IN THE SUPREME COURT OF IOWA
NO. 21-0859

REED DICKEY, MICHAEL DICKEY, and ANDREA DICKEY,

Plaintiffs-Appellants,

v.

JEREMY HOFF, JENNIE EDMUNDSON MEMORIAL HOSPITAL, METHODIST JENNIE EDMUNDSION HOSPITAL and LOESS HILLS BEHAVIORAL HEALTH, JEFF RUTLEDGE, THE SCHOOL DISTRICT OF LINCOLN, (a/k/a LINCOLN PUBLIC SCHOOLS), and EMILY GORMAN,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY
THE HONORABLE MICHAEL D. HOOPER

FINAL BRIEF OF DEFENDANTS-APPELLEES LANCASTER COUNTY SCHOOL DISTRICT 0001, a/k/a LINCOLN PUBLIC SCHOOLS AND JEFF RUTLEDGE

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US Law Network, Inc., *Statute of Limitations Quick Guide (During COVID-19 Pandemic)* (Dec. 2020)

ROUTING STATEMENT

The Iowa Supreme Court should retain this appeal. IOWA R. APP. P. 6.1001 provides that the Supreme Court shall retain the following types of cases: "(a) Cases presenting substantial constitutional questions as to the validity of a statute, ordinance, or court or administrative rule…" This appeal presents a substantial constitutional question related to the validity of the Court's Supervisory Orders issued in response to the COVID-19 pandemic. This issue is of broad public importance because the Court's decision in this litigation will affect the substantive rights and responsibilities of parties to other litigation currently before District Courts in the State of Iowa, as well as litigation that may come before the Courts in the near future.

STATEMENT OF THE CASE

Plaintiffs' Statement of the Case omits information that will affect the Court's review of this case. On September 23, 2020—approximately two and a half months before filing the instant action (and months after the subject Supervisory Orders were issued)—Plaintiff Reed Dickey moved to dismiss certain defendants in his initial Iowa claim (LACV120033). (*See* Notice of Dismissal of Party Pursuant to Iowa R. Civ. P. 1.943, filed in LACV120033 on September 23, 2020, App. p. 283). On November 20, 2020—approximately three weeks before filing the instant action (and months after

the subject Supervisory Orders were issued)—Plaintiff Reed Dickey moved to dismiss the remaining defendant in LACV120033. (*See* Notice of Dismissal of Petition Pursuant to Iowa R. Civ. P. 1.943, filed in LACV120033 on November 20, 2020, App. p. 341).

Additionally, Plaintiff Reed Dickey and his parents filed a substantially similar suit to the instant action in Nebraska on December 7, 2020, four (4) days before the case at issue in this appeal. (*See* Affidavit of Joshua J. Schauer In Support of Motion to Dismiss, or, In the Alternative, to Stay Plaintiffs' Petition by Defendants The School District of Lincoln (a.k.a. Lincoln Public Schools) and Jeff Rutledge, Exhibit A, App. p. 285). Lincoln Public Schools ("LPS") and Jeff Rutledge ("Rutledge") are defendants in the first-filed Nebraska proceedings. (*See* Affidavit of Joshua J. Schauer In Support of Motion to Dismiss, or, In the Alternative, to Stay Plaintiffs' Petition by Defendants The School District of Lincoln (a.k.a. Lincoln Public Schools) and Jeff Rutledge, Exhibit A, App. p. 285).

LPS and Rutledge disagree that this matter was timely filed as it was filed on December 11, 2020, four days after the statute of limitations ran on December 7, 2020. The Supervisory Orders issued by the Iowa Supreme Court, including its March 17, 2020, April 2, 2020, May 8, 2020 and May 22, 2020 Orders, unconstitutionally tolled the statute of limitations for civil

actions such as the above-captioned matter in violation of the Iowa Constitution, and as such, should not be considered when determining the timeliness of Plaintiffs' claims.

STATEMENT OF THE FACTS

LPS and Rutledge agree that, as this appeal was taken from an order granting pre-answer motions to dismiss, there is a limited record and limited pertinent facts. Indeed, that the alleged injuries occurred on December 7, 2018 and that the instant action was filed on December 11, 2020 are largely the only facts relevant to Plaintiffs' first argument. Other pertinent facts, including the issuance of the Supervisory Orders at issue, are set forth in Plaintiffs' Statement of the Case.

Regarding the jurisdictional issue for LPS and Rutledge, the relevant facts are that as of December 7, 2018, (1) all Plaintiffs resided in Lincoln, Lancaster County, Nebraska, (2) Rutledge was a resident of Nebraska employed by LPS, and (3) LPS was the public school district for the Lincoln, Nebraska area. (Petition)

Any other specific references to the Petition, save perhaps to establish that Plaintiffs' claims are based on an alleged personal injury and/or professional malpractice, are not relevant to the issues presented for review. Along these lines, Plaintiffs' Statement of the Facts references the

requirements of IOWA CODE § 280.13C, including when to remove a student from participation when a student exhibits signs or symptoms related to a concussion or brain injury. (*See* Plaintiffs' Proof Brief). Plaintiffs' statements are not facts related to this case as it currently stands and should not be considered in this Court's review of the matter.

ANALYSIS

I. The District Court Correctly Dismissed Plaintiffs' Claims on the Grounds That the Court Lacks Personal Jurisdiction over LPS and Rutledge.

A. Error Preservation.

LPS and Rutledge agree that error has been preserved on this issue.

B. Scope and Standard of Review.

1. Scope.

The scope of review is whether the district court properly dismissed LPS and Rutledge based on a lack of personal jurisdiction.

2. Standard.

The standard of review for a district court's decision on a motion to dismiss for lack of personal jurisdiction is for correction of errors at law. *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882 (Iowa 2014).

C. Argument

1. Standard for Personal Jurisdiction Over Out-of-State Defendants.

Generally, an out-of-state entity or individual must have sufficient "minimum contacts" with Iowa before they are subject to personal jurisdiction in Iowa. IOWA R. CIV. P. 1.306. This requirement of minimum contacts with a forum state ensures the lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 891 (Iowa 2014); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The contacts with the forum state "must show 'a sufficient connection . . . so as to make it fair' and reasonable to require the defendant to come to the state and defend the action." *Shams v. Hassan*, 829 N.W.2d 848, 854 (Iowa 2013) (quoting *Ross v. Thousand Adventures*, 675 N.W.2d 812, 815 (Iowa 2004)) (citing *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91 (1978)). It is not enough to show "[r]andom or attenuated contacts." *Ross*, 675 N.W.2d at 816 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). A defendant must "reasonably anticipate being hauled into court" in the state. *Shams*, 829 N.W.2d at 855 (quoting *Capital Promotions, L.L.C. v. Don King Prods.*, 756 N.W.2d 828, 833 (Iowa 2008)). "The ***critical focus*** is on the relationship between the defendant, the forum,

and the litigation." *Hodges v. Hodges*, 572 N.W.2d 549, 551 (Iowa 1997) (citing *Meyers v. Kallestead*, 476 N.W.2d 65, 67 (Iowa 1991)) (emphasis added).

