N.W. 957 (Iowa 1927)

*Wabash R. Co. v. City of Defiance*, 167 U.S. 88 (1897
*Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41 (Iowa 1991)
*Snouffer v. Cedar Rapids & M. City R. Co*., 92 N.W. 79 (Iowa 1902)
*Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972)
*Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*,
654 N.W.2d 910 (Iowa 2002)
*Schroyer v. Jasper Cty*., 279 N.W. 118 (Iowa 1938)
*Schnieders v. Inc. Town of Pocahontas*, 234 N.W. 207 (Iowa 1931)
*Arkansas-Missouri Power Co. v. City of Kennett, Mo*.,
78 F.2d 911 (8th Cir. 1935)
*Missouri Pub. Serv. Co v. City of Trenton, Mo*, 80 F.2d 520 (8th Cir. 1935)
*Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*,
564 F. Supp. 1425 (W.D. Va. 1983)
*Kennedy v. Civil Serv. Com'n of City of Council Bluffs*,
654 N.W.2d 511 (Iowa 2002)
Iowa Code § 6B
*Vermont Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co*.,
558 A.2d 215 (Vt. 1988)
*Herman v. Bd. of Park Comm'rs of City of Boone*, 206 N.W. 35 (Iowa 1925)
*Madrid Lumber Co. v. Boone Cty.*, 121 N.W.2d 523 (Iowa 1963)
*City of McGregor v. Janett*, 546 N.W.2d 616 (Iowa 1996)
*Bricker v. Iowa Cty., Bd. of Supers.*, 240 N.W.2d 686 (Iowa 1976)
*Aplin v. Clinton County*, 129 N.W.2d 726 (Iowa 1964)
Iowa Code Chapter 6B
*Bank of the W. v. Kline*, 782 N.W.2d 453 (Iowa 2010)
*Miller v. Marshall Cty*., 641 N.W.2d 742 (Iowa 2002)
*Bailey v. State of Alabama*, 219 U.S. 219, 239 (1911)
*Graham v. Worthington*, 146 N.W.2d 626 (Iowa 1966)
*Duncan v. City of Des Moines*, 268 N.W. 547 (Iowa 1936)
Iowa Const. art. III, §§ 38A, 39A
Iowa Code § 331
*Taylor v. Drainage Dist. No. 56*, 148 N.W. 1040 (Iowa 1914)
*Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166 (Iowa 2015)
*Bourjaily v. Johnson Cty*., 167 N.W.2d 630 (Iowa 1969)
*Doe v. Purdue Univ*., 928 F.3d 652 (7th Cir. 2019)
Iowa Code § 6B
*Smith v. State*, 34 N.E.3d 1211 (Ind. 2015)
*State v. Gentry*, 936 S.W.2d 790 (Mo. 1996)
*Redevelopment Agency v. Norm's Slauson*,
173 Cal. App. 3d 1121 (Cal. Ct. App. 1985).

*Dacy v. Village of Ruidoso*, 845 P.2d 793 (N.M. 1992)
*McMullen v. Hoffman*, 174 U.S. 639 (1899)
*Erickson v. City of Cedar Rapids*, 185 N.W. 46 (Iowa 1921)
Iowa Code § 21.1
*Hutchison v. Shull*, 878 N.W.2d 221 (Iowa 2016)
*Wells v. Dallas Cty. Bd. of Adjustment*, 475 N.W.2d 680 (Iowa Ct. App. 1991)
Iowa Code § 306
*Schroyer v. Jasper Cty.*, 279 N.W. 118 (Iowa 1938)
*Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41 (Iowa 1991)
*Rockingham Square Shopping Ctr. v. Town of Madison*,
262 S.E.2d 705 (N.C. Ct. App. 1980)
*Mumpower v. Housing Authority of City of Bristol*,
11 S.E.2d 732 (Va. S. Ct. App. 1940)
*Alameda Cty. Land Use Assn. v. City of Hayward*, 45 Cal. Rptr. 2d 752 (1995)
106 Iowa Att'y Gen. Op. No. 77-4-1 (April 1, 1977)
*Miller v. Warren Cty.*, 285 N.W.2d 190 (Iowa 1979)
Iowa Code Ann. § 335
Iowa Code Chapter 335
*Bowen v. Story Cty. Bd. of Sup'rs*¸ 209 N.W.2d 569 (Iowa 1973)
*Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996)
*Perkins v. Bd. of Sup'rs of Madison Cty*., 636 N.W.2d 58 (Iowa 2001)
*Oakes Const. Co. v. City of Iowa City*, 304 N.W.2d 797 (Iowa 1981)
*Hanson v. Vernon*¸ 27 Iowa 28 (1869)
*Stewart v. Bd. of Sup'rs of Polk Cty*., 30 Iowa 9 (1870)
*Bonnifield v. Bidwell*, 32 Iowa 149 (1871)
*Louisville & N.R. Co. v. Mottley*, 219 U.S. 467 (1911)
*Insurance Agents, Inc. v. Abel*, 338 N.W.2d 531 (Iowa Ct. App. 1983)
*Freiberg v. Muski*, 651 F.2d 608 (8th Cir. 1981)

## V. WHETHER ONE LEGISLATIVE BODY CAN BIND THE NEXT ON LEGISLATIVE DECISIONS

Iowa Const. art. III, § 1
*Neuzil v. City of Iowa City*, 451 N.W.2d 159 (Iowa 1990)
*Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa*, 176 F. 86 (8th Cir. 1910)
Iowa Code Chapter 28E
*Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41 (Iowa 1991)
*Sycamore, L.L.C. v. City Council of Iowa City*,
No. 18-0714, 2019 WL 3716364 (Iowa Ct. App. Aug. 7, 2019)
*City of Humboldt v. Knight*, 120 N.W.2d 457 (Iowa 1963)

*Jacksonville Elec. Auth. v. Dep't of Revenue*,
486 So. 2d 1350 (Fla. Dist. Ct. App. 1986)
*City of Charleston v. Se. Const. Co*., 64 S.E.2d 676 (W. Va. 1950)
*Graham v. Worthington*, 146 N.W.2d 626 (Iowa 1966)
*Duncan v. City of Des Moines*, 268 N.W. 547 (Iowa 1936)

VI. WHETHER MAHASKA COUNTY COULD FETTER ITS ABILITY TO END A DELEGATION

*Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*,
654 N.W.2d 910, 914 (Iowa 2002)
Iowa Code § 330 and Iowa Code § 330A

VII. WHETHER CHAPTER 28E ONLY ALLOWS JOINT EXERCISE OF POWERS ALL PARTIES ALREADY POSSESS

*Goreham v. Des Moines Metropolitan Area Solid Waste Agency*,
179 N.W.2d 449 (Iowa 1970)
Iowa Code § 28E.3
*Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015)
*Barnes v. Dep't of Housing & Urban Dev.*, 341 N.W.2d 766, 767 (Iowa 1983)

VIII. WHETHER THE DISTRICT COURT ERRED TREATING AN INTERLOCUTORY, PARTIAL SUMMARY JUDGMENT RULING AS AN ADVISORY OPINION WITH PRECLUSIVE EFFECT

*Stew-Mc Dev., Inc. v. Fischer*, 770 N.W.2d 839 (Iowa 2009)
*Baytown Const. Co. v. City of Port Arthur, Tex*.,
792 S.W.2d 554 (Tex. App. 1990)
*Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41 (Iowa 1991)
*Barnes v. Dep't of Housing & Urban Dev.*, 341 N.W.2d 766, 767 (Iowa 1983)
*Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988)
Iowa R. Civ. Pro. 1.904
*Waddell v. University of Iowa Community Medical Services, Inc.*,
No. 17-0716, 2018 WL 4638311 (Iowa Ct. App. Sep. 26, 2018)
*People's Bank v. Driesen*, No. 10-1676, 2011 WL 3925449
(Iowa Ct. App. Sep. 8, 2011)
*City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006)
*In re Pardee*, 872 N.W.2d 384 (Iowa 2015)
*Chamberlain, L.L.C. v. City of Ames*, 757 N.W.2d 644 (Iowa 2008)

*Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393 (Iowa 1988)
*In re Det. of Matlock*, 860 N.W.2d 898 (Iowa 2015)
*Winnebago Indus. Inc. v. Haverly*, 727 N.W.2d 567 (Iowa 2006)
*In re K.R.*, No. 06-1592, 2006 WL 3615040 (Iowa Ct. App. Dec. 13, 2006)
*Snake v. State*, No. 99-1759, 2001 WL 985052 (Iowa Ct. App. Aug. 29, 2001)
*Harrington v. Waterloo Police Dep't*, No. C05-2074,
2006 WL 3825053 (N.D. Iowa Dec. 26, 2006)
*Mid-Continent Refrigerator Co. v. Harris*, 248 N.W.2d 145 (Iowa 1976)
*Wells' Dairy, Inc. v. Travelers Indem. Co. of Ill.*,
336 F. Supp. 2d 906 (N.D. Iowa 2004)
*In re Ellenberger's Estate*, 171 Iowa 225, 153 N.W. 1036 (1915)
*Estate of McFarlin ex rel. Laass v. City of Storm Lake*,
277 F.R.D. 384 (N.D. Iowa 2011)
*Lyons v. Andersen*, 123 F. Supp. 2d 485 (N.D. Iowa 2000)
*In re Marriage of Seyler*, 559 N.W.2d 7 (Iowa 1997)
*Boddie v. Connecticut*, 401 U.S. 371 (1971)

## ROUTING STATEMENT

This case involves constitutional challenges to governmental actions and presents fundamental and urgent issues of public importance appropriately resolved by the Supreme Court. Iowa R. App. Pro. 6.1101(2)(a), (d).

## STATEMENT OF THE CASE

This combined appeal addresses legal issues arising in two separate cases involving the same 2012 Iowa Code Chapter 28E Agreement between Mahaska County ("the County") and the Cities of Pella and Oskaloosa ("the Cities") for acquiring, funding, constructing, and operating a regional airport planned for rural Mahaska County ("28E Agreement"), and creating the South Central Regional Airport Agency ("SCRAA") to fulfill these tasks. (MSJ App. p. 8).

At its core, this appeal asks whether an agreement that delegates the County's legislative authority/discretion over eminent domain, county secondary roads, and zoning to two cities (one outside the county) who otherwise lack these powers, prevents the County from freely withdrawing those powers, and purports to supersede constitutional requirements and statutory schemes is legal and enforceable. The answer must be no. Yet, that is exactly what the 28E Agreement at issue in this case does. The Cities insist

they, through the 28E Agreement and their majority membership on SCRAA, may order how, when, and where the County exercises its legislative authority, regardless of Due Process requirements or electoral mandates. (3d Am. Pet. ¶¶ 18, 62-64). The Cities contend the County breaches the 28E Agreement if it fails to comply with the Cities' orders. (3d Am. Pet. ¶¶ 56, 59).

