STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. State your full name.

David Michael Ranscht

2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)

Assistant Attorney General, Iowa Attorney General's Office (Licensing & Administrative Law Division)

3. State your date of birth (to determine statutory eligibility).

January 2, 1988

4. State your current city and county of residence.

Ankeny, Polk County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

Drake University Law School (Des Moines, IA)
August 2011 to May 2014
Juris Doctor, with Highest Honors (Order of the Coif)

Lawrence University (Appleton, WI)
September 2006 to June 2010
Bachelor of Arts, summa cum laude (double major: Music and Government)

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

Iowa Attorney General's Office
1305 E. Walnut St., 2nd Floor
Des Moines, IA 50319
Assistant Attorney General
Licensing & Administrative Law Division
July 2016 to present
Supervisor: Emily Willits

Iowa Supreme Court
1111 E. Court Ave.
Des Moines, IA 50319
Law Clerk
August 2014 to July 2016
Supervisor: Justice Daryl Hecht

Iowa Racing & Gaming Commission
1300 Des Moines St., Suite 100
Des Moines, IA 50309
Legal Intern
January 2014 to May 2014
Supervisor: Brian Ohorilko

Iowa Supreme Court
1111 E. Court Ave.
Des Moines, IA 50319
Judicial Intern
August 2013 to December 2013
Supervisor: Justice Daryl Hecht

Nyemaster, Goode, West, Hansell & O'Brien P.C.
700 Walnut St., Suite 1600
Des Moines, IA 50309
Summer Associate
May 2013 to August 2013
Supervisor: Michael Dayton

Drake University Law School
2507 University Ave. (overall university address)
Des Moines, IA 50311
Research Assistant
May 2012 to May 2014
Supervisor: Keith Miller

LaMarca & Landry, P.C. (now LaMarca Law Group, P.C.)
1820 NW 118th St., Suite 200
Clive, IA 50325
Law Clerk
March 2012 to April 2013
Supervisors: George LaMarca, Ryan Nixon

Wilderness Hotel & Golf Resort
511 E. Adams St.
Wisconsin Dells, WI
Bartender
February 2011 to August 2011

Cooper's Corner (now called LOFT)
4170 Main St.
Fish Creek, WI
Bartender
June 2010 to February 2011
Supervisor: Chris Lani

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

N/A

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

Iowa, September 2014

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

As an assistant attorney general, my clients are various State agencies, State officials, or sometimes both. My main practice area is administrative law, which includes "in-house" type advice for some agencies, handling or presenting at administrative hearings before agencies or administrative law judges, and representing agencies when a petitioner seeks judicial review of agency action. Within the broader field of administrative law, my specific area of focus is gambling regulation. I work with all three agencies that regulate gambling in Iowa—the Iowa Lottery Authority, the Iowa Racing & Gaming Commission, and the Iowa Department of Inspections & Appeals. But I represent and advise other agencies and officials, too, including the State Public Defender, the Plumbing & Mechanical Systems Board, and others on an ad hoc or per-matter basis (such as the Department of Natural Resources, the Board of Educational Examiners, and occasionally, judges sued in their official capacities). I spend approximately 60% of my time in the administrative law area; 30% on other, non-judicial-review litigation matters (whether they involve one of my assigned agencies or not); and 10% on transactional matters such as drafting and reviewing contracts for State agencies.

While a law clerk, I had one client (Justice Daryl Hecht) and spent 100% of my time on appellate practice. There was no singular focus on any area of law because the cases on which I worked depended on which cases reached the Court. But cases could and did span from criminal law (search and seizure; juvenile sentencing; sufficiency of evidence), to family law, to civil claims like tort and contract, to topics as diverse as secured transactions, statutory wrongful imprisonment, and attorney discipline.