2. LPS and Rutledge Did Not Purposefully Direct Activities at Residents of Iowa.

Iowa courts follow the Supreme Court's two-pronged test from *Burger King Corp. v. Rudzewicz* for determining whether to exercise specific personal jurisdiction. *See Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882 (Iowa 2014). Under this test, a court "evaluate[s] whether the defendant has *purposefully directed* his activities ***at residents of the forum*** *and* whether the litigation results from alleged injuries that ***arise out of or relate to those activities***." *Id.* at 893 (quoting *Capital Promotions, L.L.C.*, 756 N.W.2d at 834) (emphasis added and internal quotation marks omitted). *If* a plaintiff can prove the defendant has sufficient minimum contacts with Iowa, *then* "the court must determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Capital Promotions, L.L.C.*, 756 N.W.2d 828 at 834 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)) (internal quotation marks omitted). This, in turn, depends on the following factors: "[T]he burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining

convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (quoting *Burger King Corp.*, 471 U.S. at 477) (internal quotation marks omitted).

To the extent LPS and Rutledge purposefully directed any alleged activities at anyone in this matter, such alleged activities were directed at a resident of Nebraska, not Iowa. (Petition at ¶¶ 1–3, 8). In other words, even accepting the allegations of the operative petition as true, there is no substantive allegation that LPS or Rutledge purposely directed any material actions toward a resident of Iowa. To be sure, this litigation is not the result of alleged injuries that arise out of or relate to any activities supposedly directed by LPS and Rutledge toward a resident of Iowa. The allegedly injured party is a Nebraska resident. The allegedly negligent parties are a Nebraska school district and a Nebraska resident. (Petition at ¶¶ 1–5) At its core, this proceeding involves the alleged interactions between a Nebraska school district (including its coach) and its student, all of whom reside in Nebraska. *Id*. The lawsuit simply does not arise out of or relate to activities directed at residents of Iowa—the operative petition does not complain of injuries caused to or caused by a resident of Iowa.

If all that mattered in jurisdictional analysis is where the injury occurred, then neither this Court nor the United States Supreme Court would consider whether a defendant purposefully directed activity at a resident of the forum. That such analysis is included establishes that, even though the incident at issue occurred in Iowa, it is still not an event that gives rise to jurisdiction over LPS and Rutledge in Iowa. Again, there is no allegation or indication that this lawsuit arises out of injuries related to any alleged action by LPS or Rutledge that is purposefully directed at a resident of Iowa.

3. Assertion of Personal Jurisdiction over LPS and Rutledge Would Not Comport with Fair Play and Substantial Justice.

Even if Plaintiffs pled sufficient minimum contacts, the trial court properly analyzed whether the assertion of personal jurisdiction over LPS and Rutledge comports with fair play and substantial justice. *Capital Promotions, L.L.C.*, 756 N.W.2d at 834. Plaintiffs do not deign to even address this requirement. This is likely with good reason as both LPS and Rutledge are domiciled in Nebraska (Petition at ¶¶ 1–3, 8–9); the parties were only in Iowa for a limited time period (Petition at ¶ 13); as provided above, no activity at issue was directed at a resident of Iowa; *Plaintiffs* would face the burden of travel expenses if this case proceeds in Iowa, in addition to the burdens

Defendants would face; and, Plaintiffs already filed substantially similar claims in Nebraska before bringing this action in Iowa.

In sum, as properly determined by the trial court, the interstate judicial system's interest in obtaining the most efficient resolution of a dispute among these Nebraska residents is best served by the first-filed proceeding in Nebraska. Stated differently, the trial court properly determined that assertion of personal jurisdiction over LPS and Rutledge would not comport with fair play and substantial justice. The mere occurrence of an event in Iowa—an event entirely between Nebraska residents—is insufficient to establish personal jurisdiction in this matter.

The trial court correctly determined that LPS and Rutledge did not have sufficient minimum contacts with Iowa to establish personal jurisdiction over them. The alleged activities of LPS and Rutledge at issue in this matter were not directed at residents of Iowa. Any alleged injuries purportedly arose out of activities directed at Nebraska residents by a Nebraska resident and political subdivision. At most, the contact with Iowa was random and attenuated. Notions of fair play and substantial justice likewise preclude this matter from proceeding in Iowa. Plaintiffs and Defendants would face the burden of travel expenses if this case proceeds in Iowa. Plaintiffs filed a substantially similar suit in Nebraska before bringing this action, so they have

a convenient forum for pursuing these claims. The interstate judicial system's interest in obtaining the most efficient resolution of a dispute among these Nebraska residents is best served by the Nebraska Proceeding. Given these considerations, the factors from *Burger King Corp.* weigh against Iowa asserting personal jurisdiction over LPS and Rutledge, and the trial court properly dismissed the proceedings against those two defendants.

II. The District Court Correctly Dismissed Plaintiffs' Claims on the Grounds That the Iowa Supreme Court Acted Unconstitutionally in Tolling the Statute of Limitations Through Its Supervisory Orders.

A. Error Preservation.

LPS and Rutledge agree that error has been preserved on this issue.

B. Scope and Standard of Review

1. Scope.

The scope of review is whether the district court properly dismissed Plaintiffs' petition as untimely because the Supervisory Orders at issue were a violation of the separation of powers doctrine.

2. Standard.

When a party alleges error relating to the separation of powers doctrine, Iowa courts "make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made." *See State v. King*, 492

N.W.2d 211, 214 (Iowa Ct. App. 1992); *see also Hrbek v. State*, 958 N.W.2d 779, 784 (Iowa 2021) (discussing review of issue relating to separation of powers). Thus, the standard of review for constitutional issues is de novo. *See O'Hara v. State*, 642 N.W.2d 303, 314 (Iowa 2002). As in this case, when constitutional issues are raised on appeal from a motion to dismiss, the Court may consider the record on the motion, and may also "take judicial notice of events and conditions which are generally known and matters of common knowledge within [the court's] jurisdiction." *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 835 (Iowa 1990).

C. Argument

1. The District Court Correctly Determined that Plaintiffs' Claims are Time Barred.

The trial court properly determined that Plaintiffs' claims were filed outside of the applicable statute of limitations. Iowa Code section 614.1(2) provides that personal injury claims must be brought within two years. IOWA CODE § 614.1(2). The Iowa Supreme Court has explained that the policies behind statutes of limitations include (1) protecting defendants from problems relating to defending stale claims, (2) freeing defendants from anxiety relating to the fear of litigation, (3) removing stale claims from the courts, and (4) "***removing the uncertainty of unsettled claims from the marketplace***."