In 2017, the County sought to reclaim its legislative authority by withdrawing from the 28E Agreement after the Cities refused to amend the Agreement to restore the County's discretion. (3d Am. Pet. ¶¶ 24-26) The Cities voted against withdrawal and thereafter sued the County on August 22, 2017 in Case No. EQEQ006593, alleging breach of contract and seeking declaratory relief under Iowa Rules of Civil Procedure 1.1101 and 1.1102. (Pet. ¶¶ 35, 42, 46-47); (3d Am. Pet. ¶¶ 52, 59, 63-64). The Cities demanded the District Court declare the contract legal, hold the County could not withdraw from the 28E Agreement (or resume delegated powers) without each City approving, find the County breached by attempting withdrawal, and require the County to perform as the Cities determine going forward. *Id*. The County resisted and brought a counterclaim requesting the Court declare the contract illegal and void or, in the alternative, find the Cities breached the contract. (Answer to 3d Am. Pet. pp. 28-36).

The Cities twice sought summary judgment in Case No. EQEQ006593 ("the Cities Case"). On June 13, 2018, the District Court granted partial summary judgment on the Cities' first motion, declaring the 28E Agreement legal and finding the County breached by attempting to withdraw without the Cities' permission. (6/13/18 Ruling). The County asked the court to reconsider, but it declined. (6/29/2018 Ruling). The County appealed, but the Supreme Court found the summary judgment ruling interlocutory because the County's counterclaims remained. (MSJ App. p. 111).

The Cities then sought summary judgment again, requesting specific performance and to dismiss the County's breach of contract counterclaim. Although the court granted some specific performance the Cities sought, it held fact issues precluded summary judgment on the County's breach of contract counterclaim. (2/14/2019 Ruling). The court denied the Cities' motion to reconsider. (3/20/2019 Ruling).

On June 29, 2020, after hiring new counsel and taking discovery, the County asked the District Court to reconsider its prior orders and grant summary judgment holding the 28E Agreement void based on legal deficiencies the court did not previously consider. (Def. MSJ Mot.). The court refused to reconsider and denied summary judgment. (9/13/20 Ruling). The parties thereafter dismissed any remaining claims without prejudice to

allow appeal regarding the contract's legality as raised in another lawsuit brought by affected landowners. (Dismissal).

Concurrently, Site A Landowners ("the Landowners"), an unincorporated nonprofit association of landowners within the location selected for the regional airport and whose property rights are injured by the 28E Agreement, filed Case No. CVEQ088856 against the SCRAA, Cities, and County seeking a declaration the 28E Agreement is unlawful. The Landowners sued after the Cities successfully opposed their motion to intervene in the Cities Case and insisted the Landowners file a separate declaratory judgment action. (4/9/18 Ruling); (Landowners MSJ App. p. 171). The County crossclaimed in Case No. CVEQ088856 ("the Landowners Case") against the SCRAA and Cities, asking the court declare the 28E Agreement illegal, ultra vires, and void (Mahaska Ans. and Crossclaim).

All parties in the Landowners Case sought summary judgment. On September 18, 2020, the District Court granted the SCRAA's and Cities' summary judgment motions and denied the County's and Landowners' motions. The court held the June 13, 2018 partial, interlocutory summary judgment ruling in the Cities Case—despite not examining all legal issues *or* being final—precluded the County's claims. (9/18/2020 Ruling). The court separately held the Landowners lacked standing, finding the regional airport's

location insufficiently definite, despite SCRAA purchasing property in Site A for the airport under threat of eminent domain and affirmatively alleging Site A's selection was final. *Id.*; *see* (Cities' Combined MSJ Br. p. 6) (alleging Site A was selected and construction scheduled to begin before Cities Case litigation); (Exh. 1 to Plf's Reply in Supp. of Summ. J.) (SCRAA deeds stating eminent domain was used to acquire Site A land). The Landowners asked the court to reconsider and enlarge its ruling, which it did to deny the Landowners' Equal Protection argument, but it declined to reconsider standing. (11/3/2020 Ruling).

This consolidated appeal from this series of rulings followed.

## STATEMENT OF THE FACTS

In 2012, the County's and Cities' then representatives consummated an Iowa Code Chapter 28E agreement through which the Cities sought to replace their individual municipal airports with a regional airport in rural Mahaska County ("the 28E Agreement"). (MSJ App. p. 11–12). The 28E Agreement lasts the life of the airport. (MSJ App. p. 16).

The 28E Agreement created a separate 28E entity called the South Central Regional Airport Agency ("SCRAA") to spearhead and manage the airport efforts. (MSJ App. p. 8). SCRAA has six voting members—one from

the County, two from Oskaloosa, and three from Pella. Art. III, § 2(b) (MSJ App. p. 8); (3d Am. Pet. ¶ 18).

Because the Cities' representatives control five of the six SCRAA seats, they can outvote the County's representative on all SCRAA decisions. Art. III, § 2(b) (MSJ App. p. 8). Pella alone, despite its representatives living outside Mahaska County, has three of the four votes necessary to make any SCRAA decision affecting Mahaska County residents and property. Art. III, § 3(a) (MSJ App. p. 9).

The Cities themselves lacked statutory authority necessary to complete the proposed regional airport. Therefore, the Cities insisted they needed Mahaska County in the 28E agreement at issue, "because of its regulatory and legislative authority over the project including, without limitation, its authority to regulate zoning, road relocations, and issuing building permits necessary for construction" of the proposed airport. (3d Am. Pet. ¶¶ 21, 56; Plf. Mot. for Summ. J. Br. p. 12; Tr. at 16 (MSJ App. p. 61)) ("we will need a zoning ordinance from Mahaska County for height restrictions.").

Likewise, the Cities lacked authority to condemn property for the regional airport in rural Mahaska County ("Site A"). The Cities confirm SCRAA's ability to exercise the County's "power of eminent domain is

crucial to the Agreement to acquire the land necessary to build the new regional airport...." (Plf. Mot. for Summ. J. Br. p. 12).

Because the Cities needed the County's legislative authority to construct the regional airport, the 28E Agreement purports to re-delegate the County's powers to SCRAA for the Cities to command through their majority position. Art. X, § 1, art. XII, § 1 (MSJ App. pp. 14, 15); (3d Am. Pet. at ¶ 7). Indeed, the Cities insist "the exercise of eminent domain and legislative and regulatory authority necessary for the acquisition of land and construction of the facility" was the County's sole consideration provided in the Agreement. (3d Am. Pet. at ¶ 56).

The Cities insist they can, through their SCRAA votes, order the County to exercise its legislative authority however the Cities deem necessary for the regional airport. *See, e.g,* (Schrock Dep. at 82, 142–45). The Cities further claim the County's failure to comply is a breach, entitling the Cities to specific performance. Art. XIV, § 2 (MSJ App. p. 16); (Schrock Dep. at 95–97, 13–36).

The Cities insist the County must eliminate or move any county secondary road interfering with their airport. Apr. 3, 2017 Bd. of Sup'rs Meeting Trans. at 8, 13, 16 (MSJ App. pp. 59, 60, 61). The Cities concede "Oskaloosa (and Pella), without the 28E, do not have the legal ability to

relocate" county secondary roads because such roads are "outside of their jurisdiction." (MSJ App. p. 81; Schrock Dep. p. 93). The Cities contend, if the County declines to close "any ... road ... necessary to allow construction of the Regional Airport, Mahaska County would be in breach of the 28E Agreement." (MSJ App. p. 81).

Similarly, the 28E Agreement's Article X, Section 1 purports to delegate the County's statutorily-granted eminent domain decision-making:

> [T]he SCRAA also may acquire real property or an interest therein for a public use or purpose related to its function by use of the power of eminent domain, and is authorized to bring an action in eminent domain in its own name or may request a Party to bring such action, ***which the Party shall then do*** so long as the SCRAA shall fully reimburse the Party for all costs of acquisition....

Art. X, § 1 (MSJ App. p. 14) (emphasis added). The Cities contend the County delegated its discretion to decide where, when, and if to condemn property in rural Mahaska County to SCRAA under the Cities' control. Schrock Dep. at 144–45). The Cities also insist the Agreement empowers SCRAA to condemn on its own in rural Mahaska County using Mahaska County's statutorily-delegated eminent domain power. (Cities' Combined MSJ Br. p. 24; Schrock Dep. p. 84) ("the understanding I have is that Mahaska County is essentially

providing that authority to the parties through the 28E agreement as it's written, and it could be pursued by SCRAA").[1]

Despite the 28E Agreement delegating vast County legislative discretion and authority, the Cities contend the County cannot freely withdraw or revoke its delegation. Art. XI, § 2 (MSJ App. p. 15); (3d Am. Pet. ¶ 23). The 28E Agreement intended to remove decisions regarding a regional airport from the public's hands by "adopt[ing] a binding agreement that would outlast any elections." (3d Am. Pet. ¶¶ 11–12); (Schrock Dep. p. 20) ("it generated out of discussions about how to create a binding and long-lasting agreement that could withstand political changes within the communities"); (Schrock Dep. pp. 21, 147).

By its terms, the 28E Agreement purports to last the lifetime of the proposed regional airport and bind all future Boards of Supervisors, well beyond the Board that voted for it in 2012. Art. XIII, § 2 (MSJ App. p. 16). The Cities contend the 28E Agreement prevents the County from withdrawing or amending any portion of its delegation without each City's consent. Art.

[1] SCRAA already purported to exercise, or threatened to exercise, the County's eminent domain authority to acquire property in unincorporated Site A for the airport. (Exh. 1 to Plf's Reply in Supp. of Summ. J.). Despite asserting in deeds that property was acquired through eminent domain, no statutorily-required public notice or hearing occurred.

XI, § 2 (MSJ App. p. 15); (3d Am. Pet. ¶ 23). One reason the Cities wanted an agreement to bind future Boards of Supervisors and survive any election is obvious: A prior public vote in Oskaloosa overwhelmingly rejected the idea of a regional airport authority. (MSJ App. p. 161). No public vote *ever* supported a regional airport authority or commission. (MSJ App. p. 155).

After voters (again) rejected the regional airport—this time electing Supervisors opposed to how the airport was pursued—the new Mahaska County Supervisors sought withdrawal from the 28E Agreement. (Exh. L to Plfs' Stmt. Of Facts). But Pella and Oskaloosa, claiming the Supervisors ceded decision-making authority to the Cities, voted against the County's attempted withdrawal. (3d Am. Pet. ¶¶ 24–25, 28–29). The Cities further claim the County breaches the 28E Agreement if it exercises its right to vote in any way contrary to the Agreement. *See, e.g.,* (Schrock Dep. pp. 94-95, 135-36).

After the County tried to withdraw, the Cities sued the County, demanding the court validate the 28E Agreement, declare the County breached it, and order specific performance. (3d Am. Pet. ¶¶ 52, 59, 63-64). The County—and the Landowners in their later lawsuit—asked the Court to declare the 28E Agreement unlawful and void for numerous reasons addressed below. (Answer to 3d Am. Pet. pp. 28-34); (Site A Answer pp. 15-

21). Declining to consider legal issues the County and Landowners raised, the District Court declared the 28E Agreement lawful in all instances and found the County breached by attempting to reclaim its legislative authority. (6/13/2018 Ruling); (9/13/2020 Ruling); (9/18/2020 Ruling).