During my time at law firms as a law student, I did not have a typical client and received a broad exposure to many different types of litigation and firm clients—from business disputes involving UCC warranties, to personal injury matters, to products liability defense, to even the occasional probate or property law matter. I also worked on some transactional matters. The split between litigation and transactional matters was approximately 90–10.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

A small percentage (approximately 10%) of my practice is transactional. This mostly involves drafting and reviewing contracts—for example, the Iowa Lottery enters various promotional agreements and I sometimes review those, both for clarity and for drafting and revision to be sure the agreement comports with Iowa law.

Another 10 to 20% of my practice does not involve "appearances" because it involves advising agencies or agency staff. What does this new statute mean? Is this record confidential? Is the agency complying with applicable procurement requirements? What steps are necessary to engage in an interactive process with an agency employee who has requested an accommodation for a disability? Agency advice issues can be narrow or broad, but they're always varied.

Also included in that 10 to 20% are occasional efforts to draft clear administrative rules (when rulemaking is either statutorily required or otherwise necessary) for an agency, and to advise the agency throughout the rulemaking process—such as by drafting responses to public comments and assisting with answering questions the Administrative Rules Review Committee might have about the proposed rules.

For this answer's purposes, I have considered appearances before administrative agencies and administrative law judges to be "other tribunals."

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

Including judicial review as "litigation," approximately 60–70% at any given time.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

Administrative: 70%

Civil: 25%

Criminal: 5% (only when directly related to another administrative or civil issue occurring in my practice)

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

One legal malpractice lawsuit currently being tried before a jury in Johnson County at the time of this application (September 2022). I am associate counsel.

Approximately 6–8 contested case matters as sole counsel, involving licensee discipline or sanctions for unlawful unlicensed practice, before the Iowa Plumbing & Mechanical Systems Board.

One contested matter as associate counsel involving an appeal from an occupational license denial by the Iowa Racing & Gaming Commission. Tried to an administrative law judge.

One contested matter as sole counsel involving an appeal from the Iowa Lottery's revocation of a retail location's license to sell Lottery tickets for repeated NSF (non-sufficient funds) transactions. Tried to an administrative law judge.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

Iowa Appellate Courts

Total appellate matters:	38
Sole counsel:	9
Chief counsel:	22
Party:	20
Amicus:	2
Associate counsel:	7

United States Court of Appeals for the Eighth Circuit

Total appellate matters:	4
Sole counsel:	2
Chief counsel:	1
Associate counsel:	1

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

b. Average number of hours of pro bono service per year.

c. Types of pro bono cases.

N/A. My entire practice has been as a government lawyer and therefore subject to restrictions or limitations on providing pro bono services in individual litigated matters. *See* Iowa R. Prof'l Conduct 32:6.1 cmt. [5]. Even without undertaking individual litigated matters pro bono, however, I regularly volunteer my time to assist the profession in other ways. For example, I frequently volunteer to serve as a guest judge for moot court events or appellate advocacy classes at Drake Law School, and I have done so at the University of Iowa College of Law as well.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

N/A.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

N/A.

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

N/A.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

N/A.

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

N/A.

ii. 180 days.

N/A.

iii. 240 days.

N/A.

iv. One year.

N/A.

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,

e. The nature of your participation in the case,
f. Dates of your involvement,
g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

Matter #1: *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6 (Iowa 2018)—a case presenting issues of first impression about gambling regulation under Iowa Code chapter 99B.

