IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-1327

DAVINA VALDEZ,

Plaintiff-Appellant,

vs.

WEST DES MOINES COMMUNITY SCHOOLS and DESIRA JOHNSON,

Defendants-Appellees.

APPEAL FROM THE POLK COUNTY DISTRICT COURT
Hon. Jeffrey Farrell

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Routing Statement

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c) – (d), and (f), Appellant requests the Iowa Supreme Court retain this case because it presents substantial issues of first impression, it presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court, including review of race-based preemptory strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, and it presents substantial questions of changing legal principles, including the extension of *Batson*'s holdings under Iowa law and individual liability for race discrimination in the workplace.

Statement of the Case

This is a civil employment case brought by former Valley High School special education teacher's associate Davina Valdez against the West Des Moines Community School District ("the District") and Defendant Desira Johnson. Valdez filed her petition on December 13, 2019, later amended on June 19, 2020, alleging race discrimination and hostile work environment harassment based on race (Count I); unequal pay (Count II); retaliation (Count III); and wrongful termination in violation of public policy (Count IV). (APP. 8-23; Am. Pet., p. 1-16). Defendants denied all of Plaintiff's claims. Plaintiff voluntarily dismissed her unequal pay claim on

February 9, 2021. Defendants filed a motion for summary judgement on February 11, 2021, which was heard on March 17, 2021, and granted in part and denied in part on April 11, 2021. A jury trial began on April 12. Jury selection was completed in two stages (divided panels) and shortened due to COVID-19. After Defendant's exercise of preemptory strikes, Plaintiff challenged Defendant's peremptory strike of the only black juror on the panel, outside the presence of the jury. The Court found that Plaintiff made a prima facie showing of discrimination, and required defense counsel to explain their strike of the black juror. (TT v. II, p. 55, l. 4-6). The Court ultimately denied Plaintiff's challenge to the peremptory strike of the black juror. (TT v. II, p. 55, l. 2 – p. 56, l. 7). The trial proceeded. On April 19, 2021, at the close of evidence, and by agreement of the parties to withhold any motions until that time, the Court granted, in part, a motion for directed verdict made by the Defendants. The Court ruled that the individual defendant, Johnson, should be dismissed from the case. (TT v. VIII, p. 109, l. 19 – p. 112, l. 1). On April 20, 2021, closing arguments were made and the judge instructed the jury. The jury submitted a juror question on April 20, 2021, which the judge answered with consent of the parties. (APP. 120; Note to Jury). The jury reached a verdict the same day and judgment was entered for Defendants. Plaintiff filed a motion for new trial on May 3,

2021, and on August 28, 2021, the Court denied the motion. Plaintiff's notice of appeal was timely filed on September 20, 2021.

Statement of Facts

Davina Valdez was employed as a special education associate with West Des Moines Community Schools from 2015 until her constructive discharge on June 26, 2019. (TT v. IV, p. 77, l. 1-2; TT v. IV, p. 124, l. 16 – p. 125, l. 18; APP. 212; Pl. Tr. Ex. 8). Plaintiff's race is, in her mother's words, "Negro, black American." (TT v. VII, p. 66, l. 16-18). Plaintiff grew up in West Des Moines and attended Valley High School. During the time that Plaintiff was employed with the District, her children also attended school there. (TT v. IV, p. 75, l. 6 – p. 76, l. 17). Plaintiff's father worked for the District for 21 years. (*Id.*).

Plaintiff began work for the District as a special education associate at the freshman campus, Valley Southwoods. (TT v. IV, p. 76, l. 18 – p. 77, l. 14). After working with a particular special education student, C.O., in the summer of 2018, Plaintiff become C.O.'s one-on-one associate at Valley High School for the 2018-2019 school year. (TT v. IV, p. 78 l.12 – p. 79 l. 8). C.O., like many Level 3 special education students, is on the autism spectrum, and, according to her mother, has "little verbal communication," is "super sensitive to sound, noise," and, for C.O., following similar routines

or schedules, and having predictability, is not only "comforting" but "critically important." (TT v. IV, p. 44 l. 3 – p. 47, l. 11).

Plaintiff worked with C.O. at Valley under the leadership of teacher Kylene Simpson. (TT v. IV, p. 79, l. 14 – p. 80, l. 9). Simpson is Korean. (TT v. III, p. 219, l. 21-23). Simpson was an experienced teacher with approximately 20 years of special education teaching experience, all of which was with Level 3 Special Education students. (TT v. III p. 199, l. 24 - p. 200, l. 7). During the course of her career, Ms. Simpson had received positive job performance feedback and had strong relationships with the families of her students. (TT v. III p. 203, l. 24 – p. 206, l. 9); (TT v. IV, p. 31, l. 3-7).

Simpson observed Plaintiff's job performance and testified that "in the 20 years that I've been a teacher, a special ed teacher, she's probably the best associate I have had." (TT v. III p. 208, l. 7-9). For Plaintiff, the 2018-2019 school year began well under Simpson's teaching. (TT v. IV, p. 81 l. 17-24).

However, Plaintiff had a disturbing interaction with Defendant Johnson during the fall of 2018. Plaintiff, and another special education associate, Toree Daniel, who is biracial (African-American and Hispanic), were sitting waiting for children to come off the buses in the morning when

Johnson approached both of them and said something similar to "why would a black student call a white lady a nigger?" (TT v. IV, p. 82 l. 3-8). Both Plaintiff and Daniel were taken aback at Johnson's question. Plaintiff testified:

> Well, that's a horrible word. I felt – I was shocked. I – I – I was at a loss for words. I didn't - I don't think I responded at all. I just – I couldn't believe that someone would actually use that word. I think it's pretty universal, you know, you would say the N-word. I think everybody knows what that means. And I guess I – my first thought was, I'm so glad that she's not my teacher that I have to work with.

(TT v. IV, p. 82, l. 10-17).

Daniel testified, "And the first reaction is, like, oh, why do you feel the need to say the word and why would you ask us? I – that's my thought process on the thing for sure." (Daniel Tr. Preservation Dep., Court Ex. 2A, p. 18, l. 24 – p. 19, l. 11).

As the school year progressed, the environment within the special education classrooms at Valley became more challenging. That year a new Associate Principal had joined Valley, Jill Bryson. Bryson immediately began questioning the job performance of Simpson. (TT v. III, p. 22, l. 12 – p. 23, l. 20); (TT v. VII, p. 127, l. 3-17). Prior to that time, Simpson had been well-liked, if not revered, by teachers, parents, and students alike, and had worked at Valley High School for four years. (TT v. III, p. 200, l. 8-10).

Sometime between the beginning of the school year and early spring of 2019, Simpson reported to Bryson that a different racially discriminatory comment had been made by Johnson to Daniel. Simpson reported that Johnson had asked Daniel, when speaking about an African-American special education student, "why do you people wear their pants down like that?" (TT v. III, p. 212, l. 24 – p. 214, l. 5); (TT v. III, p. 214, l. 12 – p. 215, l. 8). Bryson responded to Simpson that she would talk to Johnson. Simpson never found out whether Bryson actually talked with Johnson about the comment. (TT v. III, p. 25, l. 5-8). Simpson did learn, however, that Bryson had sent Daniel home early one day in retaliation for Daniel not sharing with Bryson why his black co-worker did not report for work on a particular day. (TT v. III, p. 215, l. 24 – p. 216, l. 22).

In the early spring of 2019, Simpson and another special education staff member filed cross-harassment complaints against one another. The District conducted an investigation of the other complaint, but not Simpson's complaint. (TT v. III, p. 217, l. 25 – p. 218, l.25). At the conclusion of the investigation, on the false premise that Simpson had lied about the whereabouts of a key, the District pressured Simpson to resign under threats of a "long and drawn out" fight where her "kids could be on—it could be on the news and everything else." (TT v. III, p. 232, l. 3-9). Simpson did not

want to resign. (TT v. III, p. 217, l. 22-23). At the time, Simpson also asked Associate Superintendent of Human Resources Carol Seid if she was being asked to resign because she is Korean. (TT v. III, p. 218, l. 1-17). Seid responded that "we're not going to talk about it" and proceeded to discuss the results of the investigation about the key. (TT v. III, p. 218, l. 7-17). Under this pressure, Simpson signed a Separation Agreement, releasing the District of all liability. (TT v. III, p. 230, l. 14 – p. 232, l. 24).

In the wake of Simpson's departure, Bryson hired a substitute teacher, Jo Yochum, to take over Simpson's responsibilities and to oversee both the associates and students in Simpson's former classroom. (TT v. III, p. 82, l. 11-17). However, Yochum never was able to truly assume these duties because Johnson stepped in and "took over." (Yochum Pres. Dep., Court Ex. 1B, p. 16, l. 15-18).