Estate of Kuhns v. Marco, 620 N.W.2d 488, 491 & n. 1 (Iowa 2000) (emphasis added).

Plaintiffs' claims are based upon an alleged personal injury to Plaintiff Reed Dickey that occurred on December 7, 2018. By virtue of the plain language of section 614.1(2), the statute of limitations on Plaintiffs' claims ran on December 7, 2020. *See* § 614.1(2). As the district court recognized, Plaintiffs did not file the instant Petition until December 11, 2020—four days after the statute ran. Therefore, LPS and Rutledge are entitled to judgment as a matter of law, as Plaintiffs' claims are time barred.

Plaintiffs assert that the statute of limitations on their claims was tolled by operation of the Supervisory Orders issued by the Iowa Supreme Court. But, as provided below, the district court correctly found that the Iowa Supreme Court lacked constitutional authority to issue a blanket tolling of all civil statutes of limitations in Iowa. Plaintiffs, therefore, cannot rely upon the Iowa Supreme Court's Supervisory Orders to save their time barred claims.

2. <u>The General Assembly Acted Appropriately Regarding the Applicable Statute of Limitation</u>.

a. The General Assembly acted.

As noted by the trial court, and as recognized by Plaintiffs, the legislature *has* acted with respect to establishing statutes of limitations

applicable to the claims at issue. *See* IOWA CODE § 614.1(2); *see also* Plaintiffs' Proof Brief, pp. 22—23. That action by the General Assembly, regardless of how long ago it occurred, prevents any other branch of government from stepping into the fray and establishing or otherwise altering the applicable statute of limitations. In other words, the act of the legislature in creating a valid statute of limitations precludes this Court from establishing a different statute of limitations. It is only where the legislature has not acted that courts possess "a residuum of inherent common-law power to adopt rules to enable them to meet their independent constitutional and statutory responsibilities." *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 569 (Iowa 1976) (en banc).

b. The General Assembly's action was—and is—proper.

The Iowa General Assembly has the authority to make policy decisions, such as establishing statutes of limitation applicable in civil actions. The people vested the legislative authority inherent in them to the general assembly and then imposed certain restrictions upon the exercise of that authority. *Knorr v. Beardsley,* 240 Iowa 828, 38 N.W.2d 236 (1949). It follows, then, that the legislative power of the general assembly is supreme and bounded only by the limitations written in the constitution. *Id.* at 244. Thus, the "power to declare legislation unconstitutional is one which courts

exercise with great caution, and only when such conclusion is unavoidable." *Id.* at 839. The Iowa Supreme Court has specifically indicated that it is not within their province or power to question the wisdom and propriety of policy. *Id.* at 862. The Iowa Supreme Court has also stated that the judicial branch's authority to regulate practice and procedure in its court must give way when the legislative department has acted. *State v. Thompson,* 954 N.W.2d 402, 411 (Iowa 2021).

It is well established in Iowa that the setting and tolling of statutes of limitation is a legislative function. In *Harrington v. Toshiba Mach. Co.*, 562 N.W.2d 190 (Iowa 1997), the Northern District of Iowa asked the Iowa Supreme Court to interpret the express tolling provision included in Iowa Code section 613.18(3). That provision tolls "the statute of limitations to allow identification of manufacturers in products liability cases." *Id.* The Court found that "***the tolling of a statute of limitations is purely statutory, and we are not free to expand the concept to avoid hardships***." *Id* at 192.

Similarly, in *Friedrich v. State*, 801 N.W.2d 628 (Iowa Ct. App. 2011), Friedrich sought post-conviction relief outside the three-year limitation period. The Iowa Court of Appeals held that "[h]ad the legislature intended to allow an exception for claims of the nature Friedrich asserts, it could have explicitly stated so. It did not." The court further noted: "***We are simply not***

at liberty to read exceptions into section 822.3 not otherwise provided by the legislature" and included a string of citations in support of this statement:

> *See Dible v. State*, 557 N.W.2d 881, 885 (Iowa 1996), *abrogated on other grounds by Harrington v. State*, 659 N.W.2d 509, 521 (Iowa 2003); *see also Leach v. Commercial Sav. Bank of Des Moines*, 205 Iowa 1154, 1166-67, 213 N.W. 517, 522 (1927) ('The statutes of limitation . . . are founded in public needs and public policy—are arbitrary enactments by law-making power.'); *In re Evan's Will*, 193 Iowa 1240, 1245, 188 N.W. 774, 776 (1922) ('It is a matter of legislative enactment, and a court is not privileged to amend the law. As it is written, it is written.').

In *Harden v. State*, 434 N.W.2d 881 (Iowa 1989), this Court reviewed Iowa statutes of limitations and noted "the legislature will make specific provisions for tolling when it intends to do so."

c. The General Assembly had no obligation to amend the applicable statute of limitations.

The General Assembly had no affirmative duty to amend the applicable statute of limitations. Along those lines, relative to the claims at issue, the Iowa General Assembly made a policy decision to *not* change the statutes of limitations for civil actions in response to the COVID-19 pandemic. That is demonstrated by the fact that legislative action was taken on *other* pandemic-related matters. The Iowa General Assembly passed several pieces of legislation, both in 2020 and 2021, related to COVID-19 relief. Specifically, the Iowa General Assembly passed legislation providing protection from

liability to businesses and individuals for COVID-19 exposure or infection, and providing instructional time waivers for school districts and private schools due to COVID-19 related interruptions. National Council of State Legislatures, State Action on Coronavirus (COVID-19) (Nov. 5, 2021 3:33 p.m.), ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx.

The General Assembly continued to introduce and pass COVID-19 legislation during its 2021 session, including legislation allowing parents or guardians to select full time in person instruction, and prohibiting mandatory disclosure of a person's vaccination status. National Council of State Legislatures, State Action on Coronavirus (COVID-19) (Nov. 5, 2021 3:33 p.m.), ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx. The General Assembly's silence on tolling statutes of limitations thus speaks volumes about its policy decisions related to COVID-19. Simply put, *if* the legislature wanted to toll the statute of limitations in light of the pandemic, *it would have.*

Plaintiffs further argue that the Iowa Supreme Court had to act because the Iowa General Assembly suspended its session in response to COVID-19. It is irrelevant that the Iowa General Assembly suspended its session in response to COVID-19. Plaintiffs provided no case law, statute, constitutional, or other authority that allows a co-equal branch of government

to exercise the powers expressly provided in the Iowa Constitution to the legislative branch when the Iowa General Assembly is unable to act. In fact, the Iowa Constitution expressly states ". . .no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others." IOWA CONST. art. III, § 1.

