

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 24-0509
Floyd County No. EQCV031386**

**IOWA NORTHERN RAILWAY COMPANY,
Plaintiff-Appellee**

vs.

**FLOYD COUNTY BOARD OF SUPERVISORS, AND CERRO GORDO
COUNTY BAORD OF SUPERVISORS Acting as Trustees for JOINT
DRAINAGE DISTRICT NOS. 6 AND 56,
Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF FLOYD COUNTY
HONORABLE JUDGE COLLEEN D. WEILAND**

**APPELLANTS' REPLY BRIEF
AND REQUEST FOR ORAL ARGUMENT**

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ISSUE I

The Trial Court Erred In Ruling That INCR's Obligation To Construct A Culvert Through Its Railroad Embankment By The Jack And Bore Method Is Preempted

ARGUMENT

INRC's Embankment Obstructs Natural Flow of Water

On page 32 of Iowa Northern Railway Company's Brief, the railroad asserts that its embankment "is not obstructing such water".

With the construction of the open ditch on both sides of the railroad's embankment, the flow line of INRC's concrete box culvert will be 2.66 feet above the flow line of the new open ditch. The 2.66 feet of embankment, without the installation of the new 66-inch smooth steel pipe culvert will block the flow of water in the new open ditch.

It is to be remembered that the tile in Joint Drainage District 5 & 56 (JDD 6 & 56) is in poor condition with numerous blowouts, trees over the tiles, and rocks in the area, and the landowners want a main ditch to be excavated and built to replace the failing main tile line. This will increase the drainage coefficient to current standards. See Exhibits A, B, and pp. 5 and 6 of Exhibit C. D0159 Exhibit A (3-15-2024), D0160 Exhibit B (3-15-2024), D0161 Exhibit C (3-15-2024). The Board of Supervisors unanimously approved the open ditch option requested by the

landowners. See Exhibits D and E. D0162 Exhibit D (3-15-2024), D0163 Exhibit E (3-15-2024).

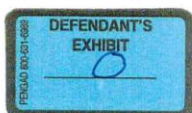
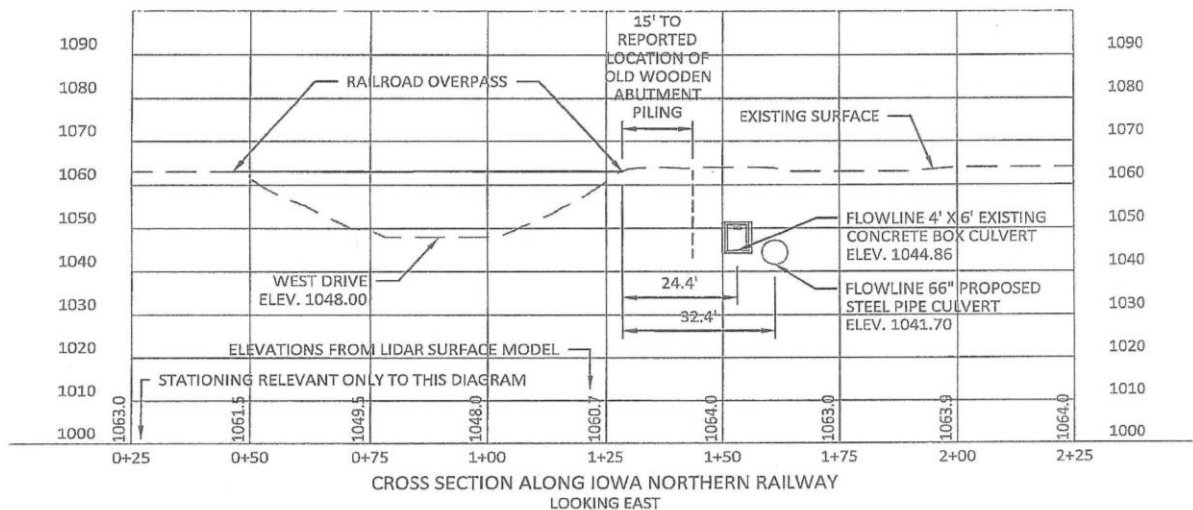
INRC, on page 17 of its Brief, says that no landowner demanded greater drainage capacity. That is not accurate. The April 8, 2014 Minutes, Exhibit D, D0162 (3-15-2024), shows that:

“The majority want an open ditch dug by the landowner that will be cheaper”, p. 6.

