**IN THE SUPREME COURT OF IOWA**

**Case No. 22-1995**

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**TERRACE HILL SOCIETY FOUNDATION,**

**Plaintiff/Appellee**

**v.**

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

**Defendants/Appellants**

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**Appeal from the Iowa District Court for Polk County (Hon. David Nelmark), Case No. CVCV063750**

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# APPELLEE'S FINAL BRIEF

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## ISSUE PRESENTED FOR REVIEW

1. Whether the District Court correctly concluded, in denying the Motion to Dismiss for failure to state a claim by the Defendant/Appellant, the Terrace Hill Commission ("the Commission"), a state agency, that the Commission constructively waived sovereign immunity by accepting custody of various historical artifacts and other items of property (collectively, "the Collection") owned by the Terrace Hill Society Foundation ("THSF") and its predecessor organizations over a period of many years, for public display at Terrace Hill.

*State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978)

*Kersten Co. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 118 (Iowa 1973)

Iowa Rule of Civil Procedure 1.421(1)(f)

2. It is THSF's position that the portion of the District Court's Ruling that granted the Motion to Dismiss with regard to THSF's alternate claims for relief against Kristin Hurd, in her official capacity as Chairperson of the Commission, and dismissed them without prejudice, are not properly subject to interlocutory review because neither the Commission nor Ms. Hurd are "aggrieved" parties entitled to seek interlocutory review of that ruling.

Iowa Rule of Appellate Procedure 6.104(1)(a)

## ROUTING STATEMENT

THSF agrees with the Commission that this interlocutory appeal should be retained by the Supreme Court because it presents fundamental issues of broad public importance; specifically, whether a state agency that has constructively waived sovereign immunity, through its course of conduct over many years, can rely on the doctrine of sovereign immunity to prevent the owner of the property from seeking legal recourse with regard to its ownership rights and, therefore, obtain ownership rights in the property placed in its custody. Iowa R. App. P. 6.1101(2)(d). However, it respectfully disagrees that this case presents "a substantial issue of first impression" because the District Court's Ruling denying the Motion to Dismiss by the Commission correctly applied well-established principles of Iowa law and controlling precedent with regard to constructive waiver of sovereign immunity by the State or a state agency.

## STATEMENT OF THE CASE

This declaratory judgment action involves the Terrace Hill Society Foundation's ("THSF") [1] request for an adjudication of its ownership rights in a collection of historical artifacts (collectively described as "the Collection") placed at Terrace Hill, the Governor's mansion.[2]

For nearly fifty years, hundreds of items that had been donated to THSF and its two predecessor organizations, the Terrace Hill Foundation, Inc. ("the Foundation") and Terrace Hill Society ("the Society"), were placed at Terrace Hill for the use and benefit of the current and previous Governors of the State of Iowa and the citizens of the State of Iowa, through the joint (and, during most of that time period, cooperative) efforts of those three non-profit organizations and the Defendant/Appellee, the Terrace Hill Commission ("the Commission"), a state agency. [3]

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[1] THSF is a non-partisan, non-profit corporation organized and existing pursuant to Iowa Code Chapter 504, and is a Section 501(c)(3) charitable organization under the Internal Revenue Code. (App. 17 (Amended Petition, ¶ 1)). THSF is the result of a merger in 2012 between the two predecessor organizations. (App. 18 (*Id.* ¶ 7)).

[2] Since the District Court's Ruling involved the denial of a Motion to Dismiss pursuant to Rule 1.421(1)(f), all references to the record will be based on the factual allegations set forth in the Amended Petition for Declaratory Judgment filed on June 27, 2022. (App. 17-19 (Amended Petition, ¶¶ 1-3, 8-12).

[3] App. 17-19 (Amended Petition, ¶¶ 1-2, 4, 7, 10-12). For purposes of this Brief, the Commission and Chairperson Hurd (in her official capacity) will be referred to collectively as "the Commission."

In recent years, however, a disagreement has developed between THSF and the Commission regarding ownership and control over the Collection.[4] Therefore, after repeated efforts to informally resolve the disagreement were unsuccessful, THSF filed a Petition for Declaratory Judgment on May 2, 2022 seeking judicial determination of its ownership rights in the Collection and restoration of its control over it.[5]

Instead of directly addressing THSF's request for a declaratory judgment on the merits — indeed, as it acknowledges, *regardless* of the merits of THSF's position — the Commission filed a Motion to Dismiss pursuant to Iowa Rule of Civil Procedure 1.421(1)(f) asserting that the doctrine of sovereign immunity prohibits THSF from seeking a declaratory judgment with regard to its ownership rights in the Collection, thereby depriving it of any legal recourse to protect its ownership rights. The Commission's position also disregards well-established principles of Iowa law and this Court's controlling precedent regarding constructive waiver of sovereign immunity, when the State or a state agency, by entering into business relationships with other parties, voluntarily subjects itself to "obligations and duties incident to" those business relationships.

[4] App. 19 (Amended Petition, ¶¶ 13-14).

[5] App. 19-20 (Amended Petition, ¶¶ 13-14, 17-20).

*State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978); *see also Lee v. State*, 815 N.W.2d 731, 737-42 (Iowa 2012) ("*Lee I*").

But in this case, the Commission goes beyond simply attempting to use the doctrine of sovereign immunity as a "shield" to evade its legal obligations with regard to the property placed in its custody by THSF and its predecessors. It also attempts to utilize sovereign immunity as a "sword" to extend its current "property rights" (possession, custody and control) in the Collection to, in effect, acquire ownership of it — a position that has consistently been rejected by modern courts, including this Court.