a. *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*. The case began as a petition for declaratory order filed by Banilla Games with the Department under Iowa Code chapter 17A. After the Department issued a declaratory order, Banilla Games petitioned for judicial review in Polk County district court, and then appealed the district court's ruling to the Iowa Supreme Court.
b. Banilla Games sought a declaration that the games it intended to distribute within the state qualified as legal amusement devices under Iowa Code chapter 99B, rather than illegal gambling devices. Banilla Games also sought a declaration that its games' outcomes were primarily determined by skill or knowledge, rather than by chance, and accordingly were exempt from separate registration requirements under chapter 99B. The Department determined the games were legal amusement devices but *were not* exempt from registration because, even considering several features of the game that Banilla Games highlighted and relied upon, the outcome was *not* primarily determined by skill or knowledge. The petition for judicial review sought to reverse the Department's conclusion.
c. The case was significant because Iowa law provides for up to 6,928 registered amusement devices across the state—and yet before this case, the meaning of the statutory phrase "primarily determined by skill or knowledge," and the meaning of the word "outcome" in that context (Iowa Code chapter 99B), had only been addressed in a single unpublished court of appeals opinion. So this was a question of first impression that, once answered, would lend clarity to the law and address new game types that had begun to proliferate at the time and continue to proliferate today.
d. I represented the Department of Inspections and Appeals and defended the declaratory order the Department had issued.
e. At the district court level, I assisted in drafting the judicial review brief (although I was not the primary drafter). Co-counsel argued the case before the district court. At the appellate level, however, I *was* the primary drafter of the Department's brief, and I also presented oral argument before the Iowa Supreme Court in a special session held at the University of Iowa College of Law in 2018.
f. I was involved for the entirety of the case, from December 2016 (when the Department was served with the petition for judicial review), through fall 2018 (when the Iowa Supreme Court issued its decision).
g. The Iowa Supreme Court unanimously affirmed the Department's declaratory order and concluded the proposed games were subject to the registration requirement. The Court's opinion adopts, in part, some of the arguments developed in the Department's appellate brief. The Court's opinion is published at 919 N.W.2d 6 (Iowa 2018).

h. My co-counsel was Assistant Attorney General John Lundquist, who was chief counsel at the district court level before I assumed the role of chief counsel on appeal.
i. Thomas Locher and Amy Locher of Locher Pavelka Dostal Braddy & Hammes, LLC represented Banilla Games.
j. Because judicial review is appellate in nature even at the district court level, there was no trial. But Judge Mary Pat Gunderson presided over the arguments at the district court and issued a ruling. The Iowa Supreme Court heard the case en banc on appeal in fall 2018. Justice David Wiggins wrote the Court's opinion.

Matter #2: *Rush v. Reynolds* and *Duff v. Reynolds*—companion cases challenging a statute amending the composition of the State Judicial Nominating Commission.

a. There were two lawsuits raising similar claims. The first was *Rush v. Reynolds*, and the second was *Duff v. Reynolds*. Both were filed in Polk County district court. The full title of the *Rush* case, including all named plaintiffs and defendants, is *Bob Rush, Brian Meyer, Rick Olson, Mary Mascher, Art Staed, Liz Bennett, Mark Smith, Jo Oldson, Mary Wolfe, Marti Anderson, Leon Spies,* and *Martin A. Diaz,* Plaintiffs, *v. Governor Kimberly K. Reynolds, Glen Dickinson, Leslie Hickey,* and *Dan Huitink*, Defendants. The *Duff* case involved one plaintiff—Thomas J. Duff—and the same four defendants.
b. The legislature passed a statute that amended the composition of the State Judicial Nominating Commission. The amendment removed the senior-most Iowa Supreme Court justice other than the Chief Justice from membership on the Commission and added a ninth appointed member, appointed by the Governor. The amendment also provided a new method for selecting the Chief Justice of the Iowa Supreme Court, which matched the existing method for selecting a chief judge of the court of appeals. The plaintiffs' lawsuits contended that the legislative amendment violated the single-subject clause found in article III, section 29 of the Iowa Constitution; the title clause also found in article III, section 29; and the constitutional separation of powers.
c. The *Rush* lawsuit asserted injuries to the plaintiffs in their capacities as citizens, legislators, lawyers, and existing members of the Commission. The *Duff* lawsuit asserted an injury to the plaintiff in his capacity as a past unsuccessful applicant for an appellate judicial vacancy. And the claims raised (in both cases) invoked article III, section 29 of the Iowa Constitution, which, at that time, had not been asserted as a ground for invalidating legislation or statutes in quite a while. The media coverage and the fact that the cases involved the framework for how our court system operates made the cases a significant topic of conversation, discussion, and debate both inside and outside the legal community.
d. I represented all four defendants: Governor Kim Reynolds (who, under the legislation, had authority to appoint a ninth member of the State Judicial Nominating Commission); Glen Dickinson and Leslie Hickey (who are employees of the Legislative Services Agency and are responsible for completing parts of the process to codify and publish every session law into the Iowa Code); and Dan Huitink (who was appointed as the ninth appointed member of the Commission after the statute took effect).
e. I participated in both cases significantly. I argued dueling motions in both cases—a motion to dismiss (filed by our office on behalf of the Defendants) and a motion for temporary injunction seeking to block the statute (filed by the plaintiff or plaintiffs, which my clients