“You want a modified Option 2. The modification is to do it yourself”, p. 7.

It was explained that the work had to be let for public bids. “They will need bids. You will need a bond and a bid security in order to do the work”, p. 5.

As shown on the below Exhibit O, D0174 Exhibit O (3-15-2024), 1044.86 is the elevation of the flowline of the 4’ x 6’ existing concrete box culvert.



1041.70 is the elevation of the flowline of the 66-inch proposed steel pipe culvert. That is a difference of 3.16 feet ($1044.86 - 1041.70 = 3.16$).

Sheet D.01 of Exhibit K, shown on page 12 of JDD 6 & 56's Brief, D0169 Exhibit K Sheet D.01 (3-15-2024), states that "Proposed 107' x 66-inch Smooth Steel Pipe Culvert By Jack And Bore Invert 0.5' Below Ditch."

So, the flowline of the new open ditch on either side of the railroad embankment is to be 0.5' above the 1041.70 flowline of the proposed steel culvert, or at elevation 1042.20 ($1041.70 + 0.5 = 1042.20$).

Therefore, the 1044.86 flowline of the existing concrete box culvert is 2.66 feet above the 1042.20 flowline of the new ditch:

1044.86	Culvert flowline
- <u>1042.20</u>	Ditch flowline
2.66	Feet difference

The railroad's embankment does block the flow of water in the new open ditch with the existing concrete box culvert being 2.66 feet above the flowline of the new open ditch.

That is why Mr. Rode stated that the existing concrete box culvert could serve as an overflow "outflow" for the new open ditch. D0191 Trans. Rode, p. 171 ll. 10-11 (5-5-2024).

On page 32 of INRC's Brief, the railroad also assert that Option #2 is below grade. As explained above, the flow line of the 66-inch smooth steel pipe culvert is

6 inches below the flow line of the open ditch to ensure that the smooth steel pipe culvert freely passes the water through the railroad embankment. With the flow line of the 66-inch smooth steel pipe culvert being 6 inches below the flow line of the open ditch, that leaves 60 inches, or 5 feet, in the smooth steel pipe culvert for the passage of water through the smooth steel pipe culvert above the flow line of the open ditch.

Under Mason City & Ft. D.R. Co. v. Board of Sup'rs of Wright County, 121 N.W. 39, 40, 144 Iowa 10 (Iowa 1909), a railroad is required to reconstruct its culvert when a drainage district would “widen and deepen such (water) course, even though this shall render necessary the rebuilding of the bridge or culvert, and when this is done, the expense is a proper one for the railway company to bear.”

“The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increased use demand.” Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, No. 0-637/10-0061 (Iowa App. Nov 10, 2010), p. 15.

See also Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, 816 N.W.2d 367, 372 (Iowa 2012), and Hardin Cnty. Drainage Dist. 55, Div. 3 Lateral 10 v. Union Pac. R.R. Co., 826 N.W.2d 507, 510-511 (Iowa 2013).

Jack And Bore Method Is Safe And Will Not Interfere With Railroad Operation

INRC, on page 18 of its Brief, says “The Iowa Northern refused and continues to refuse to construct Option #2 because the current written engineering plan is unsafe.”