The District Court (Hon. David Nelmark) rejected the Commission's attempt to utilize the doctrine of sovereign immunity in that manner, correctly applying controlling precedent and concluding that the Commission, by and through its prior course of conduct, including "willingly accept[ing] possession of THSF's property" and the property of its predecessors over several decades, constructively waived sovereign immunity.[6] As the District Court succinctly put it: "THSF has property rights under state law and the Iowa Constitution, and it is entitled to have this Court rule on the merits of its ownership claims." [7]

[6] App. 81-82 (Ruling, pp. 5-6).

[7] *Id.*

In its Brief, the Commission mischaracterizes both the factual allegations in THSF's Amended Petition, which the District Court and this Court must accept as true for purposes of ruling on a motion to dismiss pursuant to Iowa Rule of Civil Procedure 1.421(1)(f) and the basis for the District Court's Ruling denying the Motion to Dismiss.

In its Statement of the Case, and continuing throughout its Brief, the Commission repeatedly attempts to characterize the Collection as property that was "donated *to* the Commission." (Appellants' Brief, p. 8 (emphasis added)). That characterization is directly contrary to both THSF's pleadings and actual historical practices. For purposes of ruling on a motion to dismiss pursuant to Rule 1.421(1)(f), of course, the factual allegations in the pleadings control. THSF's Amended Petition states that "THSF, and its predecessors, the Foundation and the Society, received hundreds of items of donated property, including, but not limited to, historical artifacts" that comprise "the Collection" and placed them "in the care and custody of the Commission" for use and display at Terrace Hill "subject to the express understanding that it was owned by, and would continue to be owned by those predecessor organizations and (now) THSF, without any express or implied relinquishment of any ownership rights."[8]

[8] App. 19-20 (Amended Petition, ¶¶ 10-12, 18).

The property at issue was therefore "donated" *to* THSF and its predecessor organizations — not donated *by* THSF and its predecessor organizations to the Commission.[9]

The Commission also attempts to interject the proposition that the property at issue was "donated" *to* the Commission into its description of the District Court's Ruling. (Appellants' Brief, p. 10). But the District Court *did not* deny the Motion to Dismiss "because the Commission accepted and retained *donated property from THSF*," as the Commission asserts. (*Id.* (emphasis added)). Instead, it concluded that the Commission's course of conduct, including "willingly accept[ing] possession of *THSF's property*," constituted constructive waiver of sovereign immunity. (App. 81 (Ruling, p. 5) (emphasis added)).

The Commission's Brief also includes a section of Argument regarding the portion of the District Court's ruling *granting* the Motion to Dismiss[10] with regard to THSF's alternate claims for relief against its Chairperson, Ms. Hurd. (Appellants' Brief, pp. 29-34).

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[9] *Id.*

[10] The District Court concluded that THSF had not alleged that Chairperson Hurd had asserted any ownership interest in the Collection or done anything to interfere with THSF's ownership interests in it, in violation of any state or federal law that might support the alternative claims for relief asserted pursuant to the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908), as subsequently adopted by this Court. *Lee v. State*, 844 N.W.2d 668, 676-80 (Iowa 2014).

That ruling was adverse to THSF, *not* the Commission or Ms. Hurd, and, because the dismissal was without prejudice, THSF did not seek review of it. Therefore, there is nothing for the Commission or Ms. Hurd to appeal or for this Court to review with regard to that portion of the District Court's Ruling. *See* Iowa Rule of Appellate Procedure 6.104(1)(a) (limiting applications for interlocutory review to parties "aggrieved" by a ruling). *See also Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994) (quoting *Windus v. Great Plains Gas*, 116 N.W.2d 410, 415-16 (1962)) ("A dismissal without prejudice leaves the parties as if no action had been instituted" and does not constitute "an adjudication itself as to bar a new action between the parties.").

## STATEMENT OF FACTS

### I. Introduction

When ruling on the Commission's Motion to Dismiss for failure to state a claim, pursuant to Rule 1.421(1)(f), the District Court properly recognized that it was required to "consider as true the factual allegations in the Amended Petition" and consider them "in the light most favorable to THSF." (App. 78, 81 (Ruling, pp. 2, 5)); *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127-28 (Iowa 2016). Accordingly, THSF's Statement of Facts will focus primarily on "key allegations" that the District Court specifically referenced in its Ruling. (App. 78 (Ruling, p. 2)).

II. The Parties

THSF is a non-partisan, non-profit corporation.[11] THSF came into existence in July 2012 as the result of a merger between two predecessor organizations that were also non-profit corporations involved in the preservation of Terrace Hill, the Terrace Hill Foundation, Inc. ("the Foundation") and the Terrace Hill Society ("the Society").[12]

The Terrace Hill Commission ("the Commission") is a state agency[13] that is responsible for providing for the "preservation, maintenance, renovation, landscaping and administration" of Terrace Hill. *See* Iowa Code § 8A.326.

III. Historical Practices and the Current Disagreement

For nearly 50 years, THSF and its predecessors, the Foundation and the Society, have received donations of hundreds of items of property, including many priceless historical artifacts (collectively described as "the Collection").[14]

[11] App. 17 (Amended Petition, ¶ 1).

[12] App. 18 (Amended Petition, ¶ 7).

[13] App. 17 (Amended Petition, ¶ 2).

