IN THE SUPREME COURT OF IOWA
No. 22–1995

TERRACE HILL SOCIETY FOUNDATION,

Plaintiff–Appellee,

vs.

TERRACE HILL COMMISSION and
KRISTIN HURD, in her official capacity
as Chairperson of the Terrace Hill Commission,

Defendants–Appellants.

Appeal from the Iowa District Court for Polk County
David Nelmark, District Judge

# APPELLANT'S REPLY BRIEF

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### I. Terrace Hill Society Foundation's legal status is properly before this Court and shows the State never constructively waived immunity.

Terrace Hill Society Foundation ("THSF") seeks to shield this Court from its own legal representations, arguing its articles of merger and incorporation are not properly before this Court. THSF is incorrect.

THSF's articles of merger and articles of incorporation are legal documents that THSF prepared. THSF does not dispute that those documents are generally subject to judicial notice, but instead argues that because the district court did not review them below, the Commission is improperly expanding its position on appeal. But parties are always free to add "additional ammunition for the same argument" it made below. *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016) (finding party preserved argument on applicability of Code section despite party not discussing it below, as party merely added additional weight to its same argument). The Commission makes the same argument on appeal as it did to the district court—the Commission never waived its sovereign

immunity through its conduct toward, or its relationship with, THSF.

When considering whether the government waives sovereign immunity through its dealings with another entity, the legal identity and relationship of the other entity are crucial. Here, the relationship between the parties is clear not just from Executive Order 26, legislation creating the Commission, and the 1996 Agreement, but also from THSF's own representation of its legal purpose. THSF's stated incorporated purpose is two-fold:

> (1) To receive money and *other property* and to maintain a fund or funds and, subject to the restrictions and limitations set forth, *to use* such monies and *other property* and apply the whole or any part of the income therefrom and the principal thereof *exclusively for the benefit of the State of Iowa.*
>
> (2) To provide resources exclusively for the purpose of facilitating the continuing and sustaining support for the restoration, preservation and improvement of the collection and personal property and the interior and exterior of the building, and the grounds situated in the City of Des Moines, Iowa, known as "Terrace Hill" in a nonpartisan and impartial manner *under the direction of the Terrace Hill Commission*, and to coordinate with the executive and legislative branches of the state of Iowa, and others in achieving these purposes and in doing so to assist the State of Iowa and its citizens in preserving and improving this valuable State asset.

Terrace Hill Society Foundation, Restated Articles of Incorporation, Art. III (July 5, 2012), *available at* sos.iowa.gov, Business Entity 63702 (emphasis added).

The State does not waive its sovereign immunity working with entities created for the sole purpose of benefiting the State. Thus, the State accepting property from an entity whose sole purpose is to collect that property exclusively for the State's benefit does not inescapably and unambiguously waive the State's sovereign immunity. Whatever weight the implied-waiver argument may carry in another case, here, the State was working with an entity that exclusively collected property on the State's behalf. Indeed, the State using its own arms is not conduct that voluntarily assumes private legal consequences.

THSF further objects to the Commission's reading of the 1996 Agreement, which confirms that the predecessor organizations exclusively acted solely for the benefit of the State. THSF concentrates on aspirational language in the preamble—a resolution to work "harmoniously and cooperatively in the overall goal of restoring, preserving, and improving Terrace Hill"—and

ignores the substantive terms setting forth the parties' legal relationship—"The Society activities are on behalf of the State of Iowa, and its control and supervision are vested in public authority; therefore, the Society is a wholly owned instrumentality of a political subdivision and, is a part of the operation of State government." App. 60.

THSF's only response to this explicit language clarifying the legal relationship between these parties is that it must be read "in context" with the allegations in its Amended Petition. But litigants cannot use pleadings to undermine explicit contract language. Unless contract language is ambiguous, it is read and enforced as written. *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 321 (Iowa 2006). So THSF cannot at once argue that property was placed in Terrace Hill "in reliance on" the Agreement, (Appellee Br. at 27), but also that the Agreement's substantive language clarifying that all property was collected for the benefit of the State should be disregarded.

Because THSF's sole avenue to piercing sovereign immunity is by alleging conduct, the context of that conduct is critical. Here,

THSF has not alleged any conduct that could plausibly waive state sovereign immunity. At all times, the State accepted property from entities that solely collected that property on the State's behalf. The State accepting property from its own instrumentality is not the type of voluntary conduct with private parties that necessarily eliminates sovereign immunity, and the district court should be reversed.

## II. Sovereign immunity in this suit is not a "sword," and THSF exclusively relies on factually inapposite cases.

THSF argues that recognizing the State's sovereign immunity would improperly turn the doctrine into a "sword." THSF's sole argument in support of the sword is that the Commission promised to work "cooperatively" toward the "mutual goal" of preserving Terrace Hill in the 1996 Agreement, and extending immunity over personal property it received "in reliance on" on the promise of cooperation is unfair. (Appellee Br. at 27.)

But the aspirational language in the Agreement agreeing to work harmoniously and cooperatively does not bear the weight that THSF places upon it. The State did not, by agreeing to work productively toward bettering Terrace Hill, waive sovereign

immunity for non-contract suits with THSF. Constructive waiver requires more—particularly when the operational language in the Agreement makes clear that the entities exclusively worked on behalf of the State.