Plaintiffs go so far as to suggest the General Assembly should have enacted legislation making it clear that the "statute of limitations should be held firm and not tolled in response to the global Covid-19 pandemic. . . ." (*See* Plaintiffs' Proof Brief, p. 23) Yet, inconsistent with this premise, Plaintiffs also argue that because the legislature was not in session, it could not have so acted which, somehow, made the Iowa Supreme Court's Supervisory Orders constitutional. (*See* Plaintiffs' Proof Brief, p. 23). In addition to being inconsistent, these arguments are illogical.

The General Assembly affirmatively repeals or amends statutes; it does not implicitly do so by failing to reaffirm them. If that were not the case, every statute not reaffirmed during every crisis over some 150 years is called into question. In addition, the Iowa Supreme Court does not have constitutional authority, under any circumstance, to write legislation or amend existing laws when the legislature is not in session. *See* IOWA CONST. art. III, § 1 (providing that "no person charged with the exercise of powers properly

belonging to one [branch of the government] shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted"); *see also* IOWA CODE § 602.4202 (discussing the Iowa Supreme Court's role in rulemaking procedures and the required involvement of the legislative council). Once again, Plaintiffs provided no authority in support of their proposition that the "Iowa Supreme Court's Supervisory Order was a necessary and proper exercise of the judicial branch's constitutional authority over Iowa's court system to do its part to slow the person-to-person transmission" of COVID-19. (*See* Plaintiff's Proof Brief, p. 23).

d. Plaintiffs' legislative silence assertions are misplaced.

Legislative silence is inapplicable to this matter. A legislative silence argument applies when a court has *interpreted a statute* a certain way and the legislature fails to respond. *See* 73 Am. Jur. 2d *Statutes* § 82 ("Where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent . . . ."). This Court expressly held in *Pearson v. Robinson* that the presumption of assent "from legislative silence arises only when this court *has construed an Iowa statute*." *Pearson v. Robinson*, 318 N.W.2d 188, 191 (Iowa 1982) (emphasis added). Because the Supervisory Orders at issue do not

constitute the Court's interpretation of a statute, the presumption of assent from legislative silence does not apply.

Additionally, 73 Am. Jur. 2d *Statutes* § 82 includes the following summary of legislative silence:

> In determining the meaning of a statute, it is proper to consider contemporary action *of the legislature* although, as a rule, the intent of the legislature is indicated by its action and not by its failure to act. Ordinarily, the court does not draw substantive conclusions on statutory construction based on legislative inaction because ***legislative acquiescence is an exceedingly poor indicator of legislative intent***. Legislative inactivity is *inherently ambiguous and affords the most dubious foundation for drawing positive inference* when interpreting a statute.

(Emphasis added). This Court has rejected the presumption at least once, holding that the legislature's silence may instead indicate inattention. *McElroy v. State*, 703 N.W.2d 385 (Iowa 2005) ("Rather than attempt to divine legislative intent in this fashion, we must remember that legislation sometimes persists on account of inattention and default rather than by any conscious and collective decision." (citations omitted)).

Even if the doctrine were somehow applicable, an argument of legislative silence is not generally raised until the period of legislative silence is fairly long; to that end, some eleven months (and only one legislative general session) do not give rise to such an argument. *See, e.g.*, *Gen. Mortg. Corp. v. Campbell*, 138 N.W.2d 416, 420 (Iowa 1965) ("The legislature has

had ***forty years*** and ***twenty regular sessions*** to change these frequently castigated sections of the Code, but has not seen fit to do so."); *id.* at 421 ("It has been held failure to amend a statute for ***twenty years*** raises a strong presumption of legislative satisfaction with the interpretation given it by the courts." (citation omitted); *see also Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 168 n.3 (Iowa 2006) ("[I]n over ***130 years*** of our applying *nullum tempus* to our statute of limitations, the legislature has never taken action to abrogate this interpretive approach or otherwise contradict the doctrine or make the limitation period specifically applicable to the sovereign."). [1]

[1] *See, e.g.*, *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 169 n.3 ("When the legislative silence continues *in an area of legislative activity*, the presumption becomes stronger and stronger as time advances."); *State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014) (finding assent-by-legislative-silence following three Supreme Court decisions over 24 years); *Welch v. Iowa DOT*, 801 N.W.2d 590 (2011) (finding assent following three Supreme Court decisions over 40+ years, noting that the entire code chapter had been repealed and replaced during that time frame, and noting numerous amendments made to the chapter since replacement); *Cover v. Craemer*, 137 N.W.2d 595 (Iowa 1965) (finding assent to an Iowa Supreme Court decision decided almost sixty years prior).

3. Since the General Assembly Acted—and Acted Appropriately—the Subject Orders are Unconstitutional.

a. Separation of powers.

Well before the instant action was filed, the General Assembly enacted statutes of limitations applicable to the subject claims. The General Assembly was within its constitutional authority to enact these limitations. Any action by another branch to abrogate those limitations violates the separation of powers doctrine and is unconstitutional.

The statute of limitations argument hinges on the separation of powers doctrine. That doctrine is the very foundation of the State's constitutional system and is violated if one branch of government seeks to use powers granted by the constitution to another branch. *State v. Barker*, 116 Iowa 96, 108, 89 N.W. 204, 208 (1902); *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000).

The legislature is vested with the authority to pass laws. IOWA CONST. art. III, § 2. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977). To that end, the legislature adopted Iowa Code sections 614.1(2) and 614.1(9) which, respectively, set the statute

of limitations for matters such as the ones at issue in this case at two years. Nothing short of legislative action can change that limitation.

The Iowa Constitution divides the powers of government into three separate departments, legislative, executive and judicial, "and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others." IOWA CONST. art. III, § 1. The Judicial power vested in the Iowa Supreme Court is found at Article 5, section 4: "The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." IOWA CONST. art. V, § 4.

In *State v. Phillips*, the Iowa Supreme Court addressed Iowa's Separation of Powers Doctrine and clarified that the doctrine "is violated if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *Phillips*, 610 N.W.2d 840, 842 (Iowa 2000). The Iowa Supreme Court has further defined the powers granted by the constitution to the various branches

of the government. With regard to the judicial power, in *Klouda v. Sixth Judicial District Department of Correctional Services*, the Court clarified that the power granted to the courts under Iowa's Constitution "is the power to decide and pronounce a judgment and carry it into effect." *Klouda*, 642 N.W.2d 255, 261 (Iowa 2002).