[14] App. 19 (Amended Petition, ¶ 10).

For many years, THSF and its predecessors worked closely and cooperatively with the Commission, including placing many historical items from the Collection on display at Terrace Hill and assuring that Terrace Hill was maintained, preserved and restored in an appropriate manner.[15]

In 1996, the Commission and THSF's predecessors, the Society and the Foundation, entered into a written agreement, the "Agreement For Operating Procedures Between Terrace Hill Commission, Terrace Hill Society and Terrace Hill Foundation" ("the 1996 Agreement") that is specifically referenced in THSF's Amended Petition.[16] It primarily addressed fundraising efforts, but specifically provided that the Commission, the Foundation and the Society "are mutually resolved in the future to work harmoniously and cooperatively in the overall goal of restoring, preserving and improving Terrace Hill" and that they "will work cooperatively to the mutual goal of restoring, preserving and improving Terrace Hill." The 1996 Agreement also generally described the various functions of the Commission, the Foundation and the Society, as well as the working relationships among and between them as they existed in 1996 and for many years following its execution.

[15] App. 18 (Amended Petition, ¶ 9).

[16] App. 18 (Amended Petition, ¶¶ 8-9).

Before, during and after the time period the 1996 Agreement was in effect, THSF and its predecessors placed many items from the Collection into the care and custody of the Commission, in reliance on commitments by the Commission (in the 1996 Agreement and in many other communications) to work together "cooperatively" with the "mutual goal" of "restoring, preserving and improving Terrace Hill."[17] Critically, as the District Court specifically noted in its Ruling, "[a]t all material times, the Collection was placed in the care and custody of the Commission by THSF and its predecessor organizations, for use and display at Terrace Hill, subject to the express understanding that it was *owned by, and would continue to be owned by*, those predecessor organizations and [now] THSF, without any express or implied relinquishment of any ownership rights by THSF or its predecessor organizations." (App. 78 (Ruling, p. 2 (quoting THSF's Amended Petition, ¶ 18)) (emphasis added)).

In its Statement of Facts, the Commission correctly states that the Legislature amended Iowa Code § 8A.326(4) in 2013, eliminating the former statutory requirement that the Commission work with the Society and the Foundation and allowing it to enter into contracts with non-profit organizations to provide for "the preservation, maintenance, renovation, landscaping, and administration of" Terrace Hill. (Appellants' Brief, pp. 15-16).

[17] App. 19 (Amended Petition, ¶ 12).

It is undisputed that the Commission now has the statutory authority to decide, at its discretion, whether or not to enter into contracts with THSF or any other non-profit organizations. But the Legislature's 2013 amendments to Section 8A.326 did not purport to transfer ownership rights in the Collection to the Commission or provide the Commission with the legal authority to do so, if it chose to discontinue its working relationship with THSF.

Therefore, a disagreement developed between the Commission and THSF with regard to those ownership rights and "[a]s a result of the ongoing disagreement . . . the Commission has, in effect, and without the legal authority to do so, asserted control over the Collection and denied THSF control over it or access to it." (App. 78, (Ruling, p. 2 (quoting Amended Petition, ¶ 19))).

The ongoing disagreement between THSF and the Commission regarding ownership rights to the Collection ultimately resulted in THSF filing this declaratory judgment action.

IV. The Commission's References to Materials Outside the Pleadings

Beyond the general historical narrative (at least to the extent it is consistent with the factual allegations in the Amended Petition) the Statement of Facts in the Commission's Brief often strays far from the materials that were actually considered by the District Court.

First, it uses selective excerpts from the 1996 Agreement[18] to attempt to support the proposition that one of the two predecessor organizations, the Society, was "a wholly-owned instrumentality of a political subdivision" that was therefore a "part of the operation of State government" and that, according to the Commission, "all property or money donated to the Society and the Foundation to benefit Terrace Hill" was "collected on behalf of, and necessarily owned by, the State of Iowa." (Appellants' Brief, pp. 14-15 (emphasis added)). Although the 1996 Agreement was specifically referenced in the Amended Petition and, therefore, properly considered by the District Court when ruling on a motion to dismiss,[19] it must be read in full and in context and also considered in the context of the factual allegations of the Amended Petition — which, of course, must be accepted as true when ruling on a motion to dismiss. *Meade v. Christie*, 974 N.W.2d 770, 772 (Iowa 2022). The 1996 Agreement, when read in context, clearly deals primarily with fundraising. (App. 59-61, 64-68 (1996 Agreement, pp. 2-4, 7-11)). With regard to fundraising efforts by the Society, it refers to monetary contributions and makes it clear that those monetary contributions to the Society will still be controlled *by the Society*. (*Id.*).

[18] The Commission asserts contradictory positions regarding the 1996 Agreement. It contends that because it contemplated the execution of a "28E Agreement," it was "not a final enforceable contract" while simultaneously relying on it elsewhere in its Brief. (Appellants' Brief, pp. 25-27).

[19] *See King v. State*, 818 N.W.2d 1, 6 (FN1) (Iowa 2012).

Simply put, there is nothing in the 1996 Agreement with regard to the Society — let alone the Foundation — that supports the proposition that donations of personal property (to the Society, the Foundation, or, subsequently, THSF) were donations "to" the Commission or the State of Iowa. The position asserted by the Commission is fundamentally at odds with the factual allegations in the Amended Petition and the District Court's Ruling on the Motion to Dismiss.

