IN THE SUPREME COURT OF IOWA
No. 22–0243

LARRY HEDLUND,

Appellee,

vs.

STATE OF IOWA; K. BRIAN LONDON, COMMISSIONER OF THE IOWA DEPARTMENT OF PUBLIC SAFETY, Individually; CHARIS M. PAULSON, DIRECTOR OF CRIMINAL INVESTIGATION, Individually; and GERARD F. MEYERS, ASSISTANT DIRECTOR, DIVISION OF CRIMINAL INVESTIGATION, Individually,

Appellants.

Appeal from the Iowa District Court for Polk County
Paul D. Scott, District Judge

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

Appellee Larry Hedlund's brief incorrectly reads much of the caselaw it relies on and even pursues an issue that isn't contested. The Court should reject Hedlund's reading of the relevant caselaw, find that new section 70A.28(5) cannot apply retroactively, and reverse the district court.

I. Section 70A.28(5)'s *applicability*, not the meaning of various phrases in the statute, is the only issue in this appeal.

The 2019 amendments to Iowa Code chapter 70A added, as a category of available relief, "civil damages in an amount not to exceed three times the annual wages and benefits received by the aggrieved employee." 2019 Iowa Acts ch. 109, § 1; *see* Iowa Code § 70A.28(5) (2021). Hedlund devotes a portion of his brief both to arguing what the term "civil damages" includes (Hedlund Br. at 37–38) and to arguing the "three times" limitation applies only to certain categories (Hedlund Br. at 39–40). But neither issue is truly before the Court in this appeal. The district court concluded the cap only applies to "civil damages," and further concluded the categories of emotional distress and reputational damage were civil damages "made available by the amendment" in 2019. (1/8/22 Dist.

Ct. Ruling, App. 52.) The State's initial appellate brief addressed neither contention and the State acknowledges "an issue cannot be asserted for the first time in a reply brief." *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). Thus, the Court can safely ignore the statutory interpretation issue and instead decide the threshold question of whether the "civil damages" language, whatever its contours, applies to Hedlund's claim.

II. For the amendments to chapter 70A, the "event of legal consequence" relevant to retroactivity analysis occurs earlier than submission of a case to a jury.

Hedlund asserts that applying new section 70A.28(5) to his claim is not retroactive application because the event of legal consequence is "the court's award of damages to a plaintiff at a trial." (Hedlund Br. at 33). But this reading misstates the effects of the new provision.

Altering damages changes the entire texture of a suit. It changes how discovery must be conducted, what documents must be requested, and which witnesses will be necessary. On this point, *White v. Citizens National Bank of Boone* is instructive. 262 N.W.2d 812, 816 (Iowa 1978). In *White*, a plaintiff represented in

interrogatories that her damages amounted to $4,900, but on the first day of trial it became clear she was seeking damages in excess of $25,000. *Id.* at 815. Because the plaintiff had never supplemented her interrogatory response to alert the defendants to her increased claimed damages, the defendants objected, arguing "they had no opportunity to prepare to meet the testimony of damages in that amount." *Id.* The district court found the plaintiff violated then-Rule 125 (now Rule 1.508) and excluded evidence relating to damages in excess of $4,900. *Id.* at 816.

This Court affirmed. *Id.* "Faced with a claim for $25,000, defendants quite reasonably might have engaged in more investigation, might have themselves hired experts, and might have been prepared to meet plaintiff's evidence with additional rebutting testimony of their own." *Id.* Our rules of civil procedure are designed to "avoid surprise and permit the issues to become both defined and refined before trial. This allows litigants to prepare for the actual matters they will ultimately confront." *Id.*

Here, conversely, Hedlund's position would allow a civil plaintiff, during trial and up until the court enters a damages

judgment, to balloon his or her requested damages in response to a newly enacted statute. Yet Hedlund's narrow focus on the precise mechanic of formally ordering damages after trial misses all the ways new section 70A.28 impacts conduct both before suit and during litigation.

"The introduction of a right to compensatory damages is . . . the type of legal change that would have an impact on private parties' planning." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 (1994). And increasing damages during trial undermines the basic fairness principles built into our rules of civil procedure, which entitle defending parties "to be informed of the amount of the claim" prior to trial so they can litigate accordingly. *Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984).

When a change to the law impacts how an entire case is anticipated, discovered, and presented, the event of legal consequence must be the filing of the suit subjecting a defendant to liability. Whether the inquiry is framed as the event-of-legal-consequence (as in *Hrbek*) or simply a substantive change in the

law (as in *Landgraf*), the result is the same: applying section 70A.28(5) to Hedlund's claim is an improper retroactive application.