opposed). I was the primary drafter for appellate briefs in both appeals after the district court's respective rulings in each case. (Both cases involved expedited timelines for briefing and submission.) And I argued both matters orally before the Iowa Court of Appeals. The court of appeals' opinions issued in February 2020 are published on Westlaw at 2020 WL 825983 (*Duff*) and 2020 WL 825953 (*Rush*).

f. In the *Rush* matter, I filed an appearance on May 21, 2019, shortly after the petition was filed. I was chief counsel during the entirety of the case from that point on, through motion practice and an appeal, until the Iowa Supreme Court denied further review in May 2020. In the *Duff* matter, I filed an appearance in October 2019, after some written motion practice but before any reported hearings before the district court. I was then chief counsel from October 2019 through the Iowa Supreme Court's denial of further review in May 2020. The fact that both cases proceeded from filing a petition in district court to appellate review in approximately a year demonstrates the amount of work that was necessary to handle these cases thoroughly on compressed timeframes.
g. The court of appeals concluded that all plaintiffs (across both matters) lacked standing to challenge the legislative amendment, no matter what capacity (citizen, legislator, lawyer, commissioner, judicial applicant) they invoked. Therefore, the Court did not reach the merits of the constitutional claims. The court of appeals also declined to apply the doctrine of great public importance and waive the standing requirement.
h. My co-counsel were Solicitor General Jeffrey Thompson and Assistant Attorney General Thomas Ogden.
i. Bob Rush and Nate Willems of Rush & Nicholson in Cedar Rapids, Iowa represented all opposing parties in both cases.
j. Judge Sarah Crane granted a motion to dismiss the *Rush* case. Judge Joseph Seidlin granted in part and denied in part a motion to dismiss the *Duff* case. The Iowa Supreme Court granted an application for interlocutory appeal in the *Duff* case (the *Rush* case was already on appeal at the time it was granted). Both appeals were decided by a 5-judge court of appeals panel consisting of Chief Judge Thomas Bower, Judge Michael Mullins, Judge Sharon Greer, Senior Judge David Danilson, and Senior Judge Amanda Potterfield. Judges David May, Julie Schumacher, and Paul Ahlers took no part in the case.

Matter #3: Formal Attorney General Opinion re: gubernatorial succession.

a. Attorney General Opinion No. 17–4–1, upon request of Senator David Johnson. There was no "venue" because it was not a litigated matter.
b. In 2017, then-Governor Branstad was nominated to serve as United States Ambassador to China. Senator Johnson posed several legal questions about the transition of power upon the Governor's expected resignation to accept the ambassadorship. I was part of a team within the Attorney General's Office tasked with researching these questions and drafting an opinion answering them.
c. The matter was significant because governors do not often resign or leave office other than through the results of elections—but when they do, it is important to understand the framework and mechanics of the transition of power so that the management of our state is uninterrupted. As set forth in the opinion, these were important legal questions about our constitutional governance framework that had not previously been addressed directly in any attorney general opinion or Iowa Supreme Court decision.