Additionally, as the District Court clearly stated in its Ruling, the Commission's constructive waiver of sovereign immunity was not based on the 1996 Agreement itself, but on the Commission's course of conduct during and after the time period that the 1996 Agreement was in effect. (App. 79-81 (Ruling, pp. 3-5)). The Commission entering into a contract that expressly committed it to working "harmoniously" and "cooperatively" with THSF's predecessors towards the "mutual goal" of "restoring, preserving and improving Terrace Hill" is simply one component of its consistent course of conduct over many years that resulted in THSF and its predecessors placing many items from the Collection at Terrace Hill, and, therefore, in the Commission's possession, custody and control. (*Id.*; App. 18-19 (Amended Petition ¶¶ 8-12)).

Second, the Commission's Statement of Facts includes selective excerpts from corporate records from the Society, the Foundation and THSF that were never cited in the District Court proceedings and also mischaracterize those corporate records.

Those corporate records were not brought to the District Court's attention below and therefore are entirely irrelevant to any claim that it committed an error of law in ruling on the Motion to Dismiss. They should not be considered in this interlocutory appeal, but, even if they are considered, nothing in them supports the Commission's position that the District Court's Ruling constituted "legal error."[20]

[20] Judicial notice of these corporate records, while generally permissible, is beyond the scope of this interlocutory appeal. This Court "review[s] a district court's ruling on a motion to dismiss for the correction of legal error." *White v. Harkrider*, 990 N.W.2d 647, 650 (Iowa 2023) (citing *Meade v. Christie*, 974 N.W.2d 770, 774-75 (Iowa 2022)). A court is required to take judicial notice "*if* a party requests it *and* the court is supplied with the necessary information." Iowa R. Evid. 5.201(c)(2) (emphasis added). If a party does not request it, a court "*may* take judicial notice on its own." Iowa R. Evid. 5.201(c)(1) (emphasis added). In this case, neither party requested that the District Court take judicial notice of these records. Therefore, it was permitted, but *not required*, to take judicial notice of them. The records were never referenced in the District Court's Ruling, so it clearly did not consider them. As such, these records are beyond the scope of this Court's standard of review for rulings on motions to dismiss.

Even if these records had been considered by the District Court, the Commission's summary of these documents mischaracterizes them. (Appellants' Brief, pp. 12-13, 15). The articles of incorporation actually make it clear that the Society and the Foundation were organized to maintain and apply funds, in their discretion, for various purposes, not exclusively on behalf of the State and Terrace Hill as the Commission now suggests. *See* Articles of Incorporation of the Terrace Hill Society, Art. III (filed June 22, 1972) (specifying that the Society was organized for "charitable, religious, educational and scientific purposes"); Articles of Incorporation of Terrace Hill Foundation, Inc., Art. III (filed Oct. 13, 1975) (specifying that the Foundation was organized "exclusively for charitable, religious, scientific, testing for public safety, literary, or educational purposes"); Articles of Merger (filed July 5, 2012) (creating THSF by merger of the Foundation and the Society).

V. The Purpose of the Declaratory Judgment Action

In its Brief, the Commission also mischaracterizes the purpose of THSF's declaratory judgment action. THSF is *not* challenging the Commission's refusal to enter into a contract with THSF, which is a decision that THSF acknowledges is now subject to the Commission's discretion under Section 8A.326, as amended. (Appellants' Brief, p. 9-10, 15-16). Instead, the purpose of the declaratory judgment action, as the District Court correctly recognized, is to seek a judicial determination that THSF still has ownership rights in the Collection (App. 78 (Ruling, p. 2)). Although the declaratory judgment action also includes a request for injunctive relief "if necessary," there was no request for injunctive relief pending when the District Court issued its Ruling and the Ruling therefore does not either grant or deny any request for injunctive relief. (*Id.*)

The District Court, applying controlling precedent, correctly concluded that when the factual allegations in the Amended Petition are accepted as true and read in the light most favorable to THSF, the Commission's conduct constituted constructive waiver of sovereign immunity. (App. 81 (Ruling, p. 5)). Therefore, as the District Court put it: "THSF has property rights under state law and the Iowa Constitution, and it is entitled to have [the] Court rule on the merits of its ownership claims." (*Id.*).

## ERROR PRESERVATION STATEMENT

THSF agrees that the Commission properly preserved error with regard to the District Court's Ruling denying its Motion to Dismiss directed to Count I of the Amended Petition (declaratory judgment action against the Commission) due to constructive waiver of sovereign immunity, by filing an application for interlocutory appeal in a timely manner.

THSF does not agree that the District Court's Ruling granting the Motion to Dismiss with regard to THSF's alternate claims for relief against Ms. Hurd, as the Chairperson of the Commission (Count II of the Amended Petition) and dismissing those claims without prejudice is properly before this Court on interlocutory appeal. Because the dismissal was without prejudice, THSF did not seek interlocutory review and neither the Commission nor Ms. Hurd is a party who has been "aggrieved" by that ruling, pursuant to Rule 6.104(1)(a).

## SCOPE AND STANDARD OF APPELLATE REVIEW

The scope of interlocutory review should be confined to the District Court's Ruling denying the Commission's Motion to Dismiss, with regard to the declaratory judgment action stated in Count I of the Amended Petition.

The standard of review that applies to a ruling on a motion to dismiss pursuant to Rule 1.421 is for correction of errors at law. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 298 (Iowa 2020) (citing *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014)).