III. *Landgraf* shows retroactive application should not occur, and *Schmitt* does not displace *Landgraf*'s rationale.

Hedlund argues *Landgraf v. USI Film Products* conflicts with Iowa law. 511 U.S. 244 (1994); (Hedlund Br. at 18). But *Landgraf* is highly instructive and entirely consistent[1] with Iowa's approach to retroactivity.

Hedlund contends footnote 37 of *Landgraf* makes it inapplicable to this case under Iowa law. (Hedlund Br. at 18–19.) Yet this emphasis on one footnote is usually reserved for only the truly monumental. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); J.M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275, 281 (1989) ("When constitutional scholars talk about the 'problem of the footnote,' they are referring to a specific footnote, *the* Footnote, footnote four of *United States v. Carolene Products* . . .

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[1] This Court has favorably cited both the majority opinion and Justice Scalia's concurring opinion in *Landgraf* in recent cases. *See, e.g.*, *Hrbek v. State*, 958 N.W.2d 779, 782 (Iowa 2021); *State v. Macke*, 933 N.W.2d 226, 235–36 (Iowa 2019).

."). And footnote 37 of *Landgraf* doesn't overcome the persuasive logic in the rest of the opinion that explains a statutory amendment should not apply retroactively when the amendment adds categories of available damages to a type of claim, one of which is already pending at the time of the amendment. *See Landgraf*, 511 U.S. at 285–86.

The Title VII amendment at issue in *Landgraf* materially resembles the 2019 amendments to Iowa Code chapter 70A in several respects:

> Before the enactment of the 1991 Act, Title VII afforded only "equitable" remedies. The primary form of monetary relief was backpay. Title VII's backpay remedy, modeled on that of the National Labor Relations Act, is a "make-whole" remedy that resembles compensatory damages in some respects. However, the new compensatory damages provision of the 1991 Act is "in addition to," and does not replace or duplicate, the backpay remedy allowed under prior law. . . .
>
> Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled [only] to backpay under prior law. Before 1991, for example, monetary relief for a discriminatorily discharged employee generally included [only backpay and lost fringe benefits]. Under [the amendment], however, a Title VII plaintiff who wins a backpay award may also seek compensatory damages . . . .

Id. at 252–53 (cleaned up).

Similarly, before the 2019 amendment, Iowa Code chapter 70A afforded only equitable relief, including backpay. *See Hedlund v. State*, 930 N.W.2d 707, 718 (Iowa 2019). The amended statute significantly expands the monetary relief potentially available to include "civil damages," when that same plaintiff would have been entitled only to equitable relief, including reinstatement with or without backpay, under prior law. *See id.* at 716 n.5; *Landgraf*, 511 U.S. at 252–53. Thus, as in *Landgraf*, the amendment authorizes a post-enactment chapter 70A plaintiff, who seeks reinstatement with or without backpay, also to seek civil damages. *See Landgraf*, 511 U.S. at 252–53; *Hedlund*, 930 N.W.2d at 716 n.5.

Because the facts are materially similar, *Landgraf*'s reasoning is persuasive. And the core of *Landgraf* is that when evaluating retroactivity, "the court must ask whether the new provision attaches legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70. The "civil damages" amendment plows headlong into that test here; it would attach legal consequences (liability for civil damages) to events completed before its enactment (Hedlund's termination). *See id.* It would also

"increase . . . liability for past conduct." *Id.* at 280. "The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283–84.

Courts in several other jurisdictions have relied on *Landgraf* to conclude that statutory amendments enacted after a case is filed, which would increase the defendant's liability for previous conduct, do not apply retroactively to that case. *See, e.g.*, *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 497–98 (S.D.N.Y. 2014) (concluding an amendment that newly allowed "whistleblowers to recover double back pay" did not apply retroactively to conduct that occurred before the amendment's effective date); *Walleri v. Fed. Home Loan Bank of Seattle*, 965 F. Supp. 1459, 1467 (D. Or. 1997) (refusing to apply an amendment retroactively because "the 1993 version . . . attaches new legal consequences to events completed in 1990"); *Sizer v. Lopez Velasquez*, 270 A.3d 299, 304–05 (D.C. 2022) (concluding "increased liabilities" contained within a 2019 amendment would not "survive a retroactivity analysis under *Landgraf*"); *see also Young v. Altenhaus*, 472 So. 2d 1152, 1153–54 (Fla. 1985) (concluding, even before *Landgraf*, that a new fee-

shifting statute did not apply to causes of action that accrued before its effective date, even though the lawsuits were *filed* after the effective date). These decisions all recognize that a statutory amendment increasing liability for already-completed conduct is unfair retroactive application that raises due-process concerns. They also illustrate that the Court should reject retroactive application of section 70A.28's "civil damages" authorization here, because doing so would attach more consequences to conduct occurring before the statute's enactment.