The trial evidence regarding Johnson's coup of the classroom where Plaintiff worked with C.O., which was aided and abetted by Bryson, was shocking, and demonstrated both Johnson and Bryson acted differently toward students and teachers of color. (TT v. IV, p. 102 l. 3 – p. 119, l. 14) (APP. 214; Pl. Tr. Ex. 9, p. 2). Further, it revealed that Johnson harassed the Level 3 special education students, in general, as a means of harassing the associates who worked closely with, and cared deeply for, these students.

(TT v. IV, p. 85, l. 20 – p. 90, l. 23); (TT v. IV, p. 102 l. 3 – p. 119, l. 14); (TT v. IV, p. 119, l. 1-14); (TT v. VII, p. 133, l. 19 – p. 134, l. 13) ("Well, like a parent and grandparent, you can attack us, but when you start attacking our children, we become like bears.").

For example, Johnson acted contrary to the best interests of C.O. by, among other things, moving C.O.'s most cherished comfort item, her swing, into a location that was less accessible. (TT v. IV, p. 88, l. 2 – p. 89 l. 10). Johnson also removed C.O.'s morning break, which for years had calmed C.O. after a long, noisy bus ride. (TT v. IV, p. 89, l. 23 – p. 90, l. 20); (TT v. IV, p. 47, l. 22 – p. 49, l. 16). C.O. in fact refused to sit at a work table that had been put in the same location where the swing had been before Johnson moved it. (TT v. IV, p. 89, l. 14-22).

Plaintiff's first written complaint, e-mailed on April 18, 2019 to human resources and the WDCS Superintendent read, in part:

. . .

> **I feel completely <u>harassed, singled out</u> and have actually had some physical sickness with the thought of going to work to be under a microscope and insulted with accusations**.
>
> . . .
>
> **My main concern is my student.** I have seen several changes in her since Ms. Johnson has taken over the

> classroom and I am unable to communicate this with the parent. Not only with my student but all of the students.
>
> . . .
>
> **I feel completely harassed and intimidated by both Desira Johnson and Jill Bryson. I would like to file a complaint immediately.** . . . I do not feel comfortable working with Ms. Johnson or with her daughter Sierra in the classroom.

(APP. 198; Pl. Tr. Ex. 1, p. 2) (emphasis added).

On May 2, 2019, Daniel also complained to Seid that he was "constantly being belittled and discriminated against" and that "I have never seen such a hostile work environment" and that "I informed Bryson about the situations with staff I work directly with and nothing has happened . . . Bryson has yet to communicate anything to me, but states I have a lack of communication." (APP. 214; Pl. Tr. Ex. 9, p. 2).

Having heard nothing back, on May 14, 2019, Plaintiff sent her second complaint to human resources, which read in part as follows:

> To whom it may concern,
>
> I am sending this email because **over 2 weeks ago I filed a formal complaint letter and have not heard anything back or even been given an update**. I know that none of my coworkers past or present have been interviewed to confirm my allegations.
>
> . . . **I feel now more than ever discriminated against and work is more tense and hostile than ever. Not one day goes by without me coming into work to try and do my job, someone rushes up to me to tell me all the nasty, horrible, unprofessional things Desira Johnson has said about me.**

. . .

> **I refuse to be intimidated and bullied to the point where I just walk out and quit. That would not make me a responsible parent. However there is no way I can do my job to my full capacity feeling so unwanted and unappreciated.**

(APP. 199; Pl. Tr. Ex. 2).

On May 28, 2019, Plaintiff's attorney complained in writing on her behalf. (APP. 208-211; Pl. Tr. Ex. 7).

Nevertheless, and even after three written complaints, nothing was done to address Plaintiff's concerns and they were dismissed by the District as "unfounded". (APP. 202; Pl. Tr. Ex. 4, p. 3). Meanwhile, Johnson wrote a letter to Seid which implied she had found out about the complaints, and asked for Plaintiff and Daniel's "placements" to be reviewed for the 2019-2020 school year. (APP. 216-217; Pl. Tr. Ex. 10). Plaintiff applied for other jobs within the District but was not hired for any. (TT v. IV, p. 125, l. 13-18). Ultimately she resigned, writing, in part:

> It is apparent to me that the District performed a deficient investigation and has not, and will not, protect me from additional harassment and discrimination should I return to work. I cannot endure any additional treatment of the type I received during the 2018-2019 school year.

(APP. 212; Pl. Tr. Ex. 8).

After Plaintiff's constructive discharge, and in approximately September or October of 2019, the mother of a Hispanic, Level 3 special

education student complained that her son had been pinched by Johnson hard enough to leave a mark on his chest. Principal of Valley, David Maxwell, spoke to the mother, who showed him a video of the mother asking her son who made the mark on him and he said, in Spanish, "the maestro" (the teacher). (TT v. VIII, p. 86, l. 19-25). Maxwell responded by bringing Johnson into the same meeting and asking Johnson, in front of the mother, if she in fact pinched the student. Predictably, Johnson denied the allegation. No further investigation was done, and Johnson was in no way reprimanded or counseled regarding the pinching. (TT v. VIII, p. 87, l. 1 – p. 88, l. 16).

ARGUMENT

II. PLAINTIFF IS ENTITLED TO A NEW TRIAL BECAUSE DEFENSE COUNSEL STRUCK THE ONLY BLACK JUROR FOR DISCRIMINATORY REASONS AND GAVE PRETEXTUAL EXPLANATIONS REGARDING THE STRIKE, IN VIOLATION OF THE UNITED STATES AND IOWA CONSTITUTIONS

A. Standard of Review

The Iowa Supreme Court has held: "We review constitutional issues de novo." *State v. Lilly*, 930 N.W.2d 293, 298 (Iowa 2019). A *Batson* challenge, as a challenge under both federal and statute constitutions, should therefore be reviewed de novo.

B. *Batson* and Beyond: Introduction to the Issue

In *State v. Veal*, a case involving both a fair cross section claim and a *Batson* challenge, Justice Appel wrote in his concurring opinion:

> I think we should put these cases in a larger perspective in three ways. First, we should recognize the profound and persistent problem of racial discrimination in our society. Second, we should put each of the cases we decide today in their larger context within our legal system. We should decide these cases only after we have understood that context. Third, we should recognize the role of state courts in working to develop a system of justice where fair and impartial juries and freedom from discrimination are the norm and not the exception.

State v. Veal, 930 N.W.2d 319, 341 (Iowa 2019) (Appel, J., concurring). In line with Justice Appel's proviso, Plaintiff offers history and context regarding race and peremptory strikes below, and argues not only for

reversal of this case but also for solutions beyond *Batson*. In this case, the sole black juror was improperly struck by defense counsel based on discriminatory reasons, and when asked to defend the strike, defense counsel gave explanations that were, if not patently false, unsupported by the record.

C. Race Discrimination within the American Jury System

As set forth by the United States Supreme Court in the years following the end of the Civil War and after the Fourteenth Amendment was ratified:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

Strauder v. W. Virginia, 100 U.S. 303, 308 (1879).

As early as 1879, the United States Supreme Court recognized that prohibiting African-Americans from serving on a jury undermines the protections a jury system is intended to provide. *Strauder*, 100 U.S. at 308. As the Court held:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury

> drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Strauder, 100 U.S. at 308-309. The Court later held that it was not only African-Americans that were protected from intentional exclusion from juries, but members of any distinct class. *See Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

However, and despite existing constitutional protections within both the Sixth and Fourteenth Amendments, which protections have been reinforced by the Supreme Court, more than a century later, racial divisions and biases within the jury system persist. Both selection of jurors based on race and other discrimination within the jury process is still accomplished, often through the trial mechanism of peremptory strikes, but also through vestiges of racially discriminatory state laws. *See Ramos v. Louisiana,* 140 S. Ct. 1390 (2020) (holding unconstitutional state laws that did not require unanimous convictions on serious offenses)*; Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (reversing conviction in capital murder case on the basis that one of the prosecution's strikes violated *Batson*); *Foster v. Chatman*, 578 U.S. 488 (2016) (reversing conviction in capital murder case on the basis that two of the prosecution's strikes violated *Batson*); *Snyder v. Louisiana*, 552 U.S. 472 (2008) (reversing conviction in capital murder case

on the basis that one of the prosecution's strikes violated *Batson* because a black juror was struck for "nervousness" not borne out by the record) ; *Miller-El v. Dretke*, 545 U.S. 231 (2005) (reversing conviction in capital murder case on the basis that two of the prosecution's strikes violated *Batson*); *Purkett v. Elem*, 514 U.S. 765 (1995) (holding the lower court had erred by granting relief under *Batson* and holding that asserted race neutral reasons such as that the juror had long, unkepmpt hair and a mustache were sufficient to satisfy prong two of *Batson*)[1]; *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding violation of constitutional rights as to peremptory challenge in criminal case, and setting forth three-part test for constitutional challenges to peremptory strikes which decreased the burden of proof); *Swain v. Alabama*, 380 U.S. 202 (1965) (holding that peremptory strikes based on race are unconstitutional and requiring proof outside the case at issue to sustain a challenge to a strike), *partially overruled by Batson*, 476 U.S. at 85-89.