## ARGUMENT

### Section I

### THE DISTRICT COURT CORRECTLY APPLIED CONTROLLING PRECEDENT IN RULING THAT THE COMMISSION, BY ITS CONDUCT, CONSTRUCTIVELY WAIVED SOVEREIGN IMMUNITY

#### A. The District Court's Ruling Was Based on the Commission's *Conduct*

In its Ruling denying the Commission's Motion to Dismiss Count I of the Amended Petition (the declaratory judgment action) the District Court correctly concluded that when the factual allegations are considered "in the light most favorable to THSF, the Commission's prior *conduct*" with regard to the Collection, including "willingly accept[ing] possession" of it and "retainin[ing] such possession" constituted constructive waiver of sovereign immunity and therefore subjects it to THSF's request for a judicial determination regarding its ownership rights "on the merits." (App. 81 (Ruling, p. 5 (emphasis added))).

Throughout its Brief, the Commission mischaracterizes THSF's position, asserting that THSF is relying solely on the 1996 Agreement as the basis for constructive waiver of sovereign immunity. (Appellants' Brief, pp. 26-28). However, as the Amended Petition makes clear, and as the District Court correctly concluded, entering into the 1996 Agreement was only part of the course of conduct by the Commission with regard to the Collection that resulted in constructive waiver of sovereign immunity. (App. 18-19 (Amended Petition, ¶¶ 9-12); App. 79-81 (Ruling, pp. 3-5)).

The Amended Petition specifically states that the course of conduct included "many years" of close working relationships and cooperative efforts between the parties, "including, *but not limited to*, the time period in which the 1996 Agreement was in effect," and that the decision to place items from the Collection in the care and custody of the Commission was based on reliance on commitments by the Commission both "in the 1996 Agreement *and in many other communications*" with members of the Commission during that time period. (App. 18-19 (Amended Petition, ¶¶ 9-12 (emphasis added))). Accordingly, the District Court correctly noted that THSF's position was based on "the Commission's conduct during *and after*" the time period when the 1996 Agreement was in effect. (App. 79 (Ruling, p. 3 (emphasis added))).

In *Dvorak*, 261 N.W.2d at 489, this Court extended its prior holding in *Kersten Co. v. Department of Social Services*, 207 N.W.2d 117, 118 (Iowa 1973) "abandon[ing] its prior total abstention policy," by holding that the State or a state agency can constructively waive sovereign immunity by voluntarily entering into a contract with a third party, as in *Kersten*, or through *other conduct* that creates common law "obligations and duties." *Dvorak*, 261 N.W.2d at 488-89 (emphasis added) (citing *Kersten*, 207 N.W.2d at 119-21).

More recently, in *Lee I*, this Court squarely rejected the State's position that Iowa law no longer recognizes constructive waiver of sovereign immunity, reaffirming its departure from the "absolute terms" of sovereign immunity in *Kersten* and its subsequent holding in *Dvorak* that "consent to suit or waiver of sovereign immunity need not always be restricted to legislative enactment" but can also be demonstrated by the *conduct* of the State or state agencies, based on the now well-established principle that the "the State is answerable for the legal relationships it voluntarily creates." *Lee I*, 815 N.W.2d at 737-38, 741-42.

"We adopted the doctrine of constructive waiver in *Kersten* based on the public policy that it would be abhorrent to permit the State to enter into contracts with no corresponding obligation to perform its promises under the contract" and subsequently extended the doctrine of constructive waiver in *Dvorak* to "other circumstances where the State" or a state agency, through its *conduct*, "voluntarily assumes legal consequences." *Id.* at 741-42. "The same public policy grounds that supported the adoption of the doctrine at that time exist today." *Id.* at 741. As the Commission's position in this case makes abundantly clear, those same public policy considerations still exist today. The Commission is asserting certain "property interests" in property that was placed into its care and custody by THSF and its predecessors and attempting to utilize the doctrine of sovereign immunity affirmatively in order to acquire ownership interests in it. (Appellants' Brief, pp. 19-23).

The Commission directly acknowledges that it continues to retain possession of the Collection, despite THSF's claim of ownership rights, apparently under the mistaken premise that its limited statutory authority permits it to arbitrarily seize property that was placed in its care and custody in reliance on its stated commitments to work "cooperatively" with THSF and its predecessors toward their "mutual goal" of preserving and maintaining Terrace Hill. (Appellants' Brief, pp. 27-29; App. 18-19 (Amended Petition, ¶¶ 8-12)). But once it decided that it would not enter into a contract with THSF, ending the "cooperative" working relationships that formerly existed, and a disagreement developed over ownership rights to the Collection that ultimately resulted in THSF seeking a judicial determination of its ownership rights, the Commission is now attempting to not only evade any judicial determination of THSF's ownership rights "on the merits" but also seeking to, in effect, acquire ownership rights over the disputed property by attempting to wield the doctrine of sovereign immunity affirmatively, as a "sword."

Put another way, the Commission's contention that THSF's request for a declaratory judgment to determine its ownership rights should not be permitted to proceed because it is "seeking to *divest the State of its property*" would necessarily result in the Commission acquiring ownership rights without any valid determination of the "merits" of its position. (Appellants' Brief, pp. 22-23 (emphasis added)).