Thus, the Cities claim continuing control over the County's legislative authority, including eminent domain, road location, permitting and zoning powers. (Schrock Dep. p. 82).[2] Because overwhelming Iowa law establishes the 28E Agreement is ultra vires, contrary to Iowa's Code and Constitution, and improperly fetters the Supervisors' legislative discretion, it is illegal and void.

## ARGUMENT

This suit asks whether the 2012 Mahaska County Board of Supervisors could take legislatively-delegated power, such as condemnation and road location, and re-delegate its discretion/control to an unelected board controlled by Pella and Oskaloosa and, by the Cities' own admission, intentionally put those legislative decisions beyond the electorate's reach. The District Court erred by not declaring the 28E Agreement void. Mahaska County asks this Court to rectify this error for Mahaska County citizens.

[2] For brevity, the County may refer to the Cities and SCRAA collectively as "the Cities" because they were allied in the Landowners Case.

I. Error Preservation and Standard of Review

All parties agree only legal issues are presented, which were fully briefed across multiple summary judgment motions and motions to reconsider in the two cases consolidated herein. *See, e.g.,* (County MSJ Res. Br. (Cities Case)); (County Mtn. to Reconsider & MSJ Br. (Cities Case)); (County MSJ Reply Br. (Cities Case)); (County MSJ Br. (Landowners Case)); (County MSJ Reply Br. (Landowners Case)); (6/13/2018 Ruling (Cities Case)); (6/29/2018 Ruling (Cities Case)); (9/13/20 Ruling (Cities Case)); (9/18/20 Ruling (Landowners Case)). In its June 13, 2018 ruling in the Cities Case, the District Court upheld the 28E Agreement but did not consider multiple legal issues the County addresses in Parts III–VII herein, including that the Agreement violates statutory requirements for regional airport agreements, Due Process, and constitutional limitations on Chapter 28E and the County's legislative discretion. (6/13/2018 Ruling p. 7) (ruling the court was unaware of any reason to declare the 28E contract invalid). Indeed, in the Landowners Case, the court noted, "the June 13th ruling [in the Cities Case] did not directly address each and every argument that Mahaska makes here." (9/18/2020 Ruling p. 7).

To address this, in the Cities Case, the County filed a combined motion to reconsider the prior summary judgment rulings and for summary judgment

to have the 28E Agreement declared void, expressly raising the issues argued herein. (County Mtn. to Reconsider & MSJ Br. (Cities Case)). The County also expressly raised these legal issues in its summary judgment filings in the separate Landowners Case. (County MSJ Br. (Landowners Case)). The District Court denied the County's motions in both cases and declined the County's request to fully examine and rule on issues presented. Instead, the District Court in both cases relied on, and declined to reconsider, the June 13, 2018 interlocutory ruling where these issues were not considered. (9/13/20 Ruling (Cities Case)); (9/18/20 Ruling (Landowners Case)).

Though the District Court declined to fully examine the legal issues presented herein, all issues were briefed and argued below, the District Court considered and ruled on those motions, and the District Court declined to reconsider its prior ruling. *Lamasters v. State*, 821 N.W.2d 856, 863 (Iowa 2012) (error is preserved if the court is at least aware of the arguments and any "motion raising the court's failure to decide a purely legal issue . . . would preserve error"); *see also Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988) (District Court can always reconsider and correct its partial summary judgment ruling). Thus, error was preserved. This dispute, having occupied Mahaska County for years, cries out for final judicial resolution. *IBP, Inc. v. Burress*, 779 N.W.2d 210, 218 (Iowa 2010) (holding

appellate court may, "in the interest of sound judicial administration," decide legal issues fully briefed and argued, even if the district court did not reach them); *Barnes v. Iowa Dept. of Transp., Motor Vehicle Div.*, 385 N.W.2d 260, 263 (Iowa 1986).

A party seeking summary judgment always bears the burden to establish its propriety. Even absent a resistance, "a party faced with a motion for summary judgment can rely upon the district court to correctly apply the law and deny summary judgment when the moving party fails to establish it is entitled to judgment as a matter of law...." *Otterberg v. Farm Bureau Mut. Ins.*, 696 N.W.2d 24, 27 (Iowa 2005). "[I]f the movant for a summary judgment fails to sustain the burden placed upon him of establishing by evidentiary matter the absence of a genuine issue, the granting of a motion for summary judgment is not appropriate irrespective of any deficiency in the opposing party's" response. *Daboll v. Hoden*, 222 N.W.2d 727, 735 (Iowa 1974); *Mead v. Lane*, 203 N.W.2d 305, 307 (Iowa 1972). Further, declaratory judgment only may be achieved on concrete legal issues. *Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335, 336 (Iowa 1975).

"Generally, we review a district court's ruling on summary judgment for correction of errors at law. When the summary judgment was on a constitutional issue, however, our review is de novo." *Weizberg v. City of*

*Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). As explained more fully below, the illegality and invalidity of the 28E Agreement raise multiple constitutional issues, thus this Court's review is *de novo*.

## II. Unlawful Public Contracts Must Be Struck and Their Illegality Can Be Raised Any Time

A governmental entity cannot lawfully contract in a way that violates the law or exceeds its powers. *Erickson v. City of Cedar Rapids*, 185 N.W. 46, 50 (Iowa 1921).[3] This is so fundamental that "[t]he illegality of a municipal contract may be raised at any time...." *Denver & S.L. Ry. Co. v. Moffat Tunnel Imp. Dist.*, 35 F.2d 365, 374 (D. Colo. 1929), *modified*, 45 F.2d 715 (10th Cir. 1930); *Erickson*, 185 N.W. at 50–51 ("courts are always empowered to investigate and determine" whether public contracts are legal and to restrain illegal acts). Contract illegality even may be raised for the first time on appeal. *Trees v. Kersey*, 56 P.3d 765, 768 (Idaho 2002). Indeed, a court has an independent duty to root out illegality in a contract *sua sponte* at any litigation stage. *Id.*[4] This is because a court must never "lend its

[3] S*ee City of Humboldt v. Knight*, 120 N.W.2d 457, 460 (Iowa 1963) (holding trial court erred in not declaring contract void and unenforceable as *ultra vires*); *Kane v. City of Marion*, 104 N.W.2d 626, 631 (1960) (declaring, in taxpayer and citizen suit, contract between municipalities was *ultra vires*).

[4] *E.g.*, *California Pac. Bank v. Small Bus. Admin.*, 557 F.2d 218, 223 (9th Cir. 1977); *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp.

assistance in any way toward carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899).

As explained in Sections III–VII, the 28E Agreement is illegal, unconstitutional, and ultra vires; thus the District Court erred upholding the Agreement and this court must reverse and declare the 28E Agreement void.[5]

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92, 95 (S.D. Fla. 1984); *Murphy v. Rochford*, 371 N.E.2d 260, 265 (Ill. Ct. App. 1977); *Laos v. Soble*, 503 P.2d 978, 978 (Ariz. Ct. App. 1972).

[5] The District Court also erred finding the Landowners lacked standing to challenge an unlawful agreement purportedly giving authority to an unelected board to take their property. "It has been said by eminent authority that declaratory judgment actions are peculiarly appropriate in controversies between the citizen and the state." *Lewis Consol. Sch. Dist. of Cass Cty. v. Johnston*, 256 Iowa 236, 242, 127 N.W.2d 118, 122 (1964). The Landowners own property in Site A, which the Cities and SCRAA selected and insist is the location for the airport and where they purchased property for the airport under claim or threat of eminent domain. (Exh. 1 to Plf's Reply in Supp. of Summ. J.). This necessarily affects Landowners' property rights and values. *See Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 648–49 (Iowa 2013) (holding challenge to proposed highway project was ripe for judicial review where IDOT took steps toward implementing proposal); *Reynolds v Dittmer*, 312 N.W.2d 75, 77–78 (Iowa Ct. App. 1981) (holding landowners who might be affected by zoning change and incoming development had standing to challenge government action); *see also Erickson*, 185 N.W. at 50–51. Nonetheless, even if the Landowners lacked standing, standing exists for Mahaska County's crossclaims in the Landowners Case. *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1266–67 (9th Cir. 1992).

III. The 2012 28E Agreement Violates Chapters 330 and 330A.

The first reason the 28E Agreement must be declared void is because it contradicts and circumvents the specific methods Iowa's Legislature created to establish regional airports.

Iowa's Legislature provided two vehicles for counties and cities to jointly create and operate regional airports: Iowa Code Chapters 330 and 330A. Each has specific requirements, and the 28E Agreement here satisfies neither. Chapter 330A, which creates airport authorities, requires no vote by the electorate to create a regional airport agreement, but, by law, the parties ***must*** be allowed to freely withdraw. Iowa Code § 330A.7(1).[6] Despite Chapter 330A, the Cities contend, and the District Court held, the County cannot freely withdraw from the 28E Agreement. (6/13/2018 Ruling p. 6).

Chapter 330A also requires each participant authorize and adopt the airport authority agreement by ordinance (which 330A distinguishes from a resolution). Iowa Code § 330A.3; Iowa Code § 330A.6. There is no ordinance here. Mahaska Cty. Code of Ordinances (2020),

[6] The only exception to the right to withdraw is if the County owes a debt not yet paid for the airport. Iowa Code Ann. § 330A.7(1) There is no claimed debt in this case. (Schrock Dep. p. 128) ("I am unaware of any debt."); Art. VII, § 6, Art. VIII, § 4 (MSJ App. p. 13) (County has no financial obligations under the 28E Agreement).

https://www.mahaskacounty.org/files/board_of_supervisors/Code%20of%20ordinances.pdf (last visited May 22, 2020). Airport authorities must have an odd number of members. Iowa Code Ann. § 330A.5 (West). The Cities chose an even number. Art. III, Section 2(b) (MSJ App. p. 7).

Chapter 330 provides for an airport commission and allows greater permanence to manage airports by demanding a public vote to dismantle the commission. Iowa Code § 330.17(2). To gain such permanence, however, Chapter 330 also *requires* an affirmative vote by the electorate *to create* the airport commission. *Id.* § 330.17. The only public vote here occurred in Oskaloosa in 2005, which rejected a regional airport by almost 4–1. (MSJ App. pp. 155, 159, 161). Despite no favorable public vote, the Cities claim essentially the same permanence as a Chapter 330 airport commission. *But see Town of Mapleton, in Monona Cty. v. Iowa Light, Heat & Power Co.*, 216 N.W. 683, 686 (Iowa 1927) (holding, where vote is required, entity cannot exist without it). Further, an airport commission must have three or five members; SCRAA has six. Iowa Code § 330.20.