INRC ignores Mr. Rode’s current plan to move the 66-inch smooth steel pipe culvert 4 more feet away from the existing box culvert as explained in his testimony. D0191 Trans. Rode, P. 4 l. 12 to p. 6 l. 18 (5-5-2024). The 66-inch smooth steel pipe culvert will be 3.25 feet to 5 feet away from the box culvert, which is safe. Mr. Dullard’s companies, in all of its approximately 6,500 times, have successfully installed culvert pipes in embankments without interruption of the use of the embankment. D0191 Trans. Dullard, p. 123 ll. 1-4 (5-5-2024). Mr. Dullard is confident that he can install the 66-inch diameter smooth steel pipe culvert by the jack and bore method in INRC’s embankment without interruption of the rail line transportation. Mr. Dullard testified:

13 “Q Would you feel entirely comfortable to jack and
14 bore this 5.5-foot-diameter culvert, moving it four feet
15 further away from the box culvert than presently proposed?

16 A I would – I would not – me personally, I would
17 not have any problem with that.

18 Q And would that be able to be done without
19 interruption of the use of the rail line?

20 A Yes.

21 Q And why do you say that?

22 A We’re just going to use best practices and then
23 abide by whatever the conditions of the permit are set

24 forth.”
D0191 Trans. Dullard, p. 121 ll. 13-24 (5-5-2024).

INRC did not provide any evidence that it would be unsafe, or that its rail transportation would be interrupted if the 66-inch smooth steel culvert pipe is moved 4 feet further away from the existing box culvert. The only thing that INRC offered was the Plainfield, Illinois debacle of an incompetent person putting the auger 105 feet out in front of the casing, and Mr. Bannister’s reliance on Murphy’s Law that he doesn’t know what, but something may go wrong.

INRC, on page 19 of its Brief, says “The current plans have a distance of one foot between the south, exterior (buried) edge of the culvert and the proposed north edge of the 66-inch pipe, assuming that the culvert’s interior edge is two feet thick.” That statement ignores Mr. Rode’s decision to move the 66-inch smooth steel culvert another 4 feet further south. As shown on page 20 of JDD 6 & 56’s Brief:

- “Distances from adjusted location of new steel pipe culvert from box culvert:
- 34.25 – 29.25 (Boring B-01) = 5 feet.
 - 34.25 – 31 (assuming 4 feet thickness of box culvert) = 3.25 feet.”

INRC, on page 20 of its Brief, asserts that monitoring the track movement of a quarter of an inch is not an acceptable safety standard. First of all, railroad tracks move whenever trains pass over them.

Paragraph 23(c) of Exhibit K, the Project Manual. D0169 Exhibit K Project Manual (3-15-2024).

“The top of the rail shall not permanently deflect more than ¼ inch vertical or horizontal.”

Paragraph 23(f) of Exhibit K, The Project Manual, D0169 Exhibit K Project Manual (3-15-2024) states:

“If the top of rail does deflect more than ¼ inch, all operations shall stop until the matter is resolved.”

Mr. Dullard testified as follows:

12 “So while the flagman is protecting the track, we physically
13 go with a grade rod and eye lever, and you shoot the
14 railroad track at center and at three points each side of
15 center every 10 feet, and so you’re making an actual, hard,
16 physical measurement on the track closest and the track
17 furthest. And you do that whenever they require that at –
18 a lot of – a lot of the railroads, it depends on your kind
19 of observer or your train traffic, but that could be they
20 need it to be observed before, during, and after your shift.
21 They might want to monitor it every hour. And whatever that
22 permit requirement is, is what we do.”

D0191 Trans. Dullard, p. 12 ll. 12-22 (5-15-2024).

This ¼ inch permanent movement of the track safety precaution is above and beyond INRC’s own Jack And Bore Specifications, Exhibit P. D0175 Exhibit P (3-15-2024).

INRC did not provide any evidence that paragraphs 23(c) and 23(f) of Exhibit K, D0169 Exhibit K (3-15-2024), are not acceptable safety standards.

Moreover, Mr. Dullard’s testimony that his companies have approximately 6,500 times done jack and bore installations without incident and have never interrupted any rail transportation shows that the proposed jack and bore installation

of the 66-inch smooth steel pipe culvert in INRC's embankment will not unreasonably interfere with INRC's use of its rail line.