d. I did not represent any party because it was not a litigated matter. Rather, the role of our office was to be an impartial decision maker.
e. I spent significant time reading the debates of the 1857 constitutional convention, researching caselaw in Iowa and in other states that had faced similar legal questions, and drafting portions of the opinion. Ultimately, four people within the attorney general's office co-signed the opinion. The opinion lists them by seniority. Because I joined the attorney general's office in 2016, I am the fourth listed co-signer even though I was a significant participant in the research and drafting process.
f. I began research in late 2016, although it was not utilized until after Senator Johnson sent his letter in early 2017 requesting a formal opinion. I remained involved with research and drafting through publication of the opinion in May 2017.
g. The opinion consolidated several discrete questions posed in Senator Johnson's letter into two main legal questions. It concluded that upon a governor's resignation, the lieutenant governor becomes governor and has the title of Governor. It also concluded that because of specific language in the Iowa Constitution, a lieutenant governor who becomes governor in this way does not have authority to appoint a new lieutenant governor. Following the opinion, Governor Reynolds became governor and appointed an acting lieutenant governor who was not in the line of succession until after he was elected to the position at the next general election.
h. Co-counsel was Solicitor General Jeffrey Thompson, and then-Assistant Attorney General Meghan Gavin, in the Attorney General's Office. Attorney General Tom Miller ultimately signed the opinion as well.
i. There was no opposing party, and therefore no opposing counsel.
j. The matter was not "tried." It was not challenged or litigated in court either.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

My non-litigation legal experience resembles the task of an appellate judge. For example, an agency client may ask me to provide an interpretation of a statute or administrative rule. In answering the client's question, I use the same approach as an appellate judge—consulting caselaw, dictionaries, and using canons of statutory construction if necessary. Additionally, my non-litigation work has helped me develop a better understanding about the interplay of various parts of state government—for example, the administrative rulemaking process, the overlap (if any) among or between various agencies and state entities, and assorted mechanisms for agency adjudications such as declaratory orders, petitions for rulemaking, and contested cases. Possessing this expertise through experience would benefit the Court when reviewing an appeal that involved, even peripherally, one or more of those processes.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

N/A.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

N/A.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

Iowa State Bar Association—September 2014 to present

Appellate Practice Committee member—2017 to present

Administrative Law Section Council member—2017 to present

Administrative Law Section Chair—2020 to present

Editorial Advisory Board (subcommittee of the Public Relations Committee)—inaugural member (committee was established in summer 2022)

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

N/A.

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

N/A.

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

Three writing samples are included with this application. They are:

1. A law review article published in the UNLV Gaming Law Journal entitled *Problem Gambling is Funny*, which discussed the portrayal of problem gambling in popular media and was published shortly after the DSM-5 psychiatric manual reclassified problem gambling from an impulse control disorder to an addictive disorder.
2. An appellate brief filed on behalf of the State Public Defender in case number 18–1151, *Moriarty v. State Public Defender*, which was an appeal of a petition for judicial review following the State Public Defender's decision to terminate Mr. Moriarty's indigent defense contract.
3. An appellate brief filed on behalf of the Department of Natural Resources in case number 18–0087, *Carter v. Dep't of Natural Resources*, which was an appeal of a petition for declaratory judgment challenging the constitutionality of a statute governing DNR's allocation of hunting licenses (specifically deer tags).

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

N/A.

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

No member of the State Judicial Nominating Commission is a current law partner or business partner. However, in an abundance of caution, I believe it is necessary to disclose several other matters. See #29 below.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

The Law of Regulated Gambling: A Practical Guide for Business Lawyers (Am. Bar. Ass'n 2020)—author of Chapter 10 entitled "State Lotteries"

Problem Gambling is Funny, 6 UNLV Gaming L.J. 59 (2015)

Note, *Guidance From an Unlikely Source: Why a Hollywood Satire Can Help Resolve the Circuit Split over Whether Mandatory Graphic Cigarette Package Warning Labels Violate the First Amendment*, 62 Drake L. Rev. 267 (2013)

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

Presenter, *Are You "Aggrieved or Adversely Affected"*?
Iowa State Bar Association Government Practice Seminar (June 19, 2020)
This presentation occurred after, and discussed, the Iowa Supreme Court's decision in *Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34 (Iowa 2020), in which I represented the Board.