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[1] Plaintiff agrees with analysis of this opinion that questions not only its outcome but the Court's analysis of the second step of the test which did not require the prosecution to furnish a reason that was even "trial related." *See, e.g., Veal*, 930 N.W. at 352 (Appel, J., concurring).

Most recently, in *Ramos v. Louisiana*, Justice Gorsuch held, when reversing years-old prior precedent on the issue of nonunanimous criminal convictions for serious offenses:

> Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to 'establish the supremacy of the white race,' . . .

Ramos, 140 S. Ct. at 1394. Addressing the similar Oregon statute, he continued:

> Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'

Id. The Court therefore took pains to answer, in *Ramos*, the question: "How, despite these seemingly straightforward [Sixth Amendment] principles, have Louisiana's and Oregon's laws managed to hang on for so long?" The majority opinion dissected the constitutional reality (largely a problem of poorly reasoned precedent and strict adherence to *stare decisis*) that was permitting racially-motivated, unconstitutional legislation to persist at the state level in violation of the Sixth Amendment. *Ramos* finally struck down Oregon and Louisiana's discriminatory laws, though for some defendants, the constitutional correction came far too late.

Similarly, and only decided one year prior to *Ramos*, in *Flowers v. Mississippi*, the Supreme Court addressed racial bias within the selection of jurors. In that case, African-American criminal defendant, Curtis Flowers, was tried six times for murder. For different reasons, including both prosecutorial misconduct and violations of Flowers' constitutional right to have a jury of his peers, each verdict reached in the six trials was ultimately reversed. In analyzing the sixth and final trial, and whether Flowers' constitutional rights had been violated in jury selection, the Court considered the racial makeup and peremptory strikes of jurors for each of Flowers' six trials, recounting them as follows:

> At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors . . . Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death . . .
>
> At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1 black

> juror. The jury convicted Flowers and sentenced him to death . . .
>
> At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors . . . The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death . . .
>
> At Flowers' fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial . . .
>
> As to the fifth trial . . . [t]he jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.
>
> At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving only one black juror to sit on the jury . . . The jury at Flowers' sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and sentenced him to death.

Flowers, 139 S. Ct. at 2236-37. The Court's discussion of the six trials in *Flowers* offers unique evidence regarding the issue of ongoing race-based jury selection in America and its direct relation to trial outcomes.

D. Federal Constitutional Protections in Jury Selection: *Batson* v. *Kentucky* and its Progeny

The Supreme Court first squarely addressed application of the Equal Protection clause of the Constitution to peremptory strikes in *Swain v. Alabama*. 380 U.S. 202. In *Swain*, the Court held that a criminal defendant who alleged discrimination in the prosecutor's use of peremptory strikes could not rely upon only the evidence surrounding peremptory strikes in his case, nor on historical evidence of the racial makeup of juries in the county in which he was being tried, but that instead, to prove a violation of the Equal Protection Clause, the defendant needed to: "show the prosecutor's systemic use of peremptory challenges against Negroes over a period of time." *Id.* at 227. Therefore, while *Swain* first acknowledged that the Equal Protection Clause could be violated through discriminatory peremptory strikes, the evidentiary burden it placed upon the parties attempting to challenges such strikes was a "crippling burden of proof." *Batson*, 476 U.S. at 85.

While the Court since *Swain* has continued to hold tight to its protection against race discrimination within the selection of juries and in particular in the use of peremptory strikes, it has not clung to the insurmountable evidentiary burden *Swain* dictated. In *Batson v. Kentucky*,

the Court explicitly overruled the evidentiary burden placed on defendants in *Swain*, instead adopting the following standard:

> [A] black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. *Washington v. Davis*, *supra*, at 239-242. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana*, 405 U.S., at 632. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See Alexander v. Louisiana, supra, at 632, Jones v. Georgia, 389 U.S. 24, 25 (1967). Rather, the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.' *Alexander v. Louisiana*, supra, at 632; *see Washington v. Davis*, supra, at 241.

Batson, 476 U.S. at 85-86.[2] The *Batson* Court thereby announced a sea-change in the standard by which a litigant could challenge a discriminatory peremptory strike and made clear that the defendant could rely upon facts within only his own case, did not have to develop evidence "over time," and could employ "any other relevant circumstances," regarding the

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[2] The constitutional protections developed through *Batson* and progeny were explicitly extended to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991). The *Edmonson* Court held, in short: "Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Id.* at 630.

discriminatory peremptory strike. *Id.* at 86-87. In the years following *Batson's* holding, the Court has continued to expand its protections.

The Supreme Court has also acknowledged weaknesses within *Batson's* framework: "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Miller-El*, 545 U.S. at 212. Emphasizing the trial court's role in "ferreting out discrimination," the Court held:

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination.

Id. at 239-40.

The *Miller-El* Court then addressed statistical evidence of the prosecution's use of peremptory strikes against black jurors. *Id.* at 240. The Court went on to hold "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-

similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Id.* at 241 (quotations omitted).

Also relevant to the Court's consideration of the peremptory strikes made in *Miller-El*, which it ultimately held were discriminatory, were explanations the prosecutor had given when his first reasons were challenged as incorrect by defense counsel. The Court held that "It would be difficult to credit the State's new explanation, which reeks of afterthought." *Id.* at 246. In addition, the Court described that the prosecutor had offered as a reason for a strike, as an afterthought, that the potential juror's brother had a prior criminal conviction, and yet the prosecutor had "asked nothing further about the influence his brother's history might have had on [the potential juror], as it probably would have done if family history had actually mattered." (*Id.* (citing *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000) ("[T]he State's failure to engage in any meaningful voir dire examination on subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination")).

Miller-El also looked to evidence of prosecutors' disparate questioning of black venire members compared to white venire members,

with both races being questioned about capital punishment, but black witnesses more often receiving "graphic script, describing the method of execution in rhetorical and clinical detail." *Id.* at 255. The Court held of this and other evidence of disparate questioning: "Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away." *Id.* at 263. Therefore, in *Miller-El* the Court offered additional information regarding the types of evidence that could support a successful *Batson* challenge.

Similarly, in *Foster v. Chapman*, the Court repeated *Miller-El's* holding that: "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar, nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 578 U.S. at 512. The *Foster* Court also highlighted other evidence that compelled the court's holding that discrimination had occurred: "There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file." *Id.* Both *Miller-El* and *Foster's* comparisons of the stricken and seated white versus black venire members, the disparate questioning of venire members based on race, and *Foster's* focus on misrepresentations made by the prosecuting attorney, were again featured in the Court's *Flowers v.*

Mississippi case, as stated above. 139 S. Ct. 2228. The *Flowers* Court also focused on the prosecution's stated reasons for the strike, holding:

> To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. *But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling*. So it is here.

Flowers, 139 S. Ct. at 2250 (emphasis added).

In sum, Supreme Court precedent has developed and evolved over the years since slavery was abolished and the Fourteenth Amendment was ratified, has done so with history in mind, and, increasingly, the Court has recognized that the protections in place must be enhanced to be effective.

E. Iowa Precedent Follows *Batson v. Kentucky*

The Iowa Supreme Court has applied *Batson v. Kentucky* in several cases, following the burden shifting analysis used in *Batson* to consider race-based challenges to peremptory strikes. *Veal*, 930 N.W.2d at 332 (affirming denial of *Batson* challenge where prosecutor stated he struck potential juror because she was the daughter of a criminal defendant he had prosecuted); *State v. Mootz*, 808 N.W.2d 207, 219-21 (Iowa 2012) (reversing conviction of criminal defendant when prosecutor made *Batson* challenge but defense counsel offered race-neutral reasons related to the facts of that case when

striking Hispanic juror); *State v. Griffin*, 564 N.W.2d 370, 375-76 (1997) (upholding trial court's denial of *Batson* challenge where prosecutor offered legitimate, trial-related non-discriminatory reasons for strikes of two black jurors, namely, that they had both sat on prior juries that came back with lesser included offenses); *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990) (affirming denial of *Batson* challenge in a criminal case where there was no reason provided for the challenge other than that sole black juror was struck and where prosecutor offered legitimate reasons for the strike, including that the juror had worked on a board with defense counsel); *see also Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 207 (Iowa Ct. App. 2006) (upholding denial of *Batson* challenge where attorney asserted two reasons for a strike, and one of the reasons he offered was discriminatory, but the other reason was not, and where he struck other jurors for the same, non-discriminatory reason).