No Preemption

INRC, on page 28 of its Brief, cites CSX Transportation, Inc. – Petition For Declaratory Order STB Finance Docket No. 34662 Decision ID 35599 as authority for “Express preemption is absolute”. CSX Transportation, Inc. STB Docket No. 34662 is not applicable to, and is distinguishable from, our present case. The CSX case involves the Washington District of Columbia passing an Act to ban transportation of hazardous commodities by rail within a 2.2-mile radius of the United States Capitol Building. The STB found that said Act would interfere with the railroad's ability to conduct its rail operations, p. 7.

The STB, in the CSX case on page 9, rules:

“states may exercise their police powers reserved by the Constitution to the extent the use of the policy power does not unreasonably interfere with rail transportation ... Thus, courts have found it permissible for a state to maintain regulation of roads and bridges so long as no unreasonable burden is imposed on a railroad¹² ... (Emphasis added.)

¹² Iowa Chicago & E. R.R. v. Washington County, IA, 384 F.3d 557, 561-62 (8th Cir. 2004).”

“We therefore conclude that, on this record, IC & E has failed to establish that ICCTA's preemption provision preempts the state administrative proceedings commenced by IDOT in response to the County's petition that IC & E be ordered to replace the four bridges at its own expense pursuant to Iowa Code § 327F.2.” Iowa, Chicago & Eastern v. Washington County, IA, 384 F.3d 557, 561 (8th Cir. 2004).

Likewise, a railroad's duty under Section 468.109 et. seq., Code of Iowa, to reconstruct or construct a culvert to not obstruct, impede, or interfere with the free flow of water is not preempted because it does not unreasonably interfere with the operation of the rail line. This is particularly true when using the jack and bore method, which Mr. Dullard's companies have done approximately 6,500 times without incident and without interruption of the use of the rail line.

INRC cites Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d. 533 (6th Cir. 2008), which holds that the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion. Id., 550 F.3d 541. The jack and bore of the 66-inch smooth steel pipe culvert will not interfere with INRC's rail operations, as shown by all of Mr. Dullard's approximately 6,500 successful jack and bore installations.

INRC also cites Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404 (5th Cir. 2010) which holds that there is a presumption against preemption. Id., 593 F.3d 407. Also, there is no preemption unless the state regulations "unreasonably burden or interfere with rail transportation." Id., 593 F.3d 414. Again, Mr. Dullard's testimony shows that the jack and bore installation of the 66-inch smooth steel pipe culvert will not unreasonably interfere with INRC's rail transportation.

INRC cites Griffioen v. Cedar Rapids & Iowa City Railway Company, 914 N.W.2d 273 (Iowa 2018) as authority for express preemption of tort claims. The

Franks, Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404 (5th Cir. 2010) case discusses express preemption and preemption as applied.

Express preemption is “having the effect of managing or governing, and not merely incidentally affecting, rail transportation”, Id., 593 F.3d 411.

“For a state court action to be expressly preempted under ICCTA, it must seek to regulate the operations of rail transportation.” (Emphasis added.) Id., 593 F.3d 413.

“According, to its brief, other state law actions ‘may be preempted as applied – that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-based’ case-specific determination.” (Emphasis added.) Id., 593 F.3d 413.

“Under this fact-based test, state law action can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation.” (Emphasis added.) Id., 593 F.3d 414.

In the Griffioen case, the Plaintiffs challenged the railroad’s management decisions to (a) fill railroad cars with rock on bridges, and (b) how to build, maintain, inspect and keep in good repair their four bridges, which the Court found to interfere with the railroad management of its rail lines.

“The petition challenges decisions made by railroads regarding the construction of their bridges and the placement of trains on those bridges ...” Id., 914 N.W.2d 289.