The Cities insist Chapter 28E allows them to re-write procedures for creating regional airports to create new, different rules than those the Legislature provided in Chapters 330 and 330A. This position violates Iowa's Constitution and Chapters 28E, 330, and 330A. Indeed, *Barnes v. Dep't of*

*Housing & Urban Dev.*, 341 N.W.2d 766, 767 (Iowa 1983), expressly rejects the Cities' claim that Chapter 28E allows rewriting underlying statutes. Even if Chapter 28E somehow granted powers our Supreme Court expressly held it cannot, Chapters 330 and 330A preempt the Cities' inconsistent scheme.

A. Chapter 28E Cannot Exist Divorced from Underlying Statutes.

Chapter 28E allows public agencies jointly to accomplish certain tasks each already could do individually. Iowa Code § 28E.3. Chapter 28E is ***not*** a blank check to allow cities, when they dislike legislatively-specified procedures, to create their own scheme to eliminate disliked requirements and restrictions. In 1983, the United States District Court for the Northern District of Iowa referred this very issue to Iowa's Supreme Court, which expressly rejected any notion that Chapter 28E agreements can ignore underlying substantive statutes like Chapters 330 and 330A. *Barnes*, 341 N.W.2d at 767–68.

In *Barnes*, Hampton, Iowa entered into a 28E agreement with the U.S. Department of Housing and Urban Development ("HUD") for a joint housing project. *Id.* at 766–77. HUD argued Chapter 28E allowed the parties to override, or rewrite, underlying Iowa Code Chapter 403A's requirements for joint housing authorities. The Supreme Court disagreed and held 28E is not a substantive statute but merely a vehicle to jointly implement other statutes.

*Id.* at 767–68; *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449, 456 (Iowa 1970) (holding 28E only authorizes the mechanical details of implementing other substantive statutes). Thus, like here, the parties joining for the housing project, even through 28E, necessarily implemented Chapter 403A and the 28E agreement had to comply with those underlying procedures. *Barnes*, 341 N.W.2d at 767–68.

The Legislature cannot constitutionally, through Chapter 28E or otherwise, create an unfettered ability to delegate authority to an agency unguided by underlying legislation. *E.g.*, *Lewis Consol. Sch. Dist. of Cass Cty. v. Johnston*, 256 Iowa 236, 241, 127 N.W.2d 118, 122 (1964). The point as applied to Chapter 28E is simple: No "independent powers aris[e] under Chapter 28E...." *Barnes*, 341 N.W.2d at 768; *Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015) ("[A] 28E agreement confers no new powers on the entities involved, but only allows for the joint exercise of existing powers."). To avoid unconstitutionally delegating unfettered discretion to unelected representatives, a 28E agreement must be tethered to, *and bound by*, an underlying substantive statute. Chapter 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 455 (emphasis added); *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 175.

Thus, for a Chapter 28E agreement to be constitutional, it must implement and comply with underlying statutes. The 28E agreement *cannot* alter or circumvent underlying substantive statutes and procedures—including statutory approval requirements. *Barnes*, 341 N.W.2d at 767–68. Just as the 28E agreement in *Barnes* could not override 403A.5's approval requirements, the 28E Agreement here cannot override Chapters 330 and 330A's requirements without constituting an unconstitutional delegation of unfettered authority.[7]

[7] Even if the Iowa Supreme Court hadn't already resolved this issue against the Cities, a general statute, like Chapter 28E, falls in the face of a more specific statute, like 330 or 330A. Iowa Code § 4.7. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011); *Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 505, 507 (Iowa 1998) (recognizing, where conflict exists between general and specific statute, the specific prevails). Chapter 28E cannot be interpreted to render Chapters 330 and 330A superfluous. *Main Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) ("[R]epeals by implication are not favored, and are a rarity." (quotations omitted)); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003) ("A statutory interpretation that renders another statute superfluous is of course to be avoided."); *McMurry v. Bd. of Supervisors of Lee Cty.*, 261 N.W.2d 688, 691 (Iowa 1978). After all, why would any municipality follow Chapters 330 or 330A if they could simply use 28E to enjoy all the benefits with none of the restrictions?

B. Chapters 330 and 330A Would Have Preemptive Effect Even if Chapter 28E Delegated Unfettered Authority.

Rather than address the actual issue that the 28E Agreement must be tethered to, and comply with, underlying Chapters 330 or 330A to avoid being an unconstitutional delegation of authority, *see id.*, the Cities, instead, incorrectly focused below on the separate doctrine of preemption. Even if the issue *were* preemption, rather than the constitutional limits of 28E, the Cities' attempt to devise a different procedure than the State provides *is* preempted and must fail.

First, even ignoring Chapter 28E's inherent limitations, the Legislature expressly indicated a desire to occupy the field and prescribe how municipalities should jointly exercise powers to create and manage airports. Chapter 330A provides the "complete method for the exercise of the powers granted by this chapter." Iowa Code § 330A.17 (MSJ Supp. App. p. 68). The Legislature required all pre-existing authorities to transition to the new requirements when the law was enacted. *Id.* § 330A.21. When there is conflict between 330A and other statutes, "the provisions of [330A] shall be controlling and shall, to the extent of any such conflict, supersede the provisions of any other law." *Id.* § 330A.17. For "joint exercise of any powers relating to airports," the agreement "shall function in accordance with the provisions" of Chapter 330. Iowa Code § 330.4. "The word 'shall'

imposes a duty." Iowa Code § 30(a). The Legislature specifically limited the County's ability to create airport agencies/agreements, stating the County must exercise its powers "in accordance with" Chapters 330 and 330A. Iowa Code § 331.382(1)(i)–(j).

Further, our Constitution establishes "home rule," which precludes acts "inconsistent with the laws of the general assembly." Iowa Const. art. III, § 39A; *see Goodell*, 575 N.W.2d at 492 (holding Constitution permitted home rule only if not inconsistent with state laws). A "county may not avoid [a state statute] simply by labeling a[n] ... ordinance an exercise of home rule authority and ignoring the procedural requirements of" the underlying act. *Goodell*, 575 N.W.2d at 495. To suggest the Legislature may, through Chapter 28E, allow local acts "inconsistent with the laws of the general assembly," means the State, through 28E, may violate the Constitution. This is not so.

Under home rule, the Cities may not constitutionally ignore Chapters 330 and 330A. Cities and counties have power to determine local affairs *only* where those determinations are "'not inconsistent with the laws of the general assembly.'" *Goodell*, 575 N.W.2d at 492 (quoting Iowa Const. art. III § 39A). "When an ordinance '"prohibits an act permitted by a statute, or permits an act prohibited by a statute,"' the ordinance is considered inconsistent with

state law and preempted." *Id.* at 493 (quoting *City of Des Moines v. Gruen*, 457 N.W.2d 340, 342 (Iowa 1990) (quoting *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983))). "[T]he constitutional grant of home rule power is 'carefully qualified so as to withhold the grant of power where it conflicts with [a] state statute.'" *Id.* at 500 (quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 189 (Iowa 1995)). Constitutional home rule "require[s] that any local law be consistent with state statutes." *Id.* at 501; *Pearson v. Robinson*, 44 Iowa 413, 416 (1876) ("When a statute creates a right, and prescribes the manner of exercising it, an inhibition is implied upon exercising it in another manner...."). Similarly, public contracts cannot be inconsistent with state law. *Miller v. Marshall Cty.*, 641 N.W.2d 742, 750–51 (Iowa 2002); *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 656 (Iowa 1984).

Where "ordinances revise the state regulatory scheme and, by doing so, become irreconcilable with state law," they fail. *Goodell*, 575 N.W.2d at 502. If a municipality's scheme or contract does "not follow the statutory scheme established" by the Legislature, the municipality's scheme is preempted and cannot stand. *Goodell*, 575 N.W.2d at 501; *City of Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978) ("any municipal plan must be faithful to the legislative scheme adopted by the General Assembly").

Iowa's Legislature provided, absent a favorable vote by the electorate, members of a joint airport venture must be allowed to freely withdraw. Iowa Code §§ 330.17, 330A.7(1). The Cities wanted something different, so they "revise[d] the statute regulatory scheme" to provide the opposite. *Goodell*, 575 N.W.2d at 502. *Goodell* makes clear, however, when the Legislature requires parties creating regional airports be allowed to withdraw, municipal action compelling the opposite must fail. Because the 28E Agreement "permits what the state statute ... prohibits," it fails. *Id.* at 506.

Further, a scheme that "*changes* the state regulatory system," alters "the decision maker," eliminates required approval, or eliminates "notice" requirements, "is irreconcilable with state law" and cannot stand. *Id.* at 504.

> A fundamental requirement for the enforcement of a municipal contract is that the municipality must have exercised its authority to enter into the contract within the scope of the powers conferred by statute. If a municipality fails to appropriately exercise its authority or comply with statutory procedures, the contract is void.

*Miller*, 641 N.W.2d at 750–51 (citations omitted). Because the 28E Agreement here does everything *Goodell* holds it cannot, and contradicts Chapters 330 and 330A's requirements, the district court erred upholding the agreement and reversal is required.

## IV. The Cities Seek to Re-Write Delegation of Eminent Domain, Road Relocation and Zoning Powers.

Beyond overriding Chapters 330 and 330A, the 28E Agreement circumvents clear constitutional and statutory limits on the County's powers. The Cities emphasize they seek the County's "power of eminent domain" and its "authority to regulate zoning, road relocations, and issuing building permits necessary for construction" of the airport. (3d Am. Pet. ¶ 21); (Plf. Mot. for Summ. J. Br. p. 12). These are all *legislative* functions the County cannot lawfully re-delegate, restrict, or alienate and must exercise according to Iowa's Constitution and Code. Yet, because the Cities lack the powers needed to construct the airport, they seek to reassign the County's decision-making authority to the unelected SCRAA they control and deprive the public of any meaningful comment or process before their elected representatives. This is illegal.

### A. The County Cannot Restrict or Re-Delegate Legislative Authority.

Eminent domain is a core legislative function. *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005); *Ermels v. City of Webster City*, 71 N.W.2d 911, 913 (1955) (condemning for airports is legislative decision). Likewise, "zoning determinations are a legislative function." *Residential & Agric. Advisor Comm., LLC v. Dyersville City*

*Council*, 888 N.W.2d 24, 40 (Iowa 2016). The same is true of building permitting. *Rehmann v. City of Des Moines*, 215 N.W. 957, 959 (Iowa 1927). Road decisions, too, are legislative functions. *Wabash R. Co. v. City of Defiance*, 167 U.S. 88, 100–01 (1897); *Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 43 (Iowa 1991) ("Its proposed street widening was clearly a legislative function"). Indeed, the Cities expressly state they seek to usurp the Supervisors' "legislative and regulatory authority." (3d Am. Pet. ¶¶ 21, 56).