While these cases offer insight to Iowa's application of *Batson*, none offers a helpful parallel to the facts of the present case, where the defense counsel's asserted lack of rapport with the struck juror was the primary reason offered to support the strike. Moreover, none explored the metes and bounds of a *Baston* challenge under the Iowa constitution. As held by Justice Appel in his concurring opinion in *Veal*, "[T]oday, scholars believe we need to move beyond *Batson* in advancing the notion of 'equality before

the law' for African-Americans." *Veal*, 930 N.W. 2d at 344 (Appel, J., concurring). This Court should not only reverse this case based on *Batson* and progeny, but in the alternative, it should also move "beyond *Batson*."

F. The Iowa Constitution Demands Jury Selection Free of Race (or Other Distinct Class) Discrimination

Plaintiff raised her challenge to the discriminatory strike under both the United States and Iowa constitutions. (TT v. II, p. 51, l. 10-15). Relevant sections of Iowa's constitution include rights of persons, equal protection (uniform laws), and due process (right of trial by jury – due process of law). *See* Iowa Const. art. 1, §§ 1, 6, 9. For criminal cases, article 1, Section 10 is also relevant (rights of persons accused). Iowa Const. art. 1, § 10.

As recent precedent demonstrates, Iowa has applied its constitutional protections more liberally than analogous United States Supreme Court precedent, for example, by permitting challenges to "run-of-the mill" jury pool selection processes. *State v. Lilly* (*Lilly* II), No. 20-0617, 2022 Iowa Sup. LEXIS 11, at * 7, (Iowa Feb. 4, 2022) ("We thus will analyze Lilly's argument based on source list deficiencies under the Iowa Constitution's separate, unconstrained analysis"); *see also State v. Lilly* (*Lilly I*), 930 N.W.2d 293, 312 (Iowa 2019) (Appel, J., concurring) ("Our opinion engages in this important change under article I, section 10 of the Iowa Constitution.

This is entirely appropriate. Indeed, state court decisions generally have been leaders, and not followers, in efforts to ensure the right to a fair and impartial jury.").

As it has done with fair cross section cases, and perhaps even more important, this Court should go "beyond *Batson*." But the real question that arises is, how? There are some who have argued for eradication of peremptory strikes entirely, beginning with Justice Marshall in the *Batson* opinion itself. *Batson*, 476 U.S. at 102; *see also Veal*, 930 N.W.2d at 340-341, (Cady, J., and Wiggins, J., concurring). This debate must be had, but it is not Plaintiff's suggestion to do so today.

Justice Appel's concurrence in *Veal* provided specific guidance as to methods of adding "teeth" to *Batson*, including by surveying the law and Rules of other states that have done so and recommending:

> For last minority jurors, I think we should require at this stage that the prosecutor provide a specific challenge related to the facts of the case. That amounts to *Batson* with teeth on step two of the traditional analysis. Then, in step three, as under the Washington approach, the district court should objectively determine whether the asserted reason was in fact race neutral or whether race may have played a role in the strike . . . If the district court objectively determines that the reason asserted for the strike is race neutral, the district court should then objectively weigh the prosecution's racially neutral interest in eliminating the juror against the defendant's interest in a jury composed of a fair cross section of the community.

Veal, 930 N.W.2d at 361-62 (Appeal, J., concurring).

Plaintiff lauds this approach as adding teeth to *Batson* and argues for this approach, any of the others discussed within Justice Appeal's *Veal* concurrence, or others that similarly add teeth to *Batson*. While the above test would indeed apply in this case where the challenge applied to the one and only (and therefore last) minority juror, the test in the *Veal* concurrence addressed only what should occur when the peremptory strike is of the *last* minority juror. If statistics like those set forth in *Flowers* are to be avoided, and if the evidence is correct that two or more black jurors makes more of a difference on trial outcomes than only one, *Batson* should be given teeth regardless how many jurors of color are left. Further, the touchstone of any analysis with teeth is requiring reasons for a strike that are objective. One means of inserting additional objectivity is to require that at step two of the three-part *Batson* test, the striking party provide as a reason something both trial-related (*i.e.* not the presence of facial hair) and something related to the facts of the case (*i.e.* not rapport or lack thereof with counsel).

Plaintiff also suggests that when applying *Batson*, as when addressing a summary judgment motion, the Court should review the record (or in real-time the evidence supporting the strike) in the light most favorable to the party challenging the strike. That nudge, albeit a small one, will, in cases seemingly made difficult to resolve by the various race-neutral explanations

given by counsel for a particular *Batson* challenge, offer more meaningful analysis. It will also remove some of the stigma, likely impactful in this case, of the trial judge being asked to determine that one of the attorneys appearing before him or her, who made a particular strike, is acting in a "discriminatory" manner. The same analysis should thereafter apply on appeal.

The facts of this case compel reversal under *Batson*. However, and if this Court disagrees, going "beyond *Batson*" is essential to protecting against race discrimination in jury selection, and this Court should hold the strike unconstitutional under Iowa's constitution and order a new trial.

G. The Defendants' Peremptory Strike of Juror 13—Defendants' Proffered Reasons for the Strike were False, Subjective, Changing, and Together Constituted Pretext

The Supreme Court has made clear that courts must evaluate claims of discriminatory preemptory challenges in light of "all of the circumstances that bear upon the issue of racial animosity." *Foster*, 578 U.S. at 501.

In this case, that analysis begins on the record just prior to jury selection, and prior to the panel being brought into the courtroom. Defense counsel made an oral motion to the judge as to whether one of Plaintiff's primary, relevant pieces of evidence, Defendant Johnson's use of the full "n" word in her question asked to Plaintiff (black) and Daniel (biracial), could be

withheld from the jury on the basis that such comment was "prejudicial." (TT v. I, p. 3, l. 7 – p. 4, l. 6). This argument was summarily overruled by the trial court. *Id.* However, it demonstrated defense counsel's state of mind just prior to trial.

Next, when Plaintiff made her *Batson* challenge, defense counsel offered the following reasons for the strike:

(1) Because he was a manager and had not had a complaint filed against him. (TT v. II., p. 52, l. 10-12).

(2) Because she felt she did not have a good rapport with him. (TT v. II, p. 52, l. 12-13). This was later repeated as her final reason. (TT v. II, p. 54, l. 18-23).

(3) Because of his answer that "he said there must be something to it. We wouldn't be here if there wasn't something to it." (TT v. II, p. 52, l. 14-16).

(4) They were going to strike other managers, but Plaintiff struck them first. (TT v. II, p. 52, l. 17-22).

Each of Defendants' proffered reasons failed to support the strike.

1. Pretextual Reason # 1: Juror 13 was a manager and had not had a complaint filed against him

Defendants argued that counsel struck Juror 13 because he was a manager who could not recall receiving any workplace complaints. (TT v. II, p. 32, l. 9-23).

However, on the first panel of twelve jurors questioned, two jurors with management experience were individually asked about receiving

complaints. Juror 4 was asked if he had any complaints filed against him as a manager, to which he said "no." (TT v. I, p. 53, l. 11-13). Juror 4 was not asked follow-up questions, nor identified as a potential strike by Defendants. Juror 4 was Plaintiff's second strike. Juror 5, also in management at an insurance company, was asked if she had had complaints made against her, to which she said "no." (TT v. I, p. 53, l. 17- p. 54, l. 2). Juror 5 was not struck by Defendants or the Plaintiff and was on the jury.

The first set of jurors were also asked generally if anybody in the workplace had a complaint filed against them, and no one responded affirmatively. (TT v. I. p. 58, l. 5-8). There were jurors in this set with management experience who therefore had no complaints filed against them, and who were not even asked individually about the lack of complaints. Juror 12 was a department manager. (TT v. I, p. 57, l. 2-7). She was not asked about complaints against her individually, was not struck by the Defendants or Plaintiff and was on the jury. Juror 8 had experience as a manager, but was not individually asked questions about complaints against her. (TT v. I, p. 55, l. 12-21). Defendants did not strike her. She was initially struck by Plaintiff's fourth strike, but was added back to the jury by agreement of counsel after Juror 2 was unexpectedly released for health reasons.

The second set of jurors questioned contained four jurors. They were all asked if anybody had a workplace complaint filed against them, and no one responded affirmatively. (TT v.II, p. 32, l. 9 – 23). Specifically in this set of four jurors, other than Juror 13, Juror 14 had managed Walgreens for 10 years, with no complaints against him. (TT v. II, p. 23, l. 10-22). He was not struck by Defendants and was on the jury.