And all of THSF's cited authorities supporting constructive waiver are inapt. In *Dvorak*, this Court explained that sovereign immunity may be expressly or constructively waived. *State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978). There, the State voluntarily acquired land, and in turn assumed "those obligations and duties incident to land ownership." *Id.* Included in those obligations were the statutory duties of landowners to erect fences upon request. *Id.* Unlike in *Dvorak*, THSF has identified no statutory duties the Commission unavoidably assumed when working with entities that collected property on its behalf, nor does this action seek to vindicate necessarily assumed statutory obligations.

*Kersten* authorizes breach-of-contract suits against the State when it voluntarily entered into enforceable contracts with third parties. *Kersten Co., Inc. v. Dep't of Soc. Servs.*, 207 N.W.2d 117,

120 (Iowa 1973). But this is not a breach-of-contract action, so *Kersten* provides no shelter.

*Lee I* restates the general principle that conduct other than entering into a contract could, in the right case, also waive sovereign immunity. *Lee v. State*, 815 N.W.2d 731, 742 (Iowa 2012). Importantly, *Lee I* also emphasized the voluntariness and intent required to constructively strip the State of its sovereign immunity. *Id.* (affirming sovereign immunity when Lee "presented no evidence to suggest that the inclusion of the self-care leave provisions in the handbook was for any purpose other than to comply with the federal regulation implementing the FMLA"). THSF has not alleged any facts showing the Commission knowingly and voluntarily consented to personal property suits with THSF—generally resolving to work cooperatively and harmoniously in the expired Agreement is not enough.

THSF's remaining cases similarly turn on the existence of an express waiver of immunity or vindicating express contracts. *See George and Lynch, Inc. v. State*, 197 A.2d 734, 736 (Del. 1964) (authorizing suits against state for breach of contract); *Hawkeye By-*

*Products, Inc. v. State*, 419 N.W.2d 410, 412 (Iowa 1988) (discussing the "right of individuals to recover against the state on express contracts"); *Raper v. State*, 688 N.W.2d 29, 53–54 (Iowa 2004) (finding two Iowa statutes provided express consent to suit); *Anthony v. State*, 632 N.W.2d 897, 902 (Iowa 2001) (same).

Because the Commission did not expressly or constructively consent to this suit, the district court should be reversed.

## III. This is a declaratory personal-property suit—not a breach-of-contract suit, nor a bailment action, nor a 305B museum-loan dispute.

Finally, THSF points to three other types of potential lawsuits to justify its own. But even if other types of suits against the State could be authorized, it does not follow that this suit is authorized.

First, THSF says that "entering into the 1996 Agreement" is "part of the course of conduct" that constructively waived sovereign immunity over title to personal property. (Appellee Brief at 24.) But entering a contract only waives sovereign immunity for suits alleging the State breached that contract. *Kersten*, 207 N.W.2d at 120. THSF has repeatedly waived any argument that this lawsuit should be construed as a breach-of-contract action. So entering into

the 1996 Agreement cannot constitute sovereign immunity waiver conduct for this non-contract suit.

Second, THSF says that "the situation described in the Amended Petition may qualify as a 'bailment,'" but then explicitly clarifies that it is not in fact bringing a bailment action. (Appellee Br. at 32–33.) Thus, THSF has likewise waived any argument that this lawsuit should be construed as a bailment action. As with contracts, when the State enters a bailment relationship it is likely subject to corresponding bailment suits. But this is not a bailment suit, so THSF's appeal to bailment principles gets it no closer to showing that this particular suit is authorized.

And third, THSF argues the "situation described in the Amended Petition might also be considered a 'loan,' as that term is used in Iowa Code Chapter 305B, the Museum Property Act." (Appellee Br. at 33.) But again, THSF did not bring an action under chapter 305B to recover improperly retained loaned property. To preserve an interest in loaned museum property, a lender must provide the museum with a written notice of intent, which THSF has not done. Iowa Code § 305B.8. Nor has THSF brought suit

under section 305B.9 to recover the property. So while it is true that when the State in fact operates as a museum it assumes the obligations of chapter 305B, including the corresponding statutory actions to recover property, it does not follow that THSF's separate suit outside of chapter 305B is authorized.

If THSF believed the Commission breached the 1996 Agreement by not working harmoniously, breached a bailment by not returning THSF's property, or violated any portion of chapter 305B, it should have pursued those suits. But THSF's appeal to other permissible causes of action does not salvage its own impermissible suit.

The Legislature has not waived sovereign immunity over declaratory actions regarding personal property. Nor has the State's conduct in dealing with THSF constructively waived immunity over this suit. Thus, this suit is not authorized, invades sovereign immunity, and should have been dismissed.

## CONCLUSION

The ruling of the district court should be reversed, and the Commission's motion to dismiss should be granted with prejudice.

Respectfully submitted,

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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 1,831 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

*/s/ Andrew Ewing*
Assistant Attorney General

## CERTIFICATE OF FILING AND SERVICE

I certify that on August 25, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

*/s/ Andrew Ewing*
Assistant Attorney General