A County cannot "restrict[]" its legislative powers by contract, either "directly or indirectly." *Snouffer v. Cedar Rapids & M. City R. Co.*, 92 N.W. 79, 86 (Iowa 1902). The Legislature delegated rural eminent domain, secondary road, permitting and zoning authority to the County. "It is a general principle of law, expressed in the maxim 'delegatus non potest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated." *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 560 (Iowa 1972) (citation omitted). "[T]he authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied." *Id.* "[A] government subdivision cannot delegate the right to make decisions it has been empowered to make." *Warren Cty. Bd. of Health v. Warren Cty. Bd. of*

*Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002); *Schroyer v. Jasper Cty.*, 279 N.W. 118, 121 (Iowa 1938) (holding county cannot delegate "in any manner" discretion and authority Legislature granted it); *see Wabash R. Co.*, 167 U.S. at 100.

The point is simple. The Legislature alone decides to whom to delegate its authority, and the County, as agent, may not re-delegate the principle's power to SCRAA. *Schnieders v. Inc. Town of Pocahontas*, 234 N.W. 207, 209 (Iowa 1931). "[A]ny contract whereby legislative authority or duty is attempted to be delegated by a city is absolutely null and void." *Arkansas-Missouri Power Co. v. City of Kennett, Mo.*, 78 F.2d 911, 922 (8th Cir. 1935), *opinion withdrawn as to Trenton on reh'g sub nom. Missouri Pub. Serv. Co v. City of Trenton, Mo*, 80 F.2d 520 (8th Cir. 1935).[8] "We are satisfied that in assigning duties ... the legislature intended that all critical duties be performed by those persons empowered by law to do so...." *Kennedy v. Civil Serv. Com'n of City of Council Bluffs*, 654 N.W.2d 511, 513 (Iowa 2002).

[8] *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983) ("units of local government cannot by contract or otherwise barter away or surrender their essential legislative or police powers, and that contracts which impinge upon these essential governmental powers are void"); *Vermont Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co.*, 558 A.2d 215, 222–23 (Vt. 1988) (holding exercise of legislative prerogatives must remain unfettered).

Pursuant to these doctrines, the County cannot "limit or restrain" or re-delegate, whether contractually or otherwise, decision-making authority it received from the Legislature regarding eminent domain, zoning, permitting, *or* road management. Because the 2012 28E Agreement does so, it is void.

B. The Cities Seek Unlawful Alteration of Eminent Domain Law.

1. The Cities Seek Improper Delegation of Eminent Domain Authority.

Pursuant to the 28E Agreement, the County purportedly allowed SCRAA to either (a) exercise the County's eminent domain power itself, or (b) tell Supervisors when, where, how, and if to exercise the County's condemnation authority. Art. X, Section 1 (MSJ App. p. 14). Indeed, the Supervisors purportedly granted half the votes on whether to exercise their eminent domain power in rural Mahaska County to Pella residents residing in Marion County. Art. III, Section 2(b) (MSJ App. p. 8). Because the Legislature did not grant the Cities power to condemn in rural Mahaska County, the Cities concede, "the Airport could not be built without the use of [the County's] eminent domain." (Plf. Mot. for Summ. J. Br. p. 7).

By statute, "[t]he procedure for the condemnation of private property ... shall be in accordance with the provisions of" Chapter 6B. Iowa Code § 6B.1A (West). "The sovereign power to take private property from citizens without their consent is limited by our State and Federal Constitutions and

legislative enactments." *Clarke Cnty. Reservoir Comm'n*, 862 N.W.2d at 168. "**Only the legislature has the authority to delegate the power of eminent domain**." *Id.* at 176 (emphasis added) (holding eminent domain authority could not be delegated through a 28E agreement to the 28E entity or other parties to the agreement lacking that power). "[T]he power of eminent domain is vested in the state and it can be exercised by a city only as such power is expressly delegated…." *Herman v. Bd. of Park Comm'rs of City of Boone*, 206 N.W. 35, 36 (Iowa 1925).

Under *delegatus non potest delegare*, the County could not impair or alter its eminent domain decision-making at all, let alone cede it to unelected decision-makers from a different county.

2. The Cities Improperly Seek to Eliminate Due Process Protections from Eminent Domain Law.

Not only do the Cities try to override the Legislature's decision regarding who may exercise eminent domain power in rural Iowa, they also seek to circumvent prescribed procedures and negate Due Process requirements. "When the legislature permits the exercise of power in a given case only in accordance with imposed restrictions, a contract entered into in violation thereof is not merely voidable but void." *Madrid Lumber Co. v. Boone Cty.*, 121 N.W.2d 523, 525 (Iowa 1963); *see City of McGregor v.*

*Janett*, 546 N.W.2d 616, 620 (Iowa 1996) (holding governmental subdivision only could exercise power in manner specified).

Iowa condemnation law demands the public be allowed, after notice, to comment to their elected representatives to try to persuade them not to condemn land ***before*** any condemnation decision is made. Iowa Code § 6B.2A(2). Constitutional Due Process requires a "genuine hearing, not a sham." *Bricker v. Iowa Cty., Bd. of Supers.*, 240 N.W.2d 686, 690 (Iowa 1976). Yet, the Cities admit their intent is to override the legislatively compelled notice process, deprive public comment of effect, and allow decisions on crucial matters like taking property to be made by unelected representatives, half of whom are appointed from a different county:

> Pella and Oskaloosa believe Mahaska County must condemn property if requested by the SCRAA even if public comments oppose the condemnation. Schrock Dep. at 135–36, 142–43 (App. 31, 33)
>
> **RESPONSE:** Admitted. For further response, Mahaska County voluntarily agreed to this when it entered the 28E Agreement.

(Plf. Resp. to Stat. Undis. Fact ¶ 41).

> Q. So, yes, you think the word "shall" means it's mandatory that if the South Central Regional Airport Agency requests Mahaska County exercise eminent domain, it must do so; correct?
>
> A. Yes.
>
> **Q. And that's regardless of whether there are public comments opposing it; correct?**

**A. Correct. If they sign the agreement, that's the consequences with signing an agreement like this, potentially.**

(Schrock Dep. p. 142–43) (emphasis added). "The 14th Amendment to the United States Constitution requires due process in the taking." *Aplin v. Clinton County*, 129 N.W.2d 726, 727 (Iowa 1964). The Cities cannot contract around Due Process or Chapter 6B.[9] Nor could the Legislature permit cities to do so—even if it wanted.[10]

Iowa Code Chapter 6B mandates eminent domain "shall be in accordance with the provisions of this chapter." Iowa Code § 6B.1A. Iowa has "long recognized the importance of strict compliance with statutory requirements for the exercise of eminent domain." *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 172; *Bourjaily v. Johnson Cty.*, 167 N.W.2d 630, 633–34 (Iowa 1969). Eminent domain power "is **not** conferred and

[9] *Bank of the W. v. Kline*, 782 N.W.2d 453, 462 (Iowa 2010) ("It is well-established Iowa law that contracts made in contravention of a statute are void, and Iowa courts will not enforce such statutes."); *Miller*, 641 N.W.2d at 750.

[10] *Bailey v. State of Alabama*, 219 U.S. 219, 239, 244 (1911) ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.... What the state may not do directly it may not do indirectly."); *Graham v. Worthington*, 146 N.W.2d 626, 631 (Iowa 1966) (holding law violating Constitution is forbidden); *Duncan v. City of Des Moines*, 268 N.W. 547, 552 (Iowa 1936); *Taylor*, 148 N.W. at 1042 (holding due process for eminent domain "cannot be obviated by mere forms of procedure" or "by the creation of a statutory" scheme).

condemnation proceedings **shall not** begin" until Chapter 6B's notice and public hearing requirements are satisfied. Iowa Code §§ 6B.2A(1), 6B.2D (emphasis added). Chapter 6B's requirements have no home rule exception and the State's requirements cannot be contradicted. Iowa Const. art. III, §§ 38A, 39A; Iowa Code §§ 331.301(7), 364.3(4).

A public hearing is required so both affected property owners and the public are heard by the body designated to decide eminent domain in rural Mahaska County—the Supervisors. Iowa Code §§ 6B.2A(1)(d) (requiring hearing for "public input" on condemnation), 6B.2D ("persons receiving the notice have a right to attend the meeting and to voice objection to the proposed acquisition of the property"). An "essential element of due process of law" for eminent domain "is the opportunity of being heard on the subject before an impartial tribunal." *Taylor v. Drainage Dist. No. 56*, 148 N.W. 1040, 1042 (Iowa 1914). "To satisfy the Due Process Clause, a hearing must be a real one, not a sham or pretense." *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *see Bricker*, 240 N.W.2d at 690. Due Process is denied where the decision already is made based on things other than public comment and evidence presented at the hearing. *Doe*, 928 F.3d at 663.

Here, only sham hearings can occur because the Cities insist the County *must* vote to use eminent domain whenever the city-dominated SCRAA so

orders, even if public comment convinces Supervisors not to. (Plf. Resp. to Stat. Undis. Fact ¶ 41; Schrock Dep. pp. 135-36, 142–43). The Cities will already have made the County's decision through SCRAA, despite not being the acquiring agency the Legislature provided. *But see Barnes*, 341 N.W.2d at 767–68 (holding city could not delegate ability to complete housing project through 28E where substantive statute required city council approval to complete project; power to approve could not be delegated or restricted). The public and affected landowners receive no opportunity to be heard by "an impartial tribunal," or the legislatively-selected decision-maker. *Taylor*, 148 N.W. at 1042; *see Bricker*, 240 N.W.2d at 690; Iowa Code §§ 6B.2A(1)(c)–(d), (2)(c)–(d), 6B.2D. Notice provided to affected landowners and the public is rendered an after-the-fact formality.[11] *Smith v. State*, 34 N.E.3d 1211, 1219 (Ind. 2015) ("Due process is a requirement that cannot be deemed to be

[11] No notice was provided to affected Site A landowners (or the general public) that their property was subject to condemnation. (Schrock Dep. pp. 52, 86–87). The County did not agree to condemn any specific property in the 28E Agreement and the decision where to locate the airport had not been made at that time. (Schrock Dep. p. 52). Yet, the Cities have contended the County somehow ***already*** exercised eminent domain authority simply by entering into the 28E Agreement. This is illegal. Eminent domain authority is not conferred and cannot be used without *first* satisfying notice and hearing requirements. Iowa Code §§ 6B.2A, 6B.2D; *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 168, 176 (holding strict compliance with eminent domain law is required and power cannot be granted through a 28E agreement).

satisfied by mere notice and hearing after the fact…."); *State v. Gentry*, 936 S.W.2d 790, 793 (Mo. 1996) ("For purposes of due process ... notice is sufficient only if it arrives before the fact....").

The 28E Agreement eviscerates the very purpose of notice and hearing, and eliminates Supervisors' required impartial discretion. As other states recognize, decisions cannot be made prior to due process procedures:

> By the time the Agency actually conducted a hearing to determine the 'necessity' for taking the property in question, it had, by virtue of its contract with the developer ... irrevocably committed itself to take the property in question, regardless of any evidence that might be presented at that hearing.... That hearing was thus affected not by just a gross abuse of discretion but by the prior elimination of any discretion whatsoever.

*Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 1127 (Cal. Ct. App. 1985).