In addition to the powers derived from the Constitution, the courts also have some inherent powers "to do whatever is reasonably necessary to discharge their traditional responsibilities." *State v. Hoegh*, 632 N.W.2d 885, 888 (Iowa 2001). But, while these inherent powers "are necessary for courts to properly function as a separate branch of government," courts cannot use their inherent powers "to offend the doctrine of separation of powers by usurping authority delegated to another branch of government." *Id.* Thus, a court's inherent powers "may be controlled or restricted by statute" or, in some situations, even overridden by statute. *Id.* at 889. In sum, a court cannot use its inherent powers to develop rules that circumvent or conflict with statutes or rules established by the legislature. *See, e.g.*, *De Berg v. County Bd. of Ed. of Butler Cty.*, 248 Iowa 1039, 1051, 82 N.W.2d 710, 717 (1957) ("It is our function to interpret legislative enactments, but not to establish new legislative provisions by judicial procedure, nor to nullify the clear intention of such enactments.").

The Iowa Supreme Court has recognized that "[t]he legislature is supreme in the field of legislation" and that "neither the wisdom nor the advisability of any legislation presents a judicial question." *Faber v. Loveless*, 249 Iowa 593, 597, 88 N.W.2d 112, 114 (1958). In other words, the judicial branch of the government has neither the power to determine whether legislative Acts are wise or unwise, nor the power to declare an Act void unless it is plainly and without doubt repugnant to some provision of the Constitution. *Green v. City of Mount Pleasant*, 131 N.W.2d 5, 10 (Iowa 1964). Under Iowa's Constitution, the authority to enact rules of law is vested in the legislature, *not* the courts, and Iowa courts do not have constitutional authority to enact rules that conflict with those enacted by the legislature. That is undeniably true where, as here, no one is disputing the constitutionality of the statutes of limitations at issue.

Plaintiffs cite *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) for the argument that the Iowa Supreme Court is "generally the final arbiter" of what government actions are constitutional and that the Court would not have extended the statutes of limitations unless it believed "that it was appropriate and constitutional." Plaintiff's Proof Brief at 24-25. *Varnum*, though,

emphasizes the supremacy not of the judiciary, but of the constitution itself.[2] The Court explicitly stated that "the constitution belongs to the people, not the government or even the judicial branch." *Varnum*, 763 N.W.2d at 876. This case does not involve unconstitutional legislation—once again, no one is arguing that Iowa's longstanding civil statutes of limitations are unconstitutional. That the legislature did not act to alter statutes of limitations in response to the pandemic likewise does not create any constitutional concerns. *Varnum* is thus inapposite to this case.

Plaintiffs' *Varnum* argument is essentially circular—the subject order is constitutional because the Court would not have issued it if it was not constitutional. This Court, however, does not take such a view of its actions. In *Root v. Toney*, 841 N.W.2d 83 (2013) the Iowa Supreme Court examined whether a husband's notice of appeal, filed thirty-one days after a judgment, was timely. *Id.* The hours of the clerk's office in question had been shortened by a supervisory order, and the husband argued this shortening allowed him a

[2] *Id.* ("[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms."); *see also Godfrey v. State*, 752 N.W.2d 416, 425 (Iowa 2008) (Our authority to "determine the constitutionality of the acts of the other branches of government does not exist as a form of judicial superiority but is a delicate and essential judicial responsibility found at the heart of our superior form of government.")

one-day extension on filing his notice of appeal, pursuant to Iowa Code section 4.1(34). *Id.* at 87; *see also* IOWA CODE § 4.1(34). The wife argued the appeal was late, asserting a subsequent supervisory order of the Iowa Supreme Court had declared that the prior supervisory order shortening the clerk's hours redefined the clerk's regular business hours and thereby did not trigger the one-day extension of Iowa Code section 4.1(34). *Root*, 841 N.W.2d at 87.

The Iowa Supreme Court concluded as follows:

> The problem with [the wife's] position is that [the husband] was otherwise *entitled* to the one-day extension to file his notice of appeal under section 4.1(34), and the rule change, as interpreted in our supervisory order, thus effectively shortened his time to appeal by one day. *We may not change statutory terms under the guise of judicial construction. Specifically, the* ***time allowed to file a notice of appeal cannot be reduced without legislative approval****.*

Id. at 89-90 (citations omitted, emphases added). Likewise, the time allowed for Plaintiffs to file their suit here cannot be increased without legislative approval. That is, "*the supervisory order cannot trump the general assembly's authority to set the time to file a notice of appeal [or lawsuit]*." *See id.* (emphasis added).

In reaching the above conclusion, the Iowa Supreme Court noted the legislature's role in rulemaking is governed by Iowa Code section

602.4201(3), which requires legislative involvement as set forth in Iowa Code section 602.4202 before certain rules can be modified. *Id.* at 90; *see also* IOWA CODE §§ 602.4201(3); 602.4202. Importantly, the Iowa Rules of Civil Procedure are listed as being subject to the legislative rule making/altering requirements of section 602.4202. Pertinent to this matter, Iowa Rules of Civil Procedure 1.301 provides that "a civil action is commenced by filing a petition with the court. ***The date of filing*** *shall determine whether the action is commenced within the time allowed by the statute of limitations of actions*." *See* IOWA R. CIV. P. 1.301(1) (emphasis added). The subject Supervisory Orders purport to eliminate this rule, as the date of filing is no longer the operative date – the Supervisory Orders effectively subtract up to 76 days from the date of filing. This cannot be done without engaging the process set forth in Iowa Code section 602.4202. *See* §§ 602.4201(3); 602.4202.

Here, the Supervisory Orders' purported modification of Rule 1.301, like the modification of the statute of limitations, is invalid and unconstitutional, as the purported modification was never submitted to the legislature for approval. *See Root*, 841 N.W.2d at 89-90. The Supervisory Orders are in direct conflict with the language in Rule 1.301, which provides that *the date of filing* determines whether the action has been timely filed under the applicable statute of limitations – not the date of filing *minus 76*

days, as the Supervisory Orders purport to provide. In light of this conflict, the language in Rule 1.301 must prevail.

In sum, Iowa Code section 614.1 provides the timeframe in which claims may be brought. *See* IOWA CODE § 614.1. The Iowa Constitution, Iowa Supreme Court precedent, and other authorities set forth above, establish that the Iowa Supreme Court lacks the authority to alter the time for filing a lawsuit. *See id.*; *Root,* 841 N.W.2d at 89-90; *accord De Berg*, 82 N.W.2d at 717 ("It is our function to interpret legislative enactments, but not to establish new legislative provisions by judicial procedure, nor to nullify the clear intention of such enactments."); *see also Hoegh*, 632 N.W.2d at 888 (noting that courts cannot use their inherent powers "to offend the doctrine of separation of powers by usurping authority delegated to another branch of government"). Accordingly, to the extent Plaintiffs relied upon the Iowa Supreme Court's Supervisory Orders to alter the legislative limitations period, such reliance was misplaced.