Furthermore, Hedlund's reliance on *Schmitt* is misplaced. As discussed in the State's opening brief and above, in the *Landgraf* case, which is highly analogous factually, the United States Supreme Court determined that amendments adding a jury trial and additional measures of damages to Title VII were not retroactive. *See* 511 U.S. at 285–86. *Schmitt*, on the other hand, involved amending a statute to equalize the measure of damages for wrongful injury or death of a man and a woman. *Schmitt v. Jenkins Truck Lines*, 149 N.W.2d 789, 558 (Iowa 1967).

A close reading for *Schmitt* illustrates that it supports the State's position that the amendments to 70A.28 should not apply retroactively. That a statute is remedial does not end the inquiry of whether it should apply retroactively. *See* Appellant's Br. at 26–31. Once a court has determined that a statute is in fact remedial, it proceeds to a three-part test to determine whether it is appropriate to apply that statute retroactively. *Schmitt*, 149 N.W.2d at 792–93; *see also Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000) ("First, we look at the language of the new legislation; second we consider the evil to be remedied; and third, we consider whether there was any previous existing statute governing or limiting the mischief which the new legislation was intended to remedy.").

In *Schmitt*, this Court determined that a statutory amendment that equalized the measure of damages in wrongful injury or death cases involving women and men was remedial. 149 N.W.2d at 792. However, while Hedlund would like the inquiry to end there, it does not. The *Schmitt* Court also considered the three-part test that the Iowa Supreme Court has long used to determine

whether a remedial statute can be applied retroactively. *Id*. at 792–93; *Iowa Comprehensive Petroleum*, 606 N.W.2d at 375.

Schmitt, like the *Iowa Comprehensive Petroleum* and *Bainbridge* cases cited in the State's opening brief, illustrates the application of this Court's three-part test for determining retroactivity of a remedial statute. In *Schmitt*, the Court looked to the language of the newly-amended statute and found that the preamble "demonstrates an intention to provide a remedy for recognized pre-existing wrongs where redress had not previously been accorded." 149 N.W.2d at 792–93. The Court further reasoned that the amendment reflected a legislative intent for the statute to apply retroactively because it "inferentially refers to a condition in need of correction." *Id*. at 793.

Here, conversely, there is no such language contained in the amendments to 70A.28, nor can Hedlund point to any such language in the statute. *See* Appellant's Br. at 27–28. Instead, Hedlund attempts to rely on a legislator's opinion piece in the Des Moines Register and the fact that some legislators were at some point generally aware of Hedlund's lawsuit to infer retroactive

intent. Such an inference is improper. *See Poller v. Okoboji Classic Cars, LLC*, 960 N.W.2d 496, 512 (Iowa 2021) (noting individual legislator statements are "inadmissible on the question of legislative intent").

Next, the court found that the previous statutory scheme failed to provide a remedy for the existing wrong because "failed to make effective the right of a wife or children or both to recover for loss of services or support resulting from the tortious injury or death of a husband or father or both." *Schmitt*, 149 N.W.2d at 793. Such is not the case here. Before the 2019 amendments to chapter 70A, Hedlund could, and did, avail himself of a comprehensive statutory scheme providing a remedy for the alleged wrongs. *See* Appellant's Br. at 30–31. Therefore, unlike *Schmitt*, this factor also weighs toward applying the amended statute only prospectively.

Finally, *Schmitt* found that the evil to be remedied, "the inequality in the measure of damages for wrongful injury or death of a woman and those attendant on upon the injury or death of a man" weighed toward applying the amended statute retroactively. 149 N.W.2d at 793. As discussed in the State's opening brief, the

evil to be remedied by the 70A.28 amendments is prospective, unlike the situation in *Schmitt* in which a woman or children could not recover the same measure of damages for the loss of a husband or father as could be recovered for the loss of a mother or wife. Accordingly, declining to apply new section 70A.28(5) retroactively is consistent with *Schmitt*.

CONCLUSION

Hedlund filed this lawsuit in 2013, based on events that occurred earlier. The 2019 amendments to Chapter 70A do not, and should not, apply retroactively to Hedlund's lawsuit. This Court should therefore reverse the district court's decision and remand for a bench trial under the pre-2019 version of Iowa Code section 70A.28.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because it is being filed electronically.

/s/ *Jeffrey C. Peterzalek*
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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,417 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 22, 2022 this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Jeffrey C. Peterzalek*
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