In *Kiray*, when deciding that the party opposing the strike had not met its burden in showing discriminatory intent, the court noted that the attorney who made the strike had not only identified a neutral explanation, but had also identified white jurors that he had struck for the same reasons. 716 N.W.2d at 207. Here, the court followed the process set forth in *Batson*, but failed to identify that there was no such evidence of race neutrality as explained in *Kiray*. No other jurors were struck for being managers who had not faced employee complaints. No other jurors with managerial experience were "struck first by Plaintiff."

Because this reason for the strike was demonstrably pretextual, it should be rejected by this court as a valid race-neutral reason for the strike of Juror 13.

2. Pretextual Reason #2: Defense counsel did not feel she had a good "rapport" with Juror 13

Defendants next relied on defense counsel's alleged lack of rapport with Juror 13. (Tr. v. II, p. 52, l. 6-15). Defense counsel said: "He seemed at points that we did not have a good rapport once I was the one questioning him." (*Id.*) The interaction relied upon by Defendants to claim lack of rapport is as follows:

> MS. GRAHAM: The last thing I just want to talk to you a little bit about is that, you know, one of the things that the plaintiff is going to be asking for is emotional distress, in this case emotional distress damages. Again, the judge is going to be the one that's going to tell you the burden of proof, and oftentimes in cases like this there is a whole bunch of evidence on one thing that, you know, an attorney might decide to put forward, and it's not a trick, it's a trial tactic. And you might think, wow, there's a lot of evidence on that, so it must be important. And I want to make sure that all of you are not going to be swayed. Just because there's a lot of it doesn't necessarily mean that it's important. So are you all able to set aside that, which we're all inclined to do, which is, gee, there's a lot of this, it must be important. You might find in this case when you're weighing the facts that it was the smallest piece of evidence that was relevant. Is everybody able to understand that concept, and would anybody have a problem following that, or would that be difficult for you? Think everybody could do that?
>
> Seeing heads nodding.
>
> How about you, [Juror 13], you think you could do that?

> JUROR [13]: I don't understand what you're asking.
>
> MS. GRAHAM: Yeah. So I'm asking if there's a whole -- if an attorney just makes a tactic or a trial strategy to put in a whole bunch of information, you know, again, you might think, well, just on the volume that might be important. And I want to make sure you can look at, okay, there's a whole volume of evidence, but I can still consider just the smallest piece of evidence just as important and that you're going to weigh them equally against each other. Not just that you're going to find, oh, there's a whole bunch of it, so that's why I think it's important.
>
> JUROR [13]: I would say yes, you have to weigh it out. You're basically asking just because it's a lot doesn't mean that.
>
> MS. GRAHAM: Exactly.
>
> JUROR BROWN: If you just asked that, I would have better understood it.
>
> MS. GRAHAM: Sorry. Next time I will have you. That was a much better way out of putting it.

(TT v. II, p. 39, l. 18 – p. 41, l. 12).

It was only Juror 13 who defense counsel called upon to follow-up on her list of questions. And, he did not argue with her, he simply did not understand her lengthy question, and what she was asking him to agree with. In the end, and when he did understand her, he agreed with her.

By the time this exchange had happened, Juror 13 had also asked Plaintiff's counsel to repeat herself at least twice. (TT v. II, p. 13, l. 25; p.

16, l. 22-23). And so, asking counsel to repeat a question, or to clarify what was meant, was by no means uncommon for Juror 13, and it did not signify a problem with "rapport" between Juror 13 and either counsel. Indeed, other jurors asked defense counsel to explain what she meant, or to repeat her long questions, but those jurors were not stricken. (TT v. I, p. 59, l. 12 - p. 64, l. 7). Other jurors also asked Plaintiff's counsel to repeat questions. (TT v. II, p. 18, l. 5-6). And, jurors even sometimes told the judge they didn't understand his questions, yet they were not stricken by defense counsel. (TT v. I, p. 18, l. 23).

Further, in a *Batson* situation, the objective justifications are the ones most persuasive. In reversing and remanding a case where a *Batson* challenge should have been sustained, the Missouri Court explained,

> While prosecutors are free to use "horse sense" and "play hunches" in exercising peremptory challenges so long as the factors they rely on are race-neutral, objective justifications for exercising peremptory strikes against minority venire persons are the most persuasive. [Citations omitted].
>
> … The prosecutor never distinguishes the white juror/venireperson from the stricken black venireperson. This failure coupled with the low degree of logical relevance, in a criminal case, of class-action involvement left the evidence of pretext unrefuted.

State v. Marlowe, 89 S.W.3d 464, 470 (Mo. 2002).

Explanations of "rapport" or "comfort" with a juror have been found by other courts to be insufficient to survive a *Batson* challenge. *See George v. State*, 263 Ga. App. 541, 547 (Ga. Ct. App. 2003) ("His final explanation for striking juror 12, that he could not establish a rapport with him, is also inadequate. The prosecutor's level of comfort or rapport with the juror is too vague, subjective, nonspecific, and noncase-related to meet the requirements of *Batson.*"); *see also State v. Weatherspoon*, 514 N.W.2d 266, 269 (Minn. Ct. App. 1994) ("[M]ore subjective reasons for striking jurors, such as a juror's rapport with counsel, body language, or tone of voice – in short, reasons reflecting an attorney's intuition – are less subject to verification and may alert a trial court to the attorney's unconscious or conscious discrimination.). So too here. The strike cannot be supported by defense counsel's subjective belief, detached from the record, that there was an alleged lack of rapport.

3. Pretextual Reason #3: Because of his answer that "he said there must be something to it."

Within their resistance to Plaintiff's new trial motion, unlike during arguments on the record, Defendants argued the "main" reason for the strike was Juror 13's response to the multi-part question that he had requested clarification about, a compound question which potentially asked a number of different questions at the same time.

Defense counsel asked a follow-up question only to Juror 13, calling him by name, and asking "you agree with that?" (TT v. II, p. 33, l. 2-15). Juror 13 stated, "yes" he agreed. (TT v. II, p. 33, l. 13). He then explained. "But, I mean, something happened. But what it is, I guess you are trying to figure out." (TT v. II, p. 33, l. 13-15). Defendants claimed that it was this response that led them to question Juror 13's "ability to hear this case–or any case–with an open mind." (Def. Res. Br. p. 3).

However, Defendants leave out the subsequent exchange, where counsel actually *agreed* with Juror 13 that "absolutely something happened." (TT v. II p. 33, l. 16-17). The exchange continued, as follows:

> MS. GRAHAM: Okay. And, again, absolutely something happened, and we're here because plaintiff is going to tell their side of the story and defendants are going to tell their side of the story. But I just want to make sure that you don't already feel like, well, something is to this such that you already feel in favor of one party just because we're here? Okay. So you can start us out on an equal playing field?
>
> JUROR [13]: (The juror nodded his head.)
>
> MS. GRAHAM: Yes?
>
> JUROR [13]: Yes.
>
> MS. GRAHAM: Okay. Okay. Great.

(TT v. II p. 33, l. 16 – p. 34, l. 2).

Later during Defendants' voir dire, Juror 13 again agreed that he could wait to hear their side. (TT v. II, p. 44, l. 1-2).

Defendants' reliance upon this exchange in which Juror 13 mentioned that "something happened" but then agreed that he could place defendants on an even playing field, demonstrates no real, legitimate reason to excuse Juror 13. What it does show, however, was Defense counsel's focus on him, and also her disparate questioning and singling out of Juror 13. If anything, this exchange between the two is evidence that supports the *Batson* challenge. *Miller-El*, 545 U.S. at 255.

Further, defense counsel's disparate questioning of Juror 13 was not the only disparate trial tactic used toward persons of color. Defense counsel objected approximately 32 times within the trial perpetuation deposition of Daniel, which deposition lasted approximately two hours, with breaks. Defense counsel did not object similarly within any of the other trial testimony. Because Daniel was the only other African-American employee who complained to Valley administration (other than Plaintiff), his testimony was crucial to Plaintiff's case, and was substantially affected by the volume of (mostly) baseless objections made by defense counsel. Taken together, the above trial circumstances support Plaintiff's *Batson* challenge and undermine defense counsel's reliance upon Juror 13's answer that: "But,

I mean, something happened. But what it is, I guess you are trying to figure out."