In light of the above, the district court correctly found that it must apply the statute of limitations as enacted and dismiss Plaintiffs' lawsuit. The district court also correctly reasoned that the doctrine of Separation of Powers must be adhered to, "even in the face of a pandemic". This conclusion is supported by Iowa Supreme Court precedent, which provides as follows:

> It is fundamental to our system of government that the authority for courts to act is conferred by the constitution or by statute. Yet, it is equally fundamental that in addition to these delegated powers, courts also possess broad powers to do whatever is reasonably necessary to discharge their traditional responsibilities. This type of judicial authority is known as inherent power, and it is derived from the separation of powers between the three branches of government, as well as limited by it. Inherent powers are necessary for courts to properly function as a separate branch of government, **but cannot be used to offend the doctrine of separation of powers by usurping authority delegated to another branch of government**.

(Order on Defendants' Motions to Dismiss, entered Mary 14, 2021, p. 15, App. p. 266 (quoting *Hoegh*, 632 N.W.2d at 888) (emphasis supplied by district court)).

Iowa's statutes of limitations are set by statute. Those statutes were duly passed by the Iowa General Assembly and signed into law by the Governor. The Iowa General Assembly has not passed any laws abrogating or delegating this authority to the judicial branch, either in general or specifically, as it relates to the COVID-19 pandemic. Thus, the ability to regulate practice and procedure relating to deadlines for commencing actions in the Iowa Courts remains with the legislative branch. The Supervisory Orders sought to substantively amend those statutes and essentially create new law. Such power was expressly granted to the legislative branch. The Supervisory Orders are thus an unconstitutional violation of the separation of

powers doctrine, and the District Court's Order granting Defendants' Motion to Dismiss must be affirmed.

b. Other Constitutional arguments.

The other defendants assert additional arguments, namely that the subject orders were issued without the presence of a specific case or controversy before the Court and that the orders violate due process. Outside of the jurisdictional argument advanced by LPS and Rutledge, the trial court did not address due process arguments. Regarding the case or controversy element, the trial court noted that the Supervisory Orders were issued in response to the pandemic, not a case or controversy before the Court and, accordingly, the orders were in violation of the doctrine of separation of powers as stated in the Iowa and U.S. Constitutions.

It thus appears that the case or controversy element is contained within the separation of powers argument. As LPS and Rutledge did not specifically address the case or controversy issue below, we will not address it here other than to state our agreement with the arguments set forth by the other defendants. *See Ames 2304, LLC v. City of Ames, Zoning Bd. of Adjustment*, 924 N.W.2d 863, 868 (Iowa 2019) (quoting *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016)) (Iowa has accepted appellate arguments that

are "simply 'additional ammunition for the same argument [the party] made below—not a new argument advanced on appeal.'").

Along these lines, in *Iowa Ass'n of Bus. & Indus. v. City of Waterloo*, 961 N.W.2d 465 (Iowa 2021), this Court was willing to consider an argument that was raised *only* by an amicus curiae and not by a party. The Court found the amicus argument persuasive and used it as the basis of its decision to affirm in part, reverse in part, and remand. The Court acknowledged that it usually would "not allow amici curiae to raise new issues;" but, it decided a "practical approach" allowing consideration of the argument made sense because "it does not result in any unfairness." Among other considerations, the issues involved in the appeal were "purely legal" and the Iowa Association of Business and Industry addressed the amicus argument in its reply brief. Therefore, the court found that it had "a fully developed adversarial presentation on the issue." The same reasoning applies here—with both the case and controversy and due process arguments—as Plaintiffs had (and have) a chance to address such arguments as they see fit.

With regard to "adoption" of an argument, the Iowa Rules of Appellate Procedure used to include a rule that "allowed multiple appellants or appellees to join in one brief or to 'adopt by reference any part of the brief of another.'" *In re Guardianship of M.D.*, 797 N.W.2d 121, 125 (Iowa Ct. App. 2011)

(quoting *In re Interest of D.G.*, 704 N.W.2d 454, 457 (Iowa Ct. App. 2005)). However, "[t]his rule did not survive the overhaul of the appellate rules effective January 1, 2009." *Id.* at 125 n.5. That stated, it appears Iowa courts are still willing to allow such adoption of arguments, provided the party is properly a party to the appeal. *Id.* at 126. This is in line with FED. R. APP. P. 28(i) which provides that "In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs."

In sum, if this matter is decided on due process or case or controversy grounds, LPS and Rutledge respectfully submit that such grounds apply to them as well. Plaintiffs are not prejudiced inasmuch as they have had—and will have—a chance to address these issues, and the arguments apply to LPS and Rutledge as to other defendants.

4. The Actions of Other States Do Not Support Plaintiffs' Position.

A look to other states' actions in response to the pandemic does not bolster Plaintiffs' argument in favor of extending the applicable statutes of limitations.

Plaintiffs note that 21 states other than Iowa extended statutes of limitations due to the pandemic. (*See* Plaintiffs' Proof Brief, p. 24). Plaintiffs

fail to analyze in any depth the specifics of those actions, and a mere blanket statement does not address Defendants' valid argument that the subject orders violate the Iowa Constitution in several ways. Plaintiffs' argument fails to take into account that these other states have differing statutes, regulations, constitutional provisions, and case law that may allow for those extensions. Further analysis demonstrates those 21 states took varying actions to potentially extend their statutes of limitations. For example, the Kansas legislature passed House Substitute for Senate Bill No. 102 which provided the Chief Justice of the Kansas Supreme Court the authority to issue an order to extend or suspend any deadlines or time limitations established by statute when the Chief Justice determines that such action is necessary to secure the health and safety of court users, staff and judicial officers during a state of disaster emergency. US Law Network, Inc. Statute of Limitations Quick Guide (During COVID-19 Pandemic), US Law Network, Inc., 17-18 (December 2020), USLaw.org. Governor Kelly signed the bill into law on March 19, 2020. US Law Network, Inc. Statute of Limitations Quick Guide (During COVID-19 Pandemic), US Law Network, Inc., 17-18 (December 2020), USLaw.org.

The Minnesota State Legislature passed similar legislation, HF 4556, which suspended all civil court filing deadlines, statutes of limitations, and

other time periods until 60 days after the end of the peacetime emergency, or February 15, 2021, whichever is earlier. US Law Network, Inc. Statute of Limitations Quick Guide (During COVID-19 Pandemic), US Law Network, Inc., 26-27 (December 2020), USLaw.org. Minnesota Governor Tim Walz signed HF 4556 into law on April 15, 2020. US Law Network, Inc. Statute of Limitations Quick Guide (During COVID-19 Pandemic), US Law Network, Inc., 26-27 (December 2020), USLaw.org.

In each of these instances, a legislative body acted to give specifically delegated legislative authority over to the judicial branch, each with executive authority. No such grant occurred with respect to the Iowa Omnibus Order. As shown in the chart below, 13 of the states cited by Plaintiffs enacted (or already had in place) *legislation* that provided for the extension of statutes of limitations.