The Griffioen case dealt with management decisions of the railroad. Our case does not deal with management decisions and choices. Therefore, express preemption is not applicable in our present case. Our case deals with all railroads in Iowa’s statutory duty under Section 468.109 et. seq., Code of Iowa, which requires

them to “build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or water course crosses its right-of-way, so as to not obstruct, impede, or interfere with the free flow of water therein ...”

The “railroad company shall construct the improvement across its right-of-way ...” Section 468.110, Code of Iowa.

It is a statutory duty. It is not a management decision that is optional.

It is also a common law duty to not block the flow of water under Mason City & Ft. D. . Co. v. Board of Sup’rs of Wright County, 121 N.W. 39, 144 Iowa 10 (Iowa 1909); CNW v. Webster County Bd. of Sup’rs, 880 F.Supp. 1290 (N.D. Iowa, 1995); Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, No. 0-637/10-0061 (Iowa App. Nov 10, 2010); Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, 816 N.W.2d 367 (Iowa 2012); Hardin Cnty. Drainage Dist. 55, Div. 3 Lateral 10 v. Union Pac. R.R. Co., 826 N.W.2d 507 (Iowa 2013).

Preemption As Applied – No Interference With Rail Line Operations

The application of Section 468.109, Code of Iowa, et. seq. to INRC is a question of preemption as applied which is fact based. The facts in this case show from Mr. Dullard’s approximately 6,500 successful jack and bore operations, none of which interfered with rail line operations, that the installation of the 66-inch

smooth steel pipe culvert in INRC's embankment will not interfere with INRC's rail line operation.

On page 39 of INRC's Brief, it states that there is no presumption against preemption. That is false and incorrect. The following cases hold that there is a presumption against preemption. Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404, 407 (5th Cir. 2010); Gordon v. New England Cent. R.R., Inc., (D. Vt., 2017), and New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321, 334 (5th Cir. 2008).

On page 39 of INRC's Brief, it also states that the STB Tubbs Decision Docket No. FD35792 does not hold that there is no preemption in railroad crossing cases. That is incorrect. The STB Tubbs Decision, which is attached to JDD 6 & 56's Brief, on page 7 states as follows:

“ Here, the FRSA regulations that Petitioners cite are applicable to the entire national rail system and do not directly conflict with the uniform federal regulation of railroads under the Interstate Commerce Act. Accordingly, § 10501(b) does not preempt the FRSA regulations on drainage under railroad tracks.” (Emphasis added.)

Likewise, the drainage regulations and requirements in Section 468.109, Code of Iowa et. seq., are not preempted by § 10501(b).

Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015) affirms STB's ruling that Section 10501(b) does not preempt regulations on drainage under railroad tracks.

“Finally, the Board concluded that Section 10501(b) does not preempt the FRSA regulations on drainage under railroad tracks” Id., 812 F.3d 1143.

Therefore, Section 10501(b) does not preempt Iowa Code Section 468.109 et. seq. on drainage under INRC’s line by using the jack and bore method of installing the 66-inch smooth steel pipe culvert – which has been done by Mr. Dullard’s companies approximately 6,500 times without interference with the use of the rail line.

Again, the Griffioen case dealt with the management’s optional discretionary choices. Under Iowa Code Section 468.109 et. seq., INRC does not have an optional discretionary choice. Instead, INRC, pursuant to Section 468.110 “Duty to construct ... such railroad company shall construct the improvement ...” (Emphasis added.)

On page 27 of INRC’s Brief, it cites the following cases:

- Fayus Enters. V. BNSF Ry. Co., 602 F.3d 444 (DC Cir. 2010).
- Jones Creek Investors, LLC v. Columbia County, 98 F.Supp. 3d 1279 (S.D. Ga. 2015).
- Waubay Lake Farmer’s Ass’n v. BNSF Ry. Co., 2014 WL 42870-86 (U.S. D.C., D. South Dakota, August 28, 2014).