4. Pretextual Reason #4: Because, as defense counsel claimed, "we had other managers that we would have struck, but [plaintiff] ended up striking them before us"

Defendants further claim that they "had other managers that we would have struck, but [plaintiff] ended up striking them before us." (TT v. II, p. 52, l. 18-20). But the fact remains that they did not actually strike any other managers, much less any managers who had no complaints filed against them, as argued above. Plaintiff also did not strike the unidentified "them" before Defendant did. This explanation makes no sense under the circumstances.

First, as defense counsel initially conceded, they liked jurors with supervisory experience. (TT v. II, p. 52, l. 7-10). And it was only "the question about whether anyone complained against him, he had no experience with that." (TT v. II, p. 52, l. 10-12). However, Defendants also failed to question the panel uniformly to discover whether additional managers were present, and if so, if they had complaints filed against them.

Defendants struck four jurors. Their first strike was Juror 7, who owned an in-home day care and had no management experience. (TT v. I, p.

34, l. 17-23). Juror 13 was Defendant's second strike. Juror 1 was Defendant's third strike, and she worked in the clerk's office with no management experience. (TT v. I, p. 22, l. 23-25). Juror 3 was their fourth strike, and had been asked no questions of substance by defense counsel, including what job she had or whether she had management experience.[3]

Plaintiff, on the other hand, struck Juror 9 with her first strike, an oncology nurse who was not a supervisor. Plaintiff's second strike was Juror 4. While he did have management experience, he also used to be David Maxwell's boss (Defendant's witness) and Alyssa Underfer's neighbor (another potential defense witness). (TT v. II, p. 27). Defendants never identified wanting to strike Juror 4.

Plaintiff's third strike was Juror 15, a Mercy Pediatric Clinic nurse who was not in management and did not handle employee complaints. (TT v. II, p. 19., l. 21-23). That left Juror 8, Plaintiff's fourth and final strike. Defendant claimed at trial that they waited to see if Plaintiff would strike her first. (TT v. I p. 54, l. 6 – 12). However, Defendants did not identify what exactly it was about Juror 8 that they objected to. Interestingly, however,

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[3] After trial concluded, upon review of the record, it appears that there was also no basis in the record for Defendants to strike Juror 3. The Panel BioForm Report indicates that Juror 3, while white herself, was likely in a biracial marriage, due to her spouse's name. No record was made about this strike, however.

Juror 8 made comments about using damages to punish defendants. (TT v. I, p. 62, l. 11- p. 63, l. 6).

Under the analysis set forth in *Batson* and progeny, Defendants are unable to show that they struck any other juror with management experience, and their argument that they "would have," bears no support in the record. This reason also fails as a legitimate, race-neutral reason to support the strike.

H. Defendants' Reasons for Striking Juror 13 Changed Over Time—Classic Evidence of Pretext

In addition, and constituting additional evidence of pretext, by the time Defendants filed their brief in response to Plaintiff's motion for a new trial, Defendants' attorneys added reasons not previously expressed for the peremptory strike:

(5) That Juror 13's perspective about wanting people to be honest during investigations was a "concern." (Def. Res. Br. p. 5).

(6) That Juror 13 knew Judge Farrell. (Def. Res. Br. p. 5).

These newly offered reasons should be, in and of themselves, considered as evidence of pretext along the lines of the explanations in *Miller-El*, which "reek[] of afterthought." 545 U.S. at 212. However, even if considered on their merits, they should be rejected.

First, Defendants claimed that Juror 13 was struck because he "stated belief that people are always honest." This is patently false. Juror 13 did not say he believed people were always honest and instead said, in the context of being asked about employee investigations: "Well, I just was always very adamant that people were honest, and just getting to where the truth was and looking at how what the truth ended up being fell within the policy of the department. And if someone made a mistake and came in and admitted that they made a mistake, you would be more apt to look at the situation maybe a little differently than if someone were to lie about what happened." (TT. v. II, p. 15, l. 10-21). In addition, this answer was again indicative of a belief held by other jurors who were not struck. Indeed, Juror 5 said honesty was important in management. (TT v. I, p. 54, l. 24 – p. 55, l. 85). Juror 5 was not struck by Defendants and was on the jury.

And next, Defendants also claim, post-trial, that they struck Juror 13 because "it appeared to defense counsel that Juror No. 13 knew Judge Farrell—both from his comments on the record and by demeanor." (Def. Res. Br. p. 5, n. 4). Again, Defendants stretch the facts. Juror 13 did not say he knew the judge. He raised his hand when Judge Farrell asked if anyone knew him, and said "possibly" he had contact with him in the past. Judge Farrell himself explained that the two of them had seen each others' names

before, and they "may have had some connection" as a result. (TT v. II, p. 11, l. 22 – p. 12, l. 10). Defendants made no further inquiry into this issue at trial, nor any subsequent argument, that would explain how Juror 13's incidental recognition of the trial judge would have had any effect on his status as a potential juror.

Neither of Defendants' afterthought explanations for striking Juror 13 is sufficient to support the strike in this case.

I. Bias in the Questions Asked of Juror 13

At the time of trial, Plaintiff also argued that there was bias in the way questions were asked. (TT v. II, p. 52, l. 24 – p. 53, l. 12). The Court stated that he did not think there was such a bias, and that the questions were fairly asked of all the jury members. (TT v. II, p. 55, l. 2-9). This was not borne out by the record. For example, defense counsel asked a question about the use of trial tactics to both panels. But, she didn't single anyone out any one juror in first set of jurors regarding this question. (TT v. I. pp. 65-67). When she asked the same question to the second panel, she did not ask any juror about it, except Juror 13. (TT v. II p. 33, l. 2-12). And, as mentioned above, only Juror 13 was asked about whether he agreed with the multi-part, confusing questions about equal footing/why we are here.

Further, as argued above, defense counsel did not ask all jurors about their management, let alone job experience.

Ultimately, Defendants offered no race-neutral, legitimate reasons for striking Juror 13 that are supported by the record. The strike therefore violated Plaintiff's rights under the United States and Iowa constitutions and judgment should be reversed and this case remanded for a new trial.

II. THE COURT ERRED IN DIRECTING OUT INDIVIDUAL LIABILITY, AND PUNITIVE DAMAGES LIABILITY, FOR DESIRA JOHNSON

A. STANDARD OF REVIEW

Rulings on motions for directed verdict are reviewed for correction of errors at law. *Yates v. Iowa W. Racing Ass'n,* 721 N.W.2d 762, 768 (Iowa 2006). The evidence is viewed in the light most favorable to the nonmoving party so as to determine whether the evidence generated a fact question for the jury. *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011).

B. ARGUMENT

Plaintiff pleaded that Defendant Johnson was individually liable both under the Iowa Civil Rights Act and with respect to her claim for Tortious Discharge Against Public Policy and sought punitive damages with respect to the latter count. On Defendant's motion for directed verdict, the Court dismissed both such claims against Defendant Johnson, and also dismissed

any claim for punitive damages on the basis that the tortious discharge claim, which had identified Iowa Code § 280.28 as the source of public policy "is a claim that has not been recognized." (TT v. VIII, p. 109 l. 20 – p. 111, l. 21). The Court reiterated this ruling in its denial of Plaintiff's motion for new trial. (APP. 191; Ruling on Motion for New Trial, p. 21).

Plaintiff's argument that Defendant Johnson was properly individually liable for her Chapter 216 claims is two-fold. First, Defendant Johnson was in fact a supervisory employee as Plaintiff has always claimed, and thus could be held liable, individually, for harassment. *See Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999). Trial evidence proved that Defendant Johnson "took over" the Simpson classroom as of early April, 2019, providing lesson plans and materials, made frequent visits to "observe," gave instructions to Plaintiff through the long-term substitute that Plaintiff was expected to follow, and materially changed Plaintiff's job responsibilities such that she was not permitted to work with her student in the manner she had in the past—thus altering the terms and conditions of Plaintiff's employment. (TT v. IV, p. 102 l. 3 – p. 119, l. 14); (Yochum Pres. Dep., Court Ex. 1B, p. 15, l. 6 – p. 19, l. 21). Therefore, Johnson was in fact a supervisory employee.

However, and even if Johnson were not a "supervisor" of Plaintiff, individual liability for harassment and constructive discharge based on hostile work environment harassment can exist. A harasser need not have the authority to hire and fire to create a hostile work environment. *See Rumsey v. Woodgrain Millwork, Inc.,* 962 N.W.2d 9, 33-36 (Iowa 2021) ("We reject the defendants' attempt to limit individual liability as to supervisors. The 'any person' language is not limited by title. While a supervisor may have the ability to alter the terms of a subordinate's employment, that is neither sufficient nor necessary to create liability . . . Rather, it is the individual's ability to effectuate the adverse employment action at issue that can subject them to personal liability.").