State	**Source of Authorization**	**Details**
California	Legislation (and Governor's Order)	In March of 2020, the Governor gave the Judicial Council authority to adopt emergency rules due to COVID; they adopted Emergency Rule 9 tolling the statutes of limitations in civil actions. ***CAL. GOV'T CODE § 68115 gives the Judicial Council authority to toll statutes of limitations***.

State	Source of Authorization	Details
Connecticut	Legislation (and Governor's Executive Orders)	In March of 2020, the Governor tolled all statutes of limitations in Executive Order No. 7G. Later executive orders clarified and continued the tolling. ***CONN. GEN. STAT. § 28-9 provides: "Following the Governor's . . . declaration of a public health emergency pursuant to section 19a-131a, the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute***, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health."

State	Source of Authorization	Details
Delaware	Legislation	In 2009, Delaware enacted the "Judicial Emergency Act." Under that Act, ***10 DEL. C. § 2004 allows the Chief Justice to declare a judicial emergency and 10 DEL. C. § 2007(a) permits SOL tolling during such emergency***: "The Chief Justice, in an order declaring a judicial emergency, or in an order modifying or extending a judicial emergency order, ***is authorized to suspend, toll, extend, or otherwise grant relief from deadlines or other time schedules or filing requirements otherwise imposed by applicable statutes, rules, regulations***, or court orders for the duration of the emergency order, including, but not limited, to such deadlines as civil and criminal statutes of limitations, deadlines for appeals, and the expiration of temporary restraining orders or no contact orders that would otherwise expire."

State	Source of Authorization	Details
Kansas	Legislation	Legislature enacted K.S.A. § 20-172(a): ***"[D]uring any state of disaster emergency . . . the chief justice of the Kansas supreme court may issue an order to extend or suspend any deadlines or time limitations established by statute***. . . . when the chief justice determines such action is necessary to secure the health and safety of court users, staff and judicial officers."
Minnesota	Legislation	In April of 2020, the Governor signed the following legislation (H.F. 4556[3]) into law: ***"The running of deadlines imposed by statutes governing proceedings in the district and appellate courts, including any statutes of limitations or other time periods prescribed by statute, is suspended during the peacetime emergency declared on March 13, 2020, in governor's Executive Order 20-01 and any extensions authorized under Minnesota Statutes, section 12.31, subdivision 2,*** and for 60 days after the end of the peacetime emergency declaration."

[3] 2020 MINN. ALS 74

State	Source of Authorization	Details
New Hampshire	Legislation	The Senior Associate Justice issued an order that included tolling provisions. This is authorized by N.H. REV. STAT. ANN. § 490:6-a: "The chief justice of the supreme court or, if the chief justice is unavailable, the most senior associate justice available, shall have the power . . . ***in the event of a declared state of emergency, as defined in RSA 4:45, to enter such order or orders as may be appropriate to suspend, toll, or otherwise grant relief for a period of up to 21 calendar days from time deadlines imposed by otherwise applicable statutes and rules of procedure*** regarding speedy trial procedures in criminal and juvenile court proceedings, all civil and equitable court process and court proceedings, and all appellate court time limitations."

State	Source of Authorization	Details
New York	Governor's Executive Order	In March of 2020, the Governor issued Executive Order 202.8, which tolled statutes of limitations. N.Y. EXEC. LAW § 29-a gives the governor power to ***"by executive order temporarily suspend specific provisions of any statute***, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."

State	Source of Authorization	Details
North Carolina	Legislation	The Chief Justice ordered tolling of statutes of limitations in trial courts under N.C.G.S. § 7A-39(b)(1): ***"When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist*** or have existed in one or more counties of the State, the *Chief Justice may* by order entered pursuant to this subsection: (1*)* ***Extend, to a date certain no fewer than 10 days after the effective date of the order, the time or period of limitation within which pleadings, motions, notices, and other documents and papers may be timely filed*** and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings in each county named in the order."
Ohio	Legislation	In March of 2020, the Governor signed the following legislation (Am. Sub. H.B. 197) into law*:* ***"The following that are set to expire between March 9, 2020, and July 30, 2020, shall be tolled: (1) A statute of limitation***."

State	Source of Authorization	Details
Oregon	Legislation	On June 30, 2020, the Governor signed the following legislation (HB 4212) into law: "[D]uring the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 60 days after the declaration and any extension is no longer in effect, and upon a finding of good cause, ***the Chief Justice of the Supreme Court may extend or suspend any time period or time requirement established by statute*** or rule."
Tennessee	Legislation	The Chief Justice declared a disaster and tolled statutes of limitations. He is authorized to do so in TENN. CODE ANN. § 28-1-116: ***"In the event that a duly authorized member of the appellate judiciary enters an order declaring a disaster pursuant to the Tennessee supreme court rules, or the Tennessee rules of civil or appellate procedure, all applicable statutes of limitations and statutes of repose shall be extended*** in the counties subject to the order by the same number of days by which other applicable filing deadlines are extended."

State	Source of Authorization	Details
Virginia	Legislation	VA. CODE § 17.1-330 authorizes declarations of judicial emergencies; subsection (D) provides: *"**Notwithstanding any other provision of law, such order may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes***, rules, or court orders in any court processes and proceedings, including all appellate court time limitations."
West Virginia	Legislation	The Chief Justice issued orders declaring emergency days, which tolled statutes of limitations. He is authorized to do so by W. VA. CODE § 2-2-2: "When a proceeding is directed to take place or any act to be done on any particular day of the month or within any period of time prescribed or allowed . . . if that day or the last day falls on a Saturday, Sunday, legal holiday, or a weather or other emergency day, the next day that is not a Saturday, Sunday, legal holiday, or a weather or other emergency day shall be deemed to be the one intended . . .***A weather or other emergency day is designated by order of the Chief Justice of the Supreme Court of Appeals.***"

Significant distinctions exist in four other states.

Indiana

Indiana's legislature gave its supreme court more rulemaking authority than Iowa's legislature. Specifically, the Indiana legislature enacted a statute providing that "[t]he supreme court has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana." IND. CODE ANN. § 34-8-1-3. The statue goes further, stating that once the court made such rules, "**all laws in conflict with the supreme court's rules have no further force or effect**." *Id*. Conversely, Iowa's statutes regarding court rulemaking provide that the supreme court must submit a rule it wishes to make to the legislature, and "[i]f the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision in the rule or form as submitted by the supreme court." IOWA CODE § 602.4202(1).

Nevada

In April of 2020, the governor signed Declaration of Emergency Directive 009 that, among other provisions, included statute of limitation tolling provisions. The governor acted pursuant to Nevada Revised Statute § 414.070 which provides in part that, during an emergency, the governor may "perform and exercise such other functions, powers, and duties as are

necessary to promote and secure the safety and protection of the civilian population."