The Fayus case is not pertinent to our present case. It involves the application of fuel charges. Id., 602 F.3d 445. The issue of fuel charges is not pertinent to INRC’s duty under Section 468.110, Code of Iowa, to install a 66-inch smooth steel

pipe culvert by the jack and bore method as required by the engineer's plans under Section 468.109, Code of Iowa.

The Jones Creek case is also distinguishable and not pertinent to our present case. It involved the railroad's choice to have the railroad repair its own culvert. The railroad replaced its culvert with "two tubular culverts 72 inches in diameter." Id., 98 Supp. 3d 1284. The Jones Creek case does not involve a statutory duty as in Section 468.110, Code of Iowa, to install a culvert. The Jones Creek case involved the management choice as to how to repair its own culvert, not a mandatory duty to install a culvert to not "obstruct, impede, or interfere with the free flow of water."

As stated on page 39 and 40 of JDD 6 & 56's Brief, the Waubay case is distinguishable and not pertinent to our present case. The Waubay case involved excavating a railroad embankment and removing the tracks to install a new culvert.

The jack and bore method has been developed to eliminate excavating the railroad embankment and removing the tracks to put in a new culvert, probably a box culvert.

INRC has its own specifications for installing culverts using the jack and bore method. D0174 Exhibit P (03-15-2024). Again, Mr. Dullard's companies have done approximately 6,500 jack and bore installations without incident and without interference with rail operations.

All railroads in Iowa have a continuing duty to adapt to new drainage facilities to not obstruct, impede, or interfere with the free flow of water “as subsequently may become necessary” from deepening “such a course even though this shall render necessary the rebuilding of the bridge or culvert.” Mason City & Ft. D. R. Co. v. Board of Sup’rs of Wright County, 121 N.W. 39, 40, 144 Iowa 10 (Iowa 1909).

“The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increased use demand.” Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, No. 0-637/10-0061 (Iowa App. Nov 10, 2010), p. 15.

On pages 40-42 of INRC’s Brief, it argues that using the jack and bore method to install the 66-inch smooth steel pipe culvert in its embankment will unreasonably interfere with its railroad transportation. INRC has not provided any proof that the jack and bore installation will unreasonably interfere with its rail transportation. Mr. Bannister relies on Murphy’s Law that something may go wrong. Mr. Bannister relies on the Plainfield, Illinois debacle due to incompetence with the auger being 105 feet out in front of the pipe.

To the contrary, all of Mr. Dullard’s approximately 6,500 jack and bore installations have been without incident and without interruption of the rail line. Additionally, INRC has specifications of jack and bore installations; the jack and bore installation is stopped when trains pass through the work area; laser survey shots are constantly taken of tracks, and if there is a permanent ¼ inch movement of the tracks, the jack and bore operation will be stopped “until the matter is resolved”

– which ensures that there will be no interference with the rail transportation. Trans. Dullard, p. 112 ll. 12-22. D0191 (5-5-2024).

CONCLUSION

The jack and bore installation of the 66-inch smooth steel pipe culvert in INRC's embankment will not necessarily interfere with INRC's rail transportation.

The Trial Court's Ruling that JDD 6 & 56's jack and bore method of installing a 66-inch smooth steel pipe culvert in INRC's embankment is preempted and should be overruled and reversed.

REQUEST FOR ORAL ARGUMENT

The Defendants-Appellants, Floyd County, requests oral argument in this matter.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Appellants' Reply Brief and Request For Oral Argument complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Appellants' Reply Brief and Request For Oral Argument contains 4,526 words, excluding the parts of the Reply Brief and Request For Oral Argument exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Appellants' Reply Brief and Request For Oral Argument complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Appellants' Reply Brief and Request For Oral Argument has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 23rd day of July, 2024.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellants' Reply Brief and Request For Oral Argument with the Clerk of the Iowa Supreme Court, on July 23, 2024.

I, Robert W. Goodwin, hereby further certify that on July 23, 2024, I served the foregoing Appellants' Reply Brief and Request For Oral Argument, by the electronic filing system, to the following attorneys of record:

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