The Commission's position therefore goes far beyond simply attempting to use sovereign immunity as a "shield" to avoid the "legal consequences" of its prior course of conduct, contrary to this Court's prior decisions in *Kersten*, *Dvorak* and *Lee I* — the controlling precedent that the District Court correctly applied. It constitutes an attempt to utilize the doctrine of sovereign immunity offensively in order to *acquire* ownership rights in disputed property, by attempting to preclude the party claiming ownership rights from obtaining an adjudication on the merits. The public policy considerations for rejecting the Commission's attempt to utilize the doctrine of sovereign immunity in this case are therefore even stronger than the circumstances in *Kersten*, *Dvorak* or *Lee I* and fully support the District Court's decision to allow THSF's declaratory judgment action to proceed on the merits.

B. Decisions From Other Jurisdictions Also Support The District Court's Ruling Based On Public Policy Considerations Adopted by this Court

In its Brief, the Commission cites several decisions from other jurisdictions that the District Court correctly concluded were not persuasive because they are distinguishable from the situation presented in this case.[21] (Appellants' Brief, pp. 22-23; App. 80 (Ruling, p. 4)).

[21] The District Court distinguished *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798 (Mo. 1965) because "the state had not affirmatively engaged in conduct that could be considered" a constructive waiver of sovereign immunity. (App. 80 (Ruling, p. 4)).

To the extent this Court is inclined to consider cases from other jurisdictions, in addition to the controlling precedent of *Kersten*, *Dvorak* and *Lee I*,[22] the decisions originally cited with approval in *Kersten* continue to have vitality with regard to the important public policy considerations that fully support constructive waiver of sovereign immunity in situations in which the State or a state agency has voluntarily entered into business relationships with other parties involving mutual and reciprocal commitments and obligations.

In *Kersten*, the Court quoted a 1964 decision by the Delaware Supreme Court, *George and Lynch, Inc. v. State*, 197 A.2d 734, 736 (Del. 1964):

> It follows, therefore, that in authorizing the State Highway Department to enter into valid contracts the General Assembly has necessarily waived the State's immunity to suit for breach by the State of that contract. Any other conclusion would ascribe to the General Assembly an intent to profit the State at the expense of its citizens. We are unwilling to assume that the General Assembly intended the State to mislead its citizens into expending large sums to carry out their obligation to the State and, at the same time, deny to them the right to hold the State accountable for its breach of its obligations. *To state the proposition is to demonstrate its injustice; indeed, so unjust is it that it might amount to the taking of property without due process of law.*

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It also distinguished *Valley Gypsum Co. v. Pennsylvania State Police*, 581 A.2d 707 (Pa. Commw. Ct. 1990), a replevin action, and *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) because, unlike this case, "the state agency did not actually possess the property at issue." (*Id.*).

[22] *See also Raper v. State*, 688 N.W.2d 29, 53-54 (Iowa 2004) (affirming ruling that State waived sovereign immunity); *Anthony v. State*, 632 N.W.2d 897, 902 (Iowa 2001) (affirming ruling that State waived sovereign immunity).

*Id.* at 120 (emphasis added).[23]

In support of its attempt to avoid addressing the merits of THSF's request for a declaratory judgment with regard to its ownership rights, the Commission attempts to characterize THSF's request for declaratory relief as being equivalent, to "some degree," to "destroy[ing] the government itself." (Appellants' Brief, p. 25). But the prospect of allowing the Commission to obtain possession of many priceless historical artifacts over many years of mutually beneficial and cooperative efforts and then utilizing the doctrine of sovereign immunity to not only prevent THSF from seeking any legal recourse but also, in effect, acquire ownership rights to the disputed property would constitute a manifest injustice that is directly at odds with the public policy considerations described in this Court's prior decisions as well as decisions by courts in other jurisdictions. *Kersten,* 207 N.W.2d at 120 (quoting *George and Lynch*, 197 A.2d at 736) (holding that the doctrine of sovereign immunity should not be utilized by the State or a state agency to perpetrate "*injustice*," such as situations that "might amount to the *taking of property without due process of law*") (emphasis added).

[23] In *Kersten*, 207 N.W.2d at 120-21, the Court also cited several other decisions from other jurisdictions supporting the proposition that when a state or state agency enters into a contract or other reciprocal business relationships with another party, it cannot utilize the doctrine of sovereign immunity to "arbitrarily repudiate" its obligations without legal recourse to the other party.

*See also Lee I*, 815 N.W.2d at 737-38 (citing *Dvorak*, 261 N.W.2d at 489) ("[W]e have not confined the constructive waiver of [sovereign] immunity doctrine to contracts entered into by the State, but have applied it on other circumstances where the State voluntarily assumes legal consequences."); *Hawkeye By-Products, Inc. v. State*, 419 N.W.2d 410, 412 (Iowa 1988) (recognizing "need for mutuality of remedy in order to insure fairness" and to avoid "unjust enrichment" of a state agency).

This Court should not depart from the sound public policy rationale adopted in *Kersten* and reaffirmed in *Dvorak* and *Lee I* by endorsing use of the doctrine of sovereign immunity as a "sword," in order to effectuate the acquisition of property that was placed in the care and custody of a state agency "subject to the express understanding that it was owned by, and would be continue to be owned by" non-profit organizations working closely with that state agency for many years, "without any express or implied relinquishment of any ownership rights." (App. 19, 21 (Amended Petition, ¶¶ 10-12, 18)).

C. The District Court's Ruling Correctly Compared The Situation Described in the Amended Petition to a "Bailment" – But This Court's Controlling Precedent Does Not Limit Constructive Waiver of Sovereign Immunity to "Bailments"

In a footnote, the Commission also contends that the District Court erred when it characterized the Commission's possession of the Collection as a "bailment." (Appellants' Brief, p. 23 (FN 4)).