Rhode Island

After the Chief Justice of the state supreme court issued orders tolling statutes of limitations, the state legislature (effective July 3, 2021) enacted R.I. GEN. LAWS § 8-15-2.1: "The chief justice of the supreme court may, by order, take any action necessary to ensure the continued and efficient operation of the courts of the unified judicial system. Such necessary actions may include, but are not limited to . . . Enlarging, extending, tolling, or suspending any filing, appeal, or other applicable deadline or statute of limitation in the event of the closure or curtailment of court operations or other circumstances as is necessary, in the opinion of the chief justice, to ensure the fair administration of justice."

Texas

The Supreme Court of Texas issued its first tolling order on March 13, 2020, which included that "[s]ubject only to constitutional limitations, all courts in Texas may . . . [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been

lifted."[4] The order cited Texas Government Code § 22.0035(b) as authority for the order; in pertinent part, that statute provides that "Notwithstanding any other statute, the supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor." Furthermore, the Governor's first emergency order regarding Covid-19, which was issued on the same date as the Supreme Court's first order, included the same language authorizing tolling.[5]

That leaves four states—Maryland, Massachusetts, Michigan, and New Jersey. In at least one of those states, the action is facing a nearly identical appeal. *See Liberty Mut. Ins. Co. v. Murphy,* 2021 U.S. Dist. LEXIS 124343, *16 (D. Md. 2021).

Given the varying avenues used to extend statutes of limitations, various authorities used to support those declarations, and the potential for litigation related to these actions, this Court should look solely to Iowa authority to address this issue.

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[4] First Emergency Order Regarding the COVID-19 State of Disaster, Supreme Court of Texas (Mar. 13, 2020), https://www.txcourts.gov/media/1446056/209042.pdf.

[5] *First Emergency Order Regarding the Covid-19 State of Disaster*, 596 S.W.3d 265 (Tex. 2020).

Further, Plaintiffs' position related to statutes of limitations due to the COVID-19 pandemic is a minority viewpoint. Even if 21 other states extended statutes of limitations due to the COVID-19 pandemic, then 28 states did not. For example, the Alabama Supreme Court expressly declined to extend their state's statutes of limitations, recognizing the limitation on judicial authority where the legislature has constitutional authority to act, stating: "This Court cannot extend any statutory period of repose or statute of limitations period." (*In Re: COVID-19 Pandemic Emergency Response,* Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days, March 13, 2020.) The South Carolina Supreme Court acknowledged that it is inappropriate to intervene as to the relief afforded to a litigant who could not file a civil action due to the COVID-19 pandemic. RE: Operations of the Trial Courts During the Coronavirus Emergency, Order April 3, 2020. Other states, including Arkansas, Missouri, Nebraska, South Dakota and Wisconsin, simply did not take action to extend their statutes of limitations. US Law Network, Inc. Statute of Limitations Quick Guide (During COVID-19 Pandemic), US Law Network, Inc., 4-5, 28, 28, 47, 57-58 (December 2020), USLaw.org.

The COVID-19 pandemic did not and does not abrogate the Constitutional mandates binding on the branches of government. Where

powers are specifically granted to the Assembly—such as the power to establish limitations periods for the filing of lawsuits—it is only for the Assembly to modify or change its Code provisions in response to a pandemic.

5. Equitable Tolling Does Not Apply to the Claims at Issue.

Equitable tolling does not save Plaintiffs' claims. Equitable tolling occurs when a plaintiff, despite reasonable due diligence, is unable to obtain vital information to discover their injury. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830 (2002). Equitable tolling does not apply to Plaintiffs because they discovered their alleged injuries within the applicable statute of limitations period. Plaintiff Reed Dickey previously filed a lawsuit for his alleged injuries. (Petition, filed in LACV120033 on December 6, 2019, App. p. 305). He later dismissed his lawsuit after he failed to file a Certificate of Merit Affidavit to support his claims. His parents' claims were also easily discovered because any expenses or damages incurred as a result of Reed's injuries were incurred after the December 7, 2018 incident until Reed reached the age of majority. Plaintiffs Michael Dickey and Andrea Dickey could have filed suit in the first case for those damages, but chose not to do so. (Petition, filed in LACV120033 on December 6, 2019, App. p. 305). Additionally, on December 7, 2020, Plaintiffs filed a lawsuit in Nebraska that is substantially similar to the operative petition.

All plaintiffs knew of their alleged injury and damages, but they failed to file until four days after the statute of limitations expired. It is noteworthy in this regard that, in the first Iowa case, Plaintiff Reed Dickey filed his notices of dismissal via the Court's electronic filing system in late 2020, *i.e.* in the midst of the pandemic. Plaintiffs could have re-filed their action and sought tolling or an extension of case progression requirements. Regardless, the doctrine of equitable tolling is inapplicable based on the facts conceded by the Plaintiffs and their clear knowledge of their claim within the statutory period.

Plaintiffs' claim for equity also fails under the doctrine of equitable estoppel. Equitable estoppel requires a plaintiff to demonstrate four elements: (1) ***The defendant*** made a false representation or has concealed material facts; (2) The plaintiff lacks knowledge of the true facts; (3) ***The defendant*** intended the plaintiff to act upon such representations; and (4) The plaintiff relied upon such representation to their prejudice. (Emphasis supplied). *Sioux Phar, Inc. v. Summit Nutritionals Int'l, Inc.,* 859 N.W.2d 182, 191 (Iowa 2015). Equitable estoppel prevents one party who has made certain representations from taking unfair advantage of another when the party making the representations changes their position to the prejudice of the party who relied upon the representations. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004).

Plaintiffs have not alleged that Defendants made some false representation upon which they relied to their detriment. The doctrine of equitable estoppel seeks to prevent a party from prejudicing an opponent's rights through scurrilous or fraudulent conduct. Here the conduct relied upon by Plaintiffs was not that of Defendants, but the Iowa Supreme Court. In sum, equity affords no remedy to Plaintiffs.

CONCLUSION

For the reasons set forth above, Plaintiffs' Petition fails to state a claim for which relief could be granted against these Defendants. Defendants LPS and Rutledge respectfully request this Court affirm the District Court's Order granting their Motion to Dismiss, dismissing Plaintiffs' claims against them, with prejudice, and for such other and further relief as may be just and equitable.

REQUEST FOR ORAL ARGUMENT

Appellees hereby state that they desire to be heard in oral argument upon submission to the Iowa Supreme Court.

PROOF OF FILING AND SERVICE

I hereby certify that on January 11, 2022, I electronically filed the foregoing Final 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 below listed attorneys. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of Iowa Court Rules:

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of IOWA R. APP. P. 6.903(1)(d) and 6.903(1)(g)(1) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 10,065 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

DATED this 11th day of January, 2022.

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