> By making a promise ... before a ... hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action. Enforcement of such a promise allows a municipality to circumvent established statutory requirements to the possible detriment of affected landowners and the community as a whole.

*Dacy v. Village of Ruidoso*, 845 P.2d 793, 798 (N.M. 1992).[12]

[12] To the extent the Cities claim SCRAA could condemn and conduct the hearing, the same constitutional failings exist. First, landowners legislatively were provided appeal *to their elected representatives*—not unelected representatives appointed by an out-of-county city for the express purposes of taking their land. SCRAA lacks statutory eminent domain authority and

The Cities dismissed this issue below by calling constitutional notice and impartial hearing requirements a "red herring." Subverting Constitutional Due Process is no minor issue to be ignored, however. "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." *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 168. This illegal contract may not be enforced. *McMullen*, 174 U.S. at 654; *Erickson*, 185 N.W. at 50–51. The court erred enforcing a contract that purports to override legislatively specified condemnation procedures and eliminate Due Process protections.[13]

C. The Cities' Attempt to Re-Delegate and Constrain Future Road and Zoning Decisions Runs Afoul of Iowa Law.

The Cities further seek to control the County's secondary road and zoning authority. The Cities' effort to circumvent notice and hearing

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cannot gain it through the 28E Agreement. *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 176. Further, SCRAA, by the contract's design, cannot be impartial. SCRAA's very purpose is to ensure airport construction. Art. II (MSJ App. p. 8).

[13] For these same reasons, the 28E Agreement also violates Iowa's open meeting law, which requires governmental decisions be easily accessible by the public. Iowa Code § 21.1. Transparency prohibits decision-making from being delegated or made before the public hearing. *Hutchison v. Shull*, 878 N.W.2d 221, 234 (Iowa 2016); *Wells v. Dallas Cty. Bd. of Adjustment*, 475 N.W.2d 680, 683 (Iowa Ct. App. 1991).

requirements for these processes and to place those decisions beyond the power of the electorate in different hands than the Legislature specified also is unlawful.

Like rural eminent domain, "[j]urisdiction and control over the secondary roads shall be vested in the county board of supervisors of the respective counties." Iowa Code § 306.4(2); Iowa Code § 331.362 ("A county has jurisdiction over secondary roads" and "may regulate traffic and use of the secondary roads"); *see also* Iowa Code § 306.4(3)(a) (stating jurisdiction and control over farm-to-market roads in a city with a population of less than five hundred is vested in the county).

> That neither the board of supervisors nor the county engineer, the officials in whom was vested the duty, power, and authority to maintain these roads, could delegate ***any*** of their powers ***in any manner***, except as such delegation of powers might relate to duties merely ministerial in character, is well established.

*Schroyer*, 279 N.W. at 121 (emphasis added). Because Supervisor control over streets cannot be restricted:

> ***any*** contract or agreement, whether in the form of an ordinance or otherwise, which directly or indirectly surrenders or materially restricts the exercise of a governmental or legislative function or power, may at any time be terminated or annulled by the municipality.... The power given to cities and towns to control their streets, direct their improvement, and regulate their use is a legislative power, and comes within the operation of the rule we have stated.

*Snouffer*, 92 N.W. at 86 (emphasis added);

> The doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations and, in general, a municipality is not estopped from denying the validity of a contract made by its officers where there has been no authority for making such a contract. Contracts wholly beyond the powers of a municipality are void, and when a contract is made by a municipal corporation which is not warranted by the statutory authority conferred upon it, the governing body of the corporation has at all times the right to declare the contract void and to refuse compliance therewith....

*Marco Dev. Corp.*, 473 N.W.2d at 42–43 (holding street widening decision was legislative and thus contract even *potentially* limiting street decision discretion was *ultra vires* and void).[14]

The Cities leave no doubt they insist the County must act as the Cities dictate regarding rural secondary roads, contending the County breaches the 28E Agreement if it chooses *not* to close any road the Cities desire for an airport:

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[14] *Rockingham Square Shopping Ctr. v. Town of Madison*, 262 S.E.2d 705, 707 (N.C. Ct. App. 1980), *overruled on other grounds in Eastway Wrecker Serv., Inc. v. City of Charlotte*, 599 S.E.2d 410 (N.C. Ct. App. 2004) (contract where town promised to open road as inducement to build shopping center was ultra vires and unenforceable because it restricted discretionary authority of town's governing body (cited with approval in *Marco Development*, 473 N.W.2d at 43)); *Mumpower v. Housing Authority of City of Bristol*, 11 S.E.2d 732, 743 (Va. S. Ct. App. 1940) ("It is simply inconsistent with the fundamental concepts of a city as a municipal corporation to say that another political subdivision located within its bounds may dictate as to when and where it shall open, close, pave and otherwise deal with public ways within that city.").

> Oskaloosa (and Pella), without the 28E Agreement, do not have the legal ability to relocate 220th Street because the road is outside of their jurisdiction. Rather, if Mahaska County elects not to close 220th Street (or any other road) necessary to allow for construction of the Regional Airport, Mahaska County would be in breach of the 28E Agreement.

(MSJ App. p. 81); (MSJ App. p. 100) (same from Pella). Such a thumb on the scale of legislative decisions is improper. *Alameda Cty. Land Use Assn. v. City of Hayward*, 45 Cal. Rptr. 2d 752, 756 (1995). The County obligating itself to "best efforts" in exercising its "own legislative authority" unlawfully ceded its discretion to the Cities. *Id.* "What the law has designed to be the exclusive power of an individual jurisdiction has become a contingent power, dependent on the concurrence of other jurisdictions." *Id.* at 757 (rejecting a best efforts obligation on a topic committed to the county's exclusive legislative decision-making).

In *Marco Development Corp. v. City of Cedar Falls*, Cedar Falls' mayor and city council contracted with Marco Development to develop a mall. The agreement provided, "The entire expense of any [road] widening or increased capacity requirements will be borne by *parties other than the owner.*" 473 N.W.2d at 42 (emphasis in original case, but not contract). Just as the Cities here, Marco Development insisted the project's demands "obligated the City to widen a street adjacent to Marco's proposed Thunder Ridge Mall" to make it possible. *Id.* Marco Development's claim that road

changes were necessary to effectuate the contract defeated its enforcement because Cedar Falls' "proposed street widening was clearly a legislative function and the City was not free to bind itself by contract in the exercise of its legislative functions." *Id.* at 43. This rule applies whether the contract was with a public or private entity, as its purpose is to allow the electorate to intervene to change the direction of legislative decisions:

> [A]s a general rule of law, a legislative body cannot bind future legislatures. The rule supports our general political philosophy that government is a creature of the people, and that 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. The rule itself is applicable to counties, as delegates of the legislature.

106 Iowa Att'y Gen. Op. No. 77-4-1 (April 1, 1977) (internal citations omitted).

Additionally, as with eminent domain, the County has no authority to close or vacate any portion of a county road without public notice, including to all affected landowners, ***and*** a public hearing. Iowa Code §§ 306.11–306.14. Again, affected landowners *must* receive the opportunity to object. Iowa Code § 306.14; *see Miller v. Warren Cty.*, 285 N.W.2d 190, 194 (Iowa 1979) (providing notice and opportunity to object is "a necessary part of a road closing" and failure to provide it deprives county of jurisdiction to close road). The hearing must be a "genuine hearing" of substance and "not a

sham," or constitutional due process rights are violated. *Bricker* 240 N.W.2d at 689. Yet, here, the Cities claim the right to put their thumbs so heavily on the scale that they can demand the County "close 220th Street (or any other road) necessary to allow for construction of the Regional Airport" or "Mahaska County would be in breach of the 28E Agreement." (MSJ App. pp. 81, 100).

> Q. If Mahaska County elects not to close 220th Street or any other road necessary to allow for construction of the regional airport, Mahaska County would be in breach of the 28E agreement. That's Oskaloosa's position, is it not?
>
> A. Correct. That's my position as I wrote it.
>
> Q. And, sir, do you know of any exceptions where Mahaska County would not be in breach of the 28E agreement if it declined to close a road necessary for the regional airport?
>
> A. I'm not sure of any other exceptions.

(Schrock Dep. pp. 95-96).

> Q. So even if public comment persuades the supervisors, hey, they don't want to close that road, to comply with the contract, the Mahaska County Board of Supervisors still would have to close that road; correct?
>
> A. From my perspective, that would be the case. I would suggest that they try to work with the cities and the SCRAA on trying to find a mitigation road, which is what is included in the environmental assessment. The council -- The city council and board of supervisors take input all the time. Sometimes they do not follow the direction from the public input, and that's okay.

(Schrock Dep. p. 97). The County must disregard public comments to side with SCRAA no matter what the comments reveal or whether they convince

the Supervisors road closure or alteration is imprudent. This violates Due Process.

Zoning authority in rural Mahaska County, like eminent domain and road location, is delegated to County Supervisors. Iowa Code § 331.304(4). Like eminent domain and road closures, the Cities claim the County ceded part of its legislatively delegated zoning authority to the Cities. (Schrock Dep. p. 123). Like eminent domain and road relocation, zoning requires public comment and an opportunity to be heard. Iowa Code Ann. § 335.6-7 (West); *Bowen v. Story Cty. Bd. of Sup'rs*, 209 N.W.2d 569, 571 (Iowa 1973) ("Zoning is an exercise of police power and the legislative authority under which a governmental unit acts is to be strictly construed. A statutory requirement of public hearing prior to a zoning change is mandatory and jurisdictional.").[15] The Cities' effort to skew the outcome of public hearings

[15] Iowa Code Chapter 335 additionally requires the County establish a zoning commission with appointed members that must reside within Mahaska County, "but outside the corporate limits of any city...." Iowa Code § 335.8(1). The zoning commission must consider zoning issues and prepare a final report to the Supervisors recommending what action to take. *Id.* "The board of supervisors shall not hold its public hearings or take action until it has received the final report of the commission." *Id.* Yet, the Cities seek to force the County to adopt whatever zoning decision *SCRAA* makes, rendering the zoning commission's role superfluous and Chapter 335 meaningless. The 28E Agreement further violates section 335.8 by letting zoning decisions be made by Oskaloosa and Pella/Marion County residents, rather than unincorporated county residents.

by claiming the County must side with the Cities, or face suit, is no more appropriate here than regarding eminent domain or street location. *See Bowen*, 209 N.W.2d at 571–72 (nullifying zoning resolution where hearing was not before the supervisors). Fair judgment *after* the hearing is required, not a stilted process contractually mandated to favor one side over another. *See Bricker* 240 N.W.2d at 689. The District Court erred upholding a contract whereby road and zoning decision-making was re-delegated from the designated party and constitutional procedures altered.[16]

[16] The Cities contend they are entitled to specific performance of the County's legislative authority if the County fails to perform as SCRAA orders. (Schrock Dep. p. 82). Decisions regarding exercise of condemnation, secondary road, or zoning powers are political questions the court has no jurisdiction to answer for the County, however. *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996); *see Perkins v. Bd. of Sup'rs of Madison Cty.*, 636 N.W.2d 58, 67 (Iowa 2001); *Oakes Const. Co. v. City of Iowa City*, 304 N.W.2d 797, 808 (Iowa 1981); *Hanson v. Vernon*, 27 Iowa 28, 50 (1869), *overruled in part on other grounds in Stewart v. Bd. of Sup'rs of Polk Cty.*, 30 Iowa 9 (1870) and *Bonnifield v. Bidwell*, 32 Iowa 149 (1871). Because the court lacks jurisdiction to require specific performance of the County's legislative powers necessary to complete the airport, the 28E Agreement is illusory and impossible. *Louisville & N.R. Co. v. Mottley*, 219 U.S. 467, 485 (1911) (holding relief is impossible where court cannot legally enforce agreement); *Insurance Agents, Inc. v. Abel*, 338 N.W.2d 531, 535 (Iowa Ct. App. 1983) (holding agreement illusory where party cannot lawfully be required to perform). The District Court erred holding specific performance is available. It further erred declining to address this issue when raised because nonjusticiable political questions implicate subject matter jurisdiction, which may be raised at any time. *Freiberg v. Muski*, 651 F.2d 608, 609 (8th Cir. 1981).