However, the District Court's Ruling did not depend on whether the transfer of custody of the property at issue constituted a "bailment," under Iowa law. Instead, under this Court's existing precedent, the determinative issue when ruling on a Motion to Dismiss is whether the factual allegations in the Amended Petition, when taken as true, describe *conduct* by the Commission that is sufficient to constitute constructive waiver of sovereign immunity, pursuant to the controlling precedent established by this Court in *Kersten*, *Dvorak* and *Lee I*. Since the Amended Petition specifically alleges that property (the Collection) was placed in the care and custody of the Commission by THSF and its predecessors, for purposes involving their mutual benefit, without any relinquishment of ownership rights by THSF and its predecessors, the essential elements of a bailment under Iowa law do exist. *Khan v. Heritage Prop. Mgmt.*, 584 N.W.2d 725, 729-30 (Iowa Ct. App. 1998) (citing *Farmers Butter & Dairy Coop. v. Farm Bureau Mut. Ins. Co.*, 196 N.W.2d 533, 538 (Iowa 1972)) (describing essential element of a bailment and noting that it can be based on an express or implied contract or, alternatively, "can also arise by operation of law when justice requires" through a "constructive" bailment); (App. 18-19, 20 (Amended Petition, ¶¶ 8-12, 18)). However, THSF is seeking declaratory relief; it is not asserting any claims for compensatory damages, the remedy traditionally associated with bailment claims.

Therefore, while the situation described in the Amended Petition may qualify as a "bailment," the existence of a bailment is not essential to the District Court's Ruling denying the Motion to Dismiss. THSF need only allege *conduct* by the Commission sufficient to constitute constructive waiver of sovereign immunity. *Dvorak*, 261 N.W.2d at 489. As the District Court correctly concluded, based on what it identified as one of the "key" factual allegations in the Amended Petition: "[T]he Collection was placed in the care and custody of the Commission[24] . . . subject to the express understanding that it was owned by, and would continue to be owned by, those predecessor organizations and (now) THSF." (App. 20 (Amended Petition, ¶ 18); App. 78 (Ruling, p. 2)). That course of conduct fully supports the District Court's conclusion that sovereign immunity was constructively waived.

[24] 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. A "loan," in that context, "means a deposit of property not accompanied by a transfer of title to the property," which is similar to, but distinct from, a "bailment," under Iowa law. *See* Iowa Code § 305B.2(5). Notably, a "museum," as defined by Iowa Code § 305B.2(6), "means an institution located in Iowa operated by a nonprofit corporation *or a public agency*, primarily for educational, scientific, *historic preservation,* or aesthetic purposes, which owns, borrows, cares for, exhibits, studies, archives, or catalogs property." *Id.* (emphasis added). It includes, but is not limited to, "*historic sites or landmarks*," which would presumably include Terrace Hill. (*Learn More About Terrace Hill, the Iowa Governor's Residence*, Terrace Hill, https://terracehill.iowa.gov/about-us).

D. THSF Has Not Yet Requested, and the District Court Did Not Grant, Injunctive Relief

The Commission also asserts that THSF's request for injunctive relief (specifically, "access" to the Collection) in Count I of the Amended Petition involves a "significant intrusion into both the State's sovereignty and the administration of its affairs" and its "statutory obligations" under Section 8A.326(3) and should therefore be barred by the doctrine of sovereign immunity. (Appellants' Brief, pp. 24-25). In its Ruling, the District Court properly rejected the Commission's position as "beyond the scope" of the Motion to Dismiss, because THSF has not yet sought any injunctive relief in this case. (App. 78, 80 (Ruling, pp. 2, 4 (FN 1)). It also correctly recognized that any decisions regarding the specific type of "access" to the Collection that might be necessary and appropriate (if any) would most likely follow a determination that THSF does, in fact, have ownership rights. (App. 80 (Ruling, p. 4 (noting that granting a declaratory judgment that THSF has ownership rights "presumably, would ultimately result in THSF being granted access [to] the items or the items being returned to THSF."))).[25]

[25] To be very clear, however, THSF's claim for injunctive relief does not present any realistic "threat" to the sanctity or security of Terrace Hill or the residence of the Governor. The members of THSF are all private citizens who are devoted to supporting and preserving Terrace Hill and who worked respectfully and diligently with the Commission with the mutual goal of preserving Terrace Hill for many years prior to the current disagreement regarding the Collection.

In the event the District Court ultimately decides that THSF still has ownership rights in the Collection, THSF anticipates that the issue of appropriate "access" to the Collection, going forward, can be responsibly addressed by the parties in a manner that presents no "threat" to Terrace Hill[26] or, if necessary, through future rulings by the District Court that appropriately balance THSF's ownership interests in the items that are currently located at Terrace Hill with the Commission's statutory responsibilities regarding the Terrace Hill facility. At this time, however, since THSF has not yet sought any specific type of "access" to the Collection and the District Court did not grant injunctive relief in its Ruling, the Commission's position that injunctive relief would be a "significant intrusion" that should be barred by sovereign immunity is directly contrary to this Court's controlling precedent (due to conduct constituting waiver of sovereign immunity), entirely speculative and, therefore, premature.