Rumsey, which provided further clarification regarding the law on individual liability under Chapter 216, was decided after judgment was entered in this matter, but prior to the court denying Plaintiff's motion for a new trial. Plaintiff brought *Rumsey* to the trial court's attention via a supplemental filing, on July 8, 2021. (APP. 168-170; Pl. Mot. To Supp. Motion for New Tr.). The trial court addressed *Rumsey* in its Ruling denying the Motion For New Trial, but refused to apply its holding to the facts in this particular case. (App. 190-191; Ruling Denying Motion for New Trial, p. 20-21). *Rumsey* is applicable and supports Plaintiff's argument

that Defendant Johnson could be held individually liable for race-based harassment of Plaintiff.

Plaintiff's tortious discharge claim against Defendant Johnson was also improperly dismissed on directed verdict. As set forth in *Jasper v. Nizam*, "[o]ur tort laws should be applied to encourage responsible behavior for all individuals, not insulate unwanted conduct by individuals based on the legal fiction of a corporation as an independent entity." *Jasper v. Nizam*, 764 N.W.2d 751, 776 (Iowa 2009). The purpose of the tort will clearly be better served if corporate decision makers are held to the same standard of responsibility imposed on corporate actors for other tortious conduct." *Id.*

Further, "[t]he tort of wrongful discharge is clearly influenced by fcontract law because the tort involves the termination of an employment relationship between an employee and employer. *However, that influence does not control the scope of liability under the tort.* The tort of wrongful discharge does not impose liability for the discharge from employment, but the wrongful reasons motivating the discharge." *Id.* (emphasis added).

In this case, both the wrongful activity and wrongful motivations behind that activity (harassing behavior) were held by Johnson. (TT v. IV, p. 102 l. 3 – p. 119, l. 14); (Yochum Pres. Dep., Court Ex. 1B, p. 15, l. 6 – p. 19, l. 21).

Defendants also relied upon *Jasper's* holding in resisting punitive damages that: "[T]his is the first time we have specifically recognized a cause of action for wrongful discharge arising from the refusal of the employee to violate administrative rules." *Id.* at 774. But, this case is distinguishable. In contrast to *Jasper*, there was an existing, statutorily-based, Iowa public policy at issue. The Supreme Court has recognized Iowa statutes as a potential basis for wrongful termination claims since at least the case of *Springer v. Weeks & Leo Co.,* 429 N.W.2d 558, 560 (Iowa 1988). Therefore, and unlike *Jasper*, there was no new source of Iowa public policy in this case which would prohibit an award of punitive damages.

Finally, there is no question that this error prejudiced Plaintiff. During jury deliberations, the jury posed one question to the trial judge, which was answered after consultation with counsel and in writing. The jury asked, "Jury requests clarification of the term "Defendant" vs. the word "District." Instruction #26 and #27 seem to use these words interchangeably. How are we supposed to treat the different wordings?" (APP. 120, Note to Jury). Because individual liability had already been directed out of the case by this point, the judge responded that it was a "typographical error" and that the term should be "the District" in all instances. *Id.* This demonstrated that the jury was interested in the question

as to whether there was another defendant other than "the District" during their deliberations.

Plaintiff is entitled to a new trial in which Defendant Johnson remains potentially liable for both Plaintiff's 216 claims, for her tortious discharge tort claim, and for potential punitive damages liability.

III. THE COURT MADE PREJUDICIAL EVIDENTIARY ERRORS WHICH REQUIRE A NEW TRIAL

A. Standard of Review

The Court reviews evidentiary issues for an abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535 (Iowa 2018). "A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable." *Id.* (citations omitted). A ground is unreasonable or untenable when it is 'based on an erroneous application of the law.' *Id.* (citations omitted). Reversal is required for the erroneous admission of evidence if prejudice results. *State v. Rodriquez*, 636 N.W.2d 234, 244 (Iowa 2001).

B. The Court Improperly Admitted, Over Plaintiff's Objection, the Parties' Settlement Correspondence

Defendants identified settlement correspondence between the parties as trial exhibits. (APP. 261-265; Def. Tr. Exs. B-11 and B-12, as amended and redacted). Plaintiff moved in *limine* to exclude the settlement materials. In its ruling on pre-trial motions, the Court ordered that these two letters

were admissible. (APP. 42; Ruling on Pretrial Motions, p. 7). At trial, when Defendants sought to admit the letters and Plaintiff again objected, the court held that they should be admitted with redactions. (TT v. IV p. 164, l. 17-20). Defendants' Exhibit B-11 was admitted. (TT v. IV, p. 175, l. 18-23). Further, and although redacted, it still contained a sentence referencing settlement, "We are amenable to negotiating between the lawyers or engaging in a mediation if that would be helpful." (APP. 261-263; Def. Tr. Ex. B-11). B-12 was also admitted. (TT v. IV, p. 177, l. 7-11). Again, and although redacted, it contained references to settlement, including, "In this case, the District can see no legal basis upon which it owes Ms. Valdez payment," and "If Ms. Valdez chooses to pursue legal action against the District regarding this matter, then the District will vigorously defend itself." (APP. 264-265; Def. Tr. Ex. B-12). With the additional context within these letters that was not redacted, it was clear they discussed settlement.

Iowa Rule of Evidence 5.408 does not allow compromise offers or negotiations to be admissible. *See* Iowa R. Evid. 5.408(a)(1); *see also Gail v. Clark*, 410 N.W.2d 662, 672 (Iowa 1987); *State v. Keys*, 2017 Iowa App. LEXIS 485, 901 N.W.2d 837, at *8 (Iowa Ct. App. 2017) ("Under rule 5.408, the entire conversation was inadmissible if it was part of a compromise or negotiation"); *Northeast Iowa Co-op v. Lindaman*, 2014

Iowa App. LEXIS 15, 843 N.W.2d 477, at *21 (Iowa Ct. App. 2014) (an offer to confess judgment that occurs during a settlement meeting makes the confession inadmissible).

The court allowed two separate defense exhibits to be admitted which both constituted classic settlement correspondence and stated the redacted letters were offered to "rebut an allegation made by Plaintiff in support of her constructive discharge claim." (Ruling on Plaintiff's Motion for New Trial p. 17). Further, the letters were used as the case law holds is impermissible—to rebut Plaintiff's claims. *See Pierce v. F.R. Tripler & Co.,* 955 F.2d 820, 827-827 (2d Cir. 1992). And, as the *Pierce* case predicted could be the case if such correspondence is made admissible, Defendants attempted to make Plaintiff's counsel a witness in this case. (APP. 33-35; Def. Witness List) (listing Megan Flynn).

Finally, Defendants' true purpose in seeking the admission of these exhibits was in reality to accuse Plaintiff of a "set up", in essence, a sham lawsuit—which is exactly why the Rules provide for exclusion of such evidence. Throughout trial, and used with most impact in closing argument (with accompanying slides), counsel presented or referred to Exhibits B-11 and B-12 and stated that Plaintiff was "threatening litigation" making a "demand" or that Plaintiff was engineering a "set up." (TT v. IV p. 178 l. 18-

22); (TT v. IV p 176, l. 18-24); (TT v. II p. 90 l. 17-18); (TT v. IX p. 86 l. 25); (TT v. IX, p. 87 l. 1-6).

The letters admitted as B-11 and B-12 are classic settlement correspondence, that, even as redacted, were admitted contrary to Rule 5.408. Their admission resulted in prejudice to Plaintiff and alone warrants a new trial.

C. The Court Erroneously Excluded Plaintiff's Exhibit 6

The Court denied Plaintiff's attempts to admit Plaintiff's Exhibit 6, the notes of Jesse Johnston, a human resources employee who passed away prior to providing any testimony for the case. (TT v. V, p. 29, l. 8 – p. 32, l. 13; App. 203, Pl. Tr. Ex. 6; App. 88, Pl.'s Offer of Proof on Exhibit 6). Exhibit 6 had been produced by Defendants in discovery, at WDCS-DV000166-170. (App. 220, Pl.'s Ex. 115.) WDCS-DV000166-170 is what was marked as Plaintiff's Exhibit 6. (App. 203, Pl.'s Tr. Ex. 6); (App. 220, Pl.'s Tr. Ex. 115). The Defendants cited to Exhibit 6 in three of their responses to Requests for Production of Documents. (App. 220Pl.'s Tr. Ex. 115). Defendants also submitted answer to Plaintiff's Interrogatory number 17 identifying Jesse Johnston and Carol Seid as the only two individuals who were involved in the complaint investigation process. (App. 247, Pl.s Tr. Ex. 116). This Interrogatory Answer also identified Jesse Johnston as the

"Director of Human Resources" who was "the employee to oversee the complaints," with Dr. Carol Seid as the "Associate Superintendent of Human Resources" who "jointly oversees the database" that housed information about the complaints. (App. 247, Pl's Tr. Ex. 116.)