V. One Legislative Body Cannot Bind the Next on Legislative Decisions.

Under our Constitution, the Legislature legislates, Iowa Const. art. III, § 1, and the electorate, whose power the Legislature wields, ***must*** retain the right and power to intervene. 1977 Iowa Op. Att'y Gen. 106 (1977); *see Neuzil v. City of Iowa City*, 451 N.W.2d 159, 165–66 (Iowa 1990). Fundamental to democratic processes is that one Board of Supervisors cannot divest a future Board of decision-making power on legislative decisions. If the law were otherwise, the electorate could be deprived of its right of control by electing new representatives to effectuate its will and the legislative body is deprived of its Constitutional right to legislate. *Neuzil*, 451 N.W.2d at 165 ("[I]n legislative matters a municipality may not bind its successors" because they are "trustees for the public" and must retain discretion to determine when the public's interest changes).

Because eminent domain, zoning, and road location are legislative functions, the County's prior Board of Supervisors could not bind or restrict subsequent Boards on whether or how to use those powers. *See Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa*, 176 F. 86, 88 (8th Cir. 1910) (applying Iowa law to find: "In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public, and they may make no grant or contract which will bind the municipality beyond the terms

of their offices, because they may not lawfully circumscribe the legislative powers of their successors."); *Marco Develop. Corp.*, 473 N.W.2d at 44 (holding contract binding future bodies to exercise governmental authority violates Iowa's home rule); *Neuzil*, 451 N.W.2d at 165–66 (holding public body cannot bind successors on zoning because such decisions are in the public interest); *Sycamore, L.L.C. v. City Council of Iowa City*, No. 18-0714, 2019 WL 3716364, at *3 (Iowa Ct. App. Aug. 7, 2019) ("any agreement binding a future council to rezone land a specific way would be void.").

Despite such restraints being unconstitutional, the Cities admit the very purpose of the 2012 28E Agreement was to "adopt a binding agreement that would outlast any elections." (3d Am. Pet. ¶¶ 11–12; Plf. Mot. for Summ. J. Br. p. 4). *But see City of Humboldt*, 120 N.W.2d at 460 (holding municipality may not circumscribe or diminish legislative discretion of future bodies through contract, "but must transmit them unimpaired to their successors"). Because the 28E Agreement purports, and is intended, to put legislative decisions beyond the electorate's reach, it must fail.

Perhaps no case better illustrates the underlying principle than *Marco Development Corp.* The prior Cedar Falls' mayor and city council supported a mall project and signed a contract implicating street widening and zoning. *Marco Develop. Corp.*, 473 N.W.2d at 42. Just as "[t]he proposed regional

airport has met with a hostile reception in Mahaska County" (MSJ App. p. 166), the mall became an election issue resulting in the prior mayor's ouster. *Marco Develop. Corp.,* 473 N.W.2d at 42. After the electorate exerted its will by electing new leaders, Cedar Falls sought to end the Mall contract because it was *ultra vires*. Because one Cedar Falls City Council purported to bind the next on zoning and street widening, the contract was void. The City Council could not subject newly elected leaders to a prior agreement limiting legislative functions. *Id.* at 44.[17]

[17] The Cities have claimed Iowa Code Chapter 28E somehow overrides restrictions on Supervisors' power to delegate and bind themselves as described in *Marco Development Corp.* The Cities ignore the doctrine's underpinnings and *Marco Development*'s holding. Prohibiting one legislature from binding the next is of *constitutional* dimension. *Jacksonville Elec. Auth. v. Dep't of Revenue*, 486 So. 2d 1350, 1355 (Fla. Dist. Ct. App. 1986) ("it is beyond the constitutional power of one legislature to bind another"). Iowa's Constitution firmly places legislative power in the general assembly. Iowa Const. art. III, § 1 ("The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives…."). Such provisions prohibit one legislature binding the next. *City of Charleston v. Se. Const. Co.*, 64 S.E.2d 676, 682 (W. Va. 1950) ("the Legislature is without power to bind future Legislatures, and it cannot grant or delegate the right to exercise in perpetuity the police power of the State. Such delegation would be violative of Section 1, Article VI of our Constitution, which reads: 'The legislative power shall be vested in a Senate and House of Delegates.'"). The Legislature cannot override constitutional prohibitions through legislative action like Chapter 28E. *Graham*, 146 N.W.2d at 631 (holding law violating Constitution is forbidden); *Duncan*, 268 N.W. at 552 ("The Legislature can enact no law forbidden by the State Constitution…."). Indeed, *Marco Development* made clear, "authority to bind

The district court erred in holding the 2012 Mahaska County Board of Supervisors could bind future Boards years into the future on legislative functions of eminent domain, zoning, road location, and permitting.

## VI. Mahaska County Could Not Fetter Its Ability to End a Delegation.

Beyond delegating legislative decision-making to a separate body where it can be outvoted 5-1, the prior Supervisors also restricted future Boards' ability to end that delegation. Although re-delegations are typically illegal, even when allowed, Supervisors ***must*** be able to withdraw their authority through the same procedure by which it was granted.[18] For example, even if Supervisors could lawfully re-delegate their eminent domain authority, they must be "free to revoke or change [the] delegation of power" and it "must be done by the same type of procedures that created the delegation." *Warren Cty. Bd. of Health*, 654 N.W.2d at 915.

Here, the Supervisors voted to re-delegate their condemnation authority to SCRAA through a majority vote by the Board itself. (Schrock Dep. pp. 51-52). Yet the 28E Agreement requires a vote by Pella, Oskaloosa, *and*

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successive legislative bodies could not be granted by the legislature, which itself is prohibited from doing so." *Id.* at 44.

[18] This, of course, is consistent with Iowa's Airport Authority and Airport Commission statutes allowing parties to withdraw on the same terms by which they entered the arrangement. Iowa Code §§ 330.17(2); 330A.7(1).

Mahaska County for the County to retake its legislative authority and discretion. Art. XI, Section 2 (MSJ App. p. 15). Either Pella *or* Oskaloosa can veto Mahaska County's revocation of its re-delegation of its assignment from the Legislature. After "[t]he proposed regional airport … met with a hostile reception in Mahaska County," the Supervisors sought to exercise their legislative prerogative to effectuate the voters' will by ending their re-delegation through a majority vote, the same procedure the prior Supervisors used to purportedly effectuate delegation to SCRAA. (MSJ App. p. 166). Pella and Oskaloosa rejected the County's withdrawal. (3d Am. Pet. ¶¶ 24, 26, 28); *Warren Cty. Bd. of Health*, 654 N.W.2d at 915. If nothing else, this violates Iowa Code sections 330.17(2) and 330A.7(1), which guarantee joint airport agreement members the right to freely withdraw absent a public election approving and binding them to an airport commission agreement.

Thus, even if the County's re-delegation of legislative authority were lawful, the District Court erred by holding the County could not freely revoke its authority under both common law and Iowa's airport agency statutes.

## VII. Chapter 28E Only Allows Joint Exercise of Powers All Parties Already Possess.

Even if the County could lawfully re-delegate and restrict its eminent domain, secondary road, permitting, and zoning legislative authority in rural Mahaska County, it could not do so to the Cities through a 28E agreement.

The Cities concede they lack the legislative authority necessary to complete the regional airport on their own. Chapter 28E is not a vehicle for the parties to play Legislature and transfer or realign rights they do not *all* share. Consistent with case law cited above that 28E cannot be used rewrite legislative delegations, 28E agreements are merely mechanisms to jointly exercise power *all* parties already possess to complete the particular project—not a free pass to grant access to powers a city otherwise lacks. *Goreham*, 179 N.W.2d at 455.

Chapter 28E agreements are limited to *joint* exercise of powers with "any other public agency of this state **having such power or powers, privilege or authority**." Iowa Code § 28E.3 (emphasis added). Chapter 28E "confers no new powers on the entities involved, but only allows for the joint exercise of existing powers." *Clarke Cty. Reservoir Comm'n*, 862 N.W.2d at 176; *Barnes*, 341 N.W.2d at 767. The 28E agreement is "not unconstitutional *so long as the cooperating units are not exercising powers they do not already have*" and the 28E-entity is "only doing what its cooperating members *already have the power to do*." *Goreham*, 179 N.W.2d at 455 (emphasis added) (holding 28E "must be interpreted with reference to the power or powers" parties "already have. The pre-existing powers contain their own guidelines"). Thus, a 28E agreement cannot allow one or more parties to the

agreement to do a particular project a party otherwise lacks authority to do individually. *Barnes*, 341 N.W.2d at 768 (holding jointly exercised powers only can be ones "already vested in the members" to do "***this*** project" (emphasis added)); *Goreham*, 179 N.W.2d at 455 (holding public bodies may only use 28E to do jointly what "they could do individually").

The Cities admit they want to exercise powers they do not otherwise possess for a project they cannot do individually. (Cities Mot. for Summ. J. Br. p. 31 ("Neither of these necessary tasks ['condemnation of private land and road relocations'] can be accomplished without the County's exercise of its eminent domain and police powers.")); (MSJ App. p. 81) ("Oskaloosa (and Pella), without the 28E Agreement, do not have the legal ability to relocate 220th Street because the road is outside their jurisdiction").

> Q. And, sir, in fact, you understand … that Oskaloosa and Pella, without the 28E agreement, do not have the legal ability to relocate 220th Street because the road is outside of their jurisdiction; correct?
>
> A. Correct.

(Schrock Dep. p. 93); (Schrock Dep. pp. 87, 87-88). As the Cities emphasize, they need the County's power precisely because they lack it themselves, otherwise there would be no need to prevent the County from withdrawing. (Plf. Mot. for Summ. J. Br. p. 12 (stating County's "power of eminent domain

is crucial to the Agreement to acquire the land necessary to build the new regional airport")); (3d Am. Pet. at ¶ 56); (Cities Mot. for Summ. J. Br. p. 31).