The Commission's position that a request for injunctive relief would interfere with its statutory discretion "to contract with nonprofits it chooses," pursuant to Iowa Code § 8A.326(4), and that THSF should therefore be required to pursue a claim "under Chapter 17A" to challenge that decision is also incorrect — and once again mischaracterizes THSF's position.

[26] Notably, the Terrace Hill mansion and carriage house are open for public tours, by reservation. *Guided Tours of Terrace Hill*, Terrace Hill, https://terracehill.iowa.gov/visit.

As previously noted, THSF's request for declaratory judgment does not seek to require the Commission to enter into a contract with THSF. It simply seeks a judicial determination of its ownership interests in the Collection. Section 8A.326(3) requires the Commission "to provide for the preservation, maintenance, renovation, landscaping, and administration of the Terrace Hill facility." However, nothing in the statute (as originally enacted or as amended) purports to divest THSF (or its predecessors) of their ownership rights in any of the items from the Collection that have been placed on display at Terrace Hill, nor does it purport to provide the Commission with the legal authority to make any determinations regarding their ownership rights with regard to those items. Iowa Code § 8A.326(4).

Additionally, the Commission has not made any determinations with regard to THSF's ownership rights in the Collection — nor would any such determination be within the scope of Chapter 17A. *Papadakis v. Iowa State Univ. of Sci. & Tech.,* 574 N.W.2d 258, 260 (Iowa 1997) (citing *Kersten*, 207 N.W.2d at 122) (holding that claims based on business relationships between state agencies and third parties are not within scope of administrative decisions that are subject to Chapter 17A).

Section II

THE DISTRICT COURT GRANTED THE MOTION TO DISMISS WITH REGARD TO THSF'S ALTERNATE CLAIMS FOR RELIEF AGAINST CHAIRPERSON HURD, SO THERE IS NOTHING FOR THIS COURT TO REVIEW ON INTERLOCUTORY APPEAL

In its Ruling, the District Court granted the Motion to Dismiss with regard to the alternate claims for relief asserted against Kristen Hurd, in her capacity as Chairperson of the Commission, because the Amended Petition did not assert any specific violation of federal or state law. (App. 82 (Ruling, p. 6)). Therefore, it dismissed the claims asserted against her without prejudice.

In its Brief, the Commission asserts that the District Court should have dismissed the claims for relief asserted in Count II of the Amended Petition with prejudice. (Appellants' Brief, pp. 29-34).

The District Court's Ruling granting the Motion to Dismiss with regard to Count II of the Amended Petition was adverse to THSF, *not* the Commission or Ms. Hurd. Under Rule 6.104(1), interlocutory appeal is limited to parties who are "aggrieved" by a ruling of the district court. Since the District Court granted the Motion to Dismiss with regard to Count II and dismissed it, there is nothing for the Commission or Ms. Hurd to appeal or for this Court to review with regard that portion of the District Court's Ruling. *See* Rule 6.104(1)(a). *See also Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994) (quoting *Windus v. Great Plains Gas*, 116 N.W.2d 410, 415-16 (1962)).

To the extent that the Commission contends that the District Court should have dismissed the alternate claims for relief in Count II *with prejudice* based on the doctrine of sovereign immunity, it is incorrect for two reasons. First, as set forth in Section I, above, even if sovereign immunity would otherwise apply to the alternate claims for relief against Chairperson Hurd, it has been constructively waived. Second, in *Lee v. State*, 844 N.W.2d 668 (Iowa 2014) ("*Lee II*")), this Court recognized that solely prospective claims for relief against state officials based on alleged violations of either federal law or state law are *not* subject to sovereign immunity. *See Lee II*, 844 N.W.2d at 674-80 (holding that solely prospective claims for relief against state officials pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 155-56 (1908) constitute an exception to sovereign immunity).

If THSF were to seek and obtain leave to amend its pleadings to assert any "new" claims for relief against Chairperson Hurd (or, if absolutely necessary, all of the members of the Commission) a ruling denying a Motion to Dismiss might provide a viable basis for interlocutory appeal. But a ruling granting a Motion to Dismiss and dismissing claims without prejudice does not entitle the prevailing party to seek interlocutory review of that ruling. *See* Rule 6.104.

## CONCLUSION

At this stage of the case, on a Motion to Dismiss pursuant to Rule 1.421(1)(f), the sole issue presented to the District Court regarding the declaratory judgment sought by THSF was whether the factual allegations in the Amended Petition, taken as true and construed in the manner most favorable to THSF, describe a course of conduct by the Commission sufficient to constitute constructive waiver of sovereign immunity. The District Court correctly applied this Court's controlling precedent and concluded that because the Commission's "prior conduct," including "willingly accept[ing] possession of THSF's property," constructively waived sovereign immunity, THSF is therefore entitled to an adjudication "on the merits of its ownership claims." (App. 81 (Ruling, p. 5)). The District Court did not commit any error of law and its Ruling denying the Commission's Motion to Dismiss should therefore be affirmed.

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## ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the cost of printing the foregoing Appellee's Final Brief is $ 0.00 .

By /s/ ***Jason M. Casini***
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellee's Final Brief was served by electronic filing and electronic delivery via the EDMS system on September 7, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

By /s/ ***Jason M. Casini***
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## CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellee's Proof Brief was filed with the Iowa Supreme Court by electronically filing the same on September 7, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

By /s/ ***Jason M. Casini***
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This proof brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Garamond in 14 pt and contains 7,271 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ ***Jason M. Casini*** ***September 7, 2023***
JASON M. CASINI AT0001475 Date