These notes were essential to proof of Plaintiff's case because they recounted a meeting in which Plaintiff complained to Johnston, verbally, and provided supplemental information to her first written complaint to Valley administration. (App. 88 Pl.'s Offer of Proof on Exhibit 6), Therefore, Exhibit 6 was offered, not for its truth, but instead to demonstrate that the District was on notice as to the issues Plaintiff discussed with Ms. Johnston.

Exhibit 6 was a panacea of written proof for Plaintiff. It contained notes of Plaintiff's complaints about Johnson's treatment of the students, of her complaint of a hostile work environment based on race, and also notes of Johnston's interviews with not only Plaintiff, but also Defendant Johnson and Bryson. (App. 203, Pl. Tr. Ex. 6; App. 88, Pl.'s Offer of Proof on Exhibit 6). The notes regarding Johnston's interviews with Johnson and Bryson support Plaintiff's argument that both women knew about her complaints and knew that she was the complaining party because the information they were asked about pointed directly to information known only by Plaintiff.

Without Exhibit 6, Defendants were allowed to unfairly argue at trial that "we just don't know" what Jesse Johnston was told by Valdez about the substance of her complaints. Defendants were allowed to claim in closing that plaintiff was "apparently targeting [Johnston] because, again, she is deceased." (TT, v. IX, p. 82, l. 18-20). Defendants claimed, "they're saying this person did this but now that person is deceased." (TT, v. IX, p. 84, l. 20-21.)

Defendants were able to unfairly argue that Valdez never complained of "bullying or harassment" to students. (TT, v. IX, p. 81, l. 19-24). The District was also able to unfairly argue that the administration did not realize that Plaintiff was making a hostile environment allegation based on race (TT, v. IX, p. 95, l. 7-10), which Exhibit 6 helps refute. And, Defendants were able to continue with their charade throughout the trial that Johnson and Bryson didn't know it was Valdez who had filed a complaint about them with human resources until the final report was issued, when Exhibit 6 made it clear that they knew all along who made the complaint. (TT v. IX, p. 86, l. 7-10; App. 203, Pl.'s Tr. Ex. 6).

Had Plaintiff been able to admit Exhibit 6, Plaintiff would have been able to conclusively show the jury specific items Johnston (and therefore by default, the District), had discovered about Valdez's allegations during the

investigation. Exhibit 6 also demonstrates that Johnston, and thus the District, was on notice that Daniel would be able to provide evidence relevant to the complaint, and that he had taken sick days because of the stress. (APP. 206; Pl. Tr. Ex. 6, p. 4). Daniel, of course, had a pending complaint himself that was later founded for racially inappropriate language used towards himself and Valdez. This Exhibit links the two complaints.

Further, excluded Exhibit 6 goes directly to the elements of Tortious Discharge against Public Policy, which included element 3: "Plaintiff made a complaint of harassment and bullying of students to management or human resources;" and element 4: "Plaintiff's complaint was the determining factor in defendants' conduct that caused plaintiff to constructively discharge." (Final Jury Instruction Number 26.) As such, the exclusion of Exhibit 6 was highly prejudicial to the count of tortious discharge against public policy.

Instead of being able to affirmatively show what the District had been put on notice of regarding Valdez's complaints, however, Exhibit 6 was excluded and the jury had to wonder what it contained. It also allowed the Defendants to make inflammatory comments in closing that Plaintiff was "targeting" a "deceased woman" for the results of an investigation. (TT v. IX, p. 82, l. 19-20).

For all of these reasons, Plaintiff should receive a new trial where Exhibit 6 is admitted into evidence.

D. The Court Improperly Excluded Evidence that a Parent Complained Johnson Pinched Her Son, a Hispanic Level 3 Special Education Student

Pursuant to the trial court's ruling on motions in *limine*, Plaintiff made an offer of proof regarding a parent's complaint that her son, a Level 3 special education student named R.O., was pinched by Defendant Johnson. (TT v. VIII, p. 85, l. 6 – p. 88 l. 19). R.O.'s mother complained to Principal Maxwell, and he brought Johnson into the meeting with R.O.'s mother and asked Johnson if she did it. (TT v. VIII, p. 87, l. 1-10). Maxwell dismissed the allegations: "I know Des as a teacher and never had anything like this been – had she been accused of anything like this before. And it was so out of character that it just didn't make sense." (TT v. VIII, p. 89, l. 1-10). No report was prepared regarding the incident. (TT v. VIII, p. 87, l. 14-16). However, R.O. was eventually transferred out of Johnson's classroom at the request of his mother. (TT v. VIII, p. 87, l. 17 – 88 l. 16). And Maxwell agreed to check in on R.O. on a weekly basis, though he did not keep to that commitment. (*Id.*)

Further, R.O. was a student whom Plaintiff had observed Johnson mistreat and was also part of the basis for Plaintiff's complaints to Valley

administration about Johnson. (TT v. IV, p. 107 l. 1 – p. 109 l. 7); (TT v. IV p. 98, l. 6 – 104 l. 6), (APP. 198; Pl. Tr. Ex. 1, p. 2); (APP. 210; Pl. Tr. Ex. 7, p. 3). Nevertheless, and despite the fact that the same supervisor was involved in the alleged pinching activity, and that Plaintiff's complaints had involved Johnson's mistreatment of R.O. (very similar subject matter), and, as the trial court recognized, that the incident "may show racial animus," the trial court held such evidence should be excluded because it occurred after Valdez constructively discharged. (APP. 39; Ruling on Pretrial Motions, p. 4).

Case law related to proof of the discriminatory environment in which Plaintiff worked, and discriminatory animus through complaints of others, even if the complaint occurred after the time Plaintiff was employed, supports Plaintiff's position that evidence regarding the complaint of abuse to R.O. was admissible. *See Salami v. Von Maur, Inc.*, No. 12-0639, 2013 WL 3864537, at **7-8 (Iowa Court App. July 24, 2013); *Estes v. Dick Smith Ford, Inc.*, 86 F.2d 1097, 1104 (8th Cir. 1988), *abrogated on other grounds* by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *cited in Salami*, 2013 WL 3864537, at *7); *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155-56 (8th Cir. 1990); *Philipp v. ANR Freight Sys.*, 61 F.3d 669, 676-677 (8th Cir. 1995); *see also Pantoja v. Anton*, 129 Cal. Rptr. 3d 384, 405

(Cal. App. 5th 2011) (collecting cases and concluding trial court should have admitted evidence of sexual harassment against female employees other than plaintiff that occurred outside the plaintiff's presence and at times when plaintiff was not employed).

Evidence of the report of Johnson's pinching of R.O., and the District's reaction to that report further support Plaintiff's claim that her complaints of discrimination and harassment fell on deaf ears. Even when faced with a parent's complaint of physical harm to a student, the District did nothing.

While the Court did not expressly cite Rule 5.403 in excluding the pinching incident, this also may have been a basis for excluding evidence regarding the pinching complaint. This argument is misplaced. "All powerful evidence is prejudicial to one side. The key is whether the danger of *unfair* prejudice substantially outweighs the evidence's probative value. *State v. Buelow*, 951 N.W.2d 879, 889 (Iowa 2020) ("Courts should use Rule 5.403 sparingly, since it allows for relevant evidence to be excluded.") (emphasis added). There was no unfair prejudice in admitting evidence of the report of a parent complaint regarding abuse to R.O. by Johnson, and on the contrary, exclusion of this evidence prejudiced Plaintiff.

Conclusion

Plaintiff was a deprived of a fair trial before a jury of her peers. Plaintiff respectfully requests that this Court reverse the judgment rendered in defendants' favor and remand this case for a new trial.

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REQUEST FOR ORAL ARGUMENT

Comes now Appellant, by and through the undersigned attorneys, and requests that she have oral argument pursuant to Iowa Appellate Rule 6.903(2)(i).

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COST CERTIFICATE

I hereby certify that the costs of printing this brief were $0.00 because it was filed electronically.

/s/ Megan Flynn

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Iowa R. App. P. 6.903(1)(g) because it contains 13,716 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the typestyle requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 type.

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CERTIFICATE OF FILING

I, the undersigned attorney, hereby certify that I have cause to be filed electronically pursuant to Iowa Rule 16.1201 et. seq. this Appellant's Brief and Request for Oral Argument with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on the May 25, 2022.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on the 25th day of May, 2022, I caused to be served the attached Appellant's Proof Brief and Request for Oral Argument by Electronically filing with the Clerk of the Supreme Court for service to opposing parties pursuant to Iowa Rule 16.1201 et. seq. to the following persons:

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