The Cities seek exactly what Polk County sought in *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*. When the 28E agreement at issue in *Goreham* was implemented, Polk County generally had bonding authority, but lacked power to issue bonds for waste collection and disposal. Other 28E agreement parties possessed that power. 179 N.W.2d at 461–62. Because Polk County lacked the specific power at issue, it could not gain or use the other entities' powers through 28E: "there is nothing in these legislative provisions to indicate that counties may participate if their power and authority is restricted and does not conform to that of the other public bodies, parties to the agreement." *Id.*

Polk County could not participate in the 28E agreement at issue because it "did not possess like power or authority in this field of public service with other participating municipal bodies." *Id.* at 462. Polk County only could rejoin the 28E Agreement *after* the Legislature granted it the same authority. *Id.* Because here the Cities admit they seek powers they otherwise lack, the Cities' authority does not "conform to that of the other public bodies, parties to the agreement." *Id.* Indeed, the Cities know this limitation, confirming in an Environmental Assessment submitted to the FAA that, "Chapter 28-E-Joint

Exercise of Governmental Powers permits any governmental entity to undertake any activity jointly ***so long as each agency has the power to undertake that particular activity on its own***." (MSJ App. p. 174) (emphasis added). !

The 28E Agreement is unconstitutional because it purports to grant the Cities and SCRAA powers they "do not already have" to do something "they could [not] do individually," and the District Court erred upholding the agreement. *Goreham*, 179 N.W.2d at 455–56.[19]

VIII. The District Court Erred Treating an Interlocutory, Partial Summary Judgment Ruling as an Advisory Opinion with Preclusive Effect.

Finally, while the County properly raised these numerous legal failings to the District Court in both the Cities and Landowners Cases, the court in both matters erred declining to consider them. First, in the Cities Case, the District Court declined to reconsider a June 13, 2018 summary judgment ruling where the Cities apparently sought and achieved a broad declaration

[19] The Cities urge following the Legislature's and constitution's limitations on Chapter 28E makes airport agreements unworkable, but Chapters 330 and 330A provide vehicles the Legislature deemed appropriate to create and operate joint regional airports. (Landowners MSJ Supp. App. 1–104) (Iowa airport 28E agreements invoking and following 330A). The Cities' inability to gain electoral support prevents creating an airport, not the Legislature's procedures. The Cities cannot contract around statutory requirements. *Barnes*, 341 N.W.2d at 768.

that the 28E Agreement is lawful in all ways at all times—despite having not considered all legal issues and despite no final ruling being entered. *See* (9/18/2020 Ruling p. 7) (recognizing the June 13 ruling did not address all the County's arguments).[20] The ruling did not examine, among other things, the impact of Chapters 330 and 330A, controlling cases like *Marco Development Corp.* or *Barnes*, or constitutional limits on the County's power and 28E agreements.

Not only did the court have a duty to consider all legal infirmities, it could not allow a declaratory judgment to become a blanket, advisory opinion deciding issues not yet presented. *Stew-Mc Dev., Inc. v. Fischer*, 770 N.W.2d 839, 848 (Iowa 2009) (mere mention of an issue in declaratory actions "does not open the door to resolution of any and all hypothetical issues"); *Baytown Const. Co. v. City of Port Arthur, Tex.*, 792 S.W.2d 554, 557, 558 (Tex. App. 1990) (holding a party seeking a "blanket judgment with a blanket, all-encompassing adjudication by the trial bench finding that the ordinances in

[20] On June 13, 2018, in an interlocutory, partial summary judgment, the District Court held "SCRAA has not deprived Mahaska County of its legislative and governmental functions and powers," without mentioning or examining the legal issues raised herein. (6/13/18 Ruling p. 7). Despite not having yet been presented these arguments, the court held, "There is simply no rationale [sic] legal basis to invalidate this 28E agreement." (6/13/18 Ruling p. 7). The court held, "The Court further finds the agreement is binding and does not violate public policy." (6/13/18 Ruling p. 8).

question were valid and constitutional in every respect" must show "*that the ordinances passed all statutory and constitutional musters*" (emphasis in original)). Thus, the Cities Case court erred denying the County's motion in the Cities case to reconsider the prior ruling and declining to examine the 28E Agreement's illegality and declare the Agreement void.[21]

[21] The court can reexamine and correct its partial summary judgment rulings at any time, even years later. *Lagle*, 430 N.W.2d at 396. Although the court in the Cities Case held Iowa Rule of Civil Procedure 1.904 prevented reexamining the contract's legality, the Supreme Court's comments to the rule establish it "is not intended to affect prior case law concerning a court's inherent authority to reconsider." Iowa R. Civ. Pro. 1.904 cmt; *see Waddell v. University of Iowa Community Medical Services, Inc.*, No. 17-0716, 2018 WL 4638311, at *2 (Iowa Ct. App. Sep. 26, 2018) (affirming order reconsidering summary judgment four years after initial decision); *People's Bank v. Driesen*, No. 10-1676, 2011 WL 3925449, at *12 (Iowa Ct. App. Sep. 8, 2011) (affirming grant of second motion to reconsider summary judgment). Indeed, the District Court did not apply Rule 1.904 when the Cities essentially requested the same kind of reconsideration earlier in the case. The District Court declined to dismiss the County's breach of contract counterclaim and held summary judgment was "not appropriate." (Jun. 29, 2018 Ruling); (Jun.13, 2018 Ruling). Months later, the Cities again sought dismissal through summary judgment and a subsequent motion to reconsider. (Mar. 20, 2019 Ruling); (Feb. 4, 2019 Ruling). Despite these being successive, months-later motions requesting reconsideration of the earlier summary judgment ruling, the District Court did not simply hold Rule 1.904 barred the Cities' request. (Feb. 4, 2019 Ruling at 4–5). Instead, it reexamined the record and the parties' arguments, though it ultimately came to the same conclusion that fact issues precluded summary judgment. *Id.* The District Court erred not similarly reexamining the earlier ruling when the County presented important constitutional issues for resolution.

The court in the Landowners Case also erred declining to address the 28E Agreement's failings by giving a partial, interlocutory June 13, 2018 summary judgment ruling in the Cities Case preclusive effect in a separate case. Putting aside that the court must consider a contract's illegality, which can be raised at any time, res judicata and issue preclusion require a "valid and final judgment." *City of Johnston v. Christenson*, 718 N.W.2d 290, 297 (Iowa 2006); *In re Pardee*, 872 N.W.2d 384, 391 (Iowa 2015) (holding no issue preclusion where determination was not "necessary to the ***final*** judgment"); *Chamberlain, L.L.C. v. City of Ames*, 757 N.W.2d 644, 648 (Iowa 2008). There was no final judgment here.

The Cities in fact argued to the Supreme Court that the June 13, 2018 ruling was not final to prevent the County from appealing that ruling until now. Appellees' Mtn. to Request Ct. to Deny Permission for Interlocutory Appeal at ¶¶ 6, 11, 12 (Landowners MSJ App. pp. 121–22) (stating "rights of the parties have not been finally determined" and noting the ruling "is not a final order"); *Lagle*, 430 N.W.2d at 395–96 (holding partial summary judgment not final). The Supreme Court agreed and held the ruling was interlocutory because there were pending counterclaims. Sep. 5, 2018 Order (MSJ App. p. 111); *see In re Det. of Matlock*, 860 N.W.2d 898, 901 (Iowa 2015) ("We do not consider a ruling final if the district court intends to act

further on the case before entering its final decision of the issues."). Having successfully argued on appeal that the partial summary judgment ruling was *not* final, the Cities were judicially estopped from recanting later. *Winnebago Indus. Inc. v. Haverly*, 727 N.W.2d 567, 573–74 (Iowa 2006); *In re K.R.*, No. 06-1592, 2006 WL 3615040, at *1 (Iowa Ct. App. Dec. 13, 2006).

An interlocutory, partial summary judgment ruling in a different case is *not* a final judgment with preclusive effect. *Snake v. State*, No. 99-1759, 2001 WL 985052, at *2 (Iowa Ct. App. Aug. 29, 2001) (interlocutory summary judgment is not final for preclusion purposes); *see Harrington v. Waterloo Police Dep't*, No. C05-2074, 2006 WL 3825053, at *2–3 (N.D. Iowa Dec. 26, 2006) (applying Iowa law to hold same).

The ruling could not be final because, until judgment was entered deciding all claims, the District Court retained the right to reconsider and reverse its earlier ruling. *Lagel*, 430 N.W.2d at 396; *Mid-Continent Refrigerator Co. v. Harris*, 248 N.W.2d 145, 146 (Iowa 1976) (holding partial summary judgment rulings do not preclude reconsideration and reversal); *Wells' Dairy, Inc. v. Travelers Indem. Co. of Ill.*, 336 F. Supp. 2d 906, 911–12 (N.D. Iowa 2004) (holding interlocutory summary judgment in separate state court case had no preclusive effect because state court could still reconsider the ruling).

Further, when appeal is not yet possible—or was prevented—res judicata is inapplicable. *In re Ellenberger's Estate*, 171 Iowa 225, 153 N.W. 1036, 1040 (1915) ("the doctrine of res judicata ... does not apply to ... interlocutory orders made in the progress of a cause"); *see* Restatement (Second) of Judgments § 28, cmt. a (1982) ("the availability of review for the correction of errors has become critical to the application of preclusion doctrine").[22] Thus, the District Court in the Landowners Case erred giving the partial, interlocutory summary judgment ruling in the then-pending Cities Case preclusive effect in a separate suit.

## CONCLUSION

Because the 2012 28E Agreement is illegal in numerous ways, the District Court's decision that the Agreement was lawful and enforceable must be reversed to avoid enforcement of an illegal governmental contract.

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[22] In addition, *res judicata* could not apply to the Landowners who were excluded from the Cities Case at the Cities' insistence that they could file their own separate suit. *Estate of McFarlin ex rel. Laass v. City of Storm Lake*, 277 F.R.D. 384, 387 (N.D. Iowa 2011) (holding res judicata could not apply to party denied request to participate in case); *Lyons v. Andersen*, 123 F. Supp. 2d 485, 487 (N.D. Iowa 2000) (same). Due Process precludes denying the Landowners their opportunity to contest a contract designed to violate their rights. *In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997) ("Due process mandates that persons who are required to settle disputes through the judicial process 'must be given a meaningful opportunity to be heard.'" (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).

## REQUEST FOR ORAL ARGUMENT

Appellant, Mahaska County, Iowa, does not believe oral argument is necessary, but should the court allow it, Mahaska County respectfully requests to be heard orally upon the submission of this appeal.

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PROOF OF SERVICE

I hereby certify that on the 3rd day of March, 2021, I electronically filed the foregoing Appellant's Proof 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 13,781 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 Times New Roman 14 pt.

Dated: March 3, 2021

*/s/ V. Drake*

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