Panelist / Presenter, *Conversation with the Iowa Supreme Court's Newest Members*, Iowa State Bar Association Annual Meeting, Summer 2019

Panelist / Presenter, *Judicial Review of Administrative Decisions*, Iowa Association of Administrative Law Judges, Spring 2017

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook: David Ranscht
LinkedIn: David Ranscht

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

<u>Law School</u>
Highest Honors, Order of the Coif

Finalist, 2014 Supreme Court Day appellate advocacy competition
(Davis, Brown, Koehn, Shors & Roberts Award for Excellence in Advocacy)

7 CALI awards for top grade in a specific course
(Torts, Contracts I, Civil Procedure II, Gaming Law, Criminal Procedure I, Business Associations, and Negotiable Instruments)

College:
Dean's List (8 semesters)
Phi Beta Kappa
2010 Government Student of the Year
Pi Kappa Lambda Freshman Prize

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Jeffrey Thompson
Solicitor General of Iowa
515-281-4419
Mr. Thompson has supervised me in several matters, including attorney general opinions and significant litigated cases representing state agencies and officials. Mr. Thompson is chief counsel in the jury trial mentioned above in question #8(e), for which I am associate counsel.

Emily Willits
Director, Licensing & Administrative Law Division
Iowa Attorney General's Office
515-281-6403
Ms. Willits is my direct supervisor within the attorney general's office.

Megan Tooker
Chief Administrative Officer and General Counsel, Iowa Lottery Authority
515-725-7851
Ms. Tooker is the general counsel for one of my agency clients, the Iowa Lottery. She was also the executive director of the Iowa Ethics & Campaign Disclosure Board during the *Dickey* matter mentioned in question #23 above, in which I represented the Board on appeal. Ms. Tooker and I work closely on matters requiring legal analysis or opinions related to the Iowa Lottery.

Matt Strawn
CEO, Iowa Lottery Authority
515-725-7880
Mr. Strawn is the head of my agency client, the Iowa Lottery. For a period in 2019 when the Lottery was conducting a search for new general counsel, I served as acting general counsel while maintaining my other attorney general's office workload. During that time, Mr. Strawn was my primary contact with the agency and I worked closely with him. I continue to work closely with him on some matters as the need arises.

Kurt Swaim
First Assistant State Public Defender
515-725-2012
Mr. Swaim is the "second in command" of the State Public Defender system. The State Public Defender has been one of my client agencies since 2017. The head of the agency is the State Public Defender, who is appointed by the Governor. Mr. Swaim has been a fixture in my work with the State Public Defender (the agency) even as the appointed State Public Defender (the person) has changed over time. Since 2017, I have worked with Mr. Swaim on litigation (including civil lawsuits brought against public defender employees), personnel matters, subpoena responses, open records requests, and more.

27. Explain why you are seeking this judicial position.

I believe in the judiciary. The judicial branch was my first employer after law school, and that experience was formative. I understand that the Court's role is to determine the *right* answer to the legal questions that come before it—not necessarily the convenient, advantageous, or most newsworthy answer. I would continue that approach if nominated and appointed.

Because of my fundamental belief in the judiciary, I am also seeking the position because I have noticed fewer applicants for recent appellate openings: fewer than ten applicants for recent openings on both the Iowa Supreme Court and the Iowa Court of Appeals. That cannot be because there aren't enough qualified lawyers—but must be for some other reason, perhaps including, in some instances, a simple lack of interest in being an appellate judge.

Well, I'm interested. I started my legal career learning how an appellate justice approaches cases, what an appellate justice looks for in a good brief, and how an appellate justice thinks through and analyzes thorny issues that may not have a clear answer. I've tried to carry forward that approach in my practice—always thinking about what a case may look like on appeal, not just what it looks like initially.

When deciding whether to apply for this position, at times I wondered whether I am too young. I've only been practicing for eight years. But the substance of those eight years has given me a lot of relevant experience. This is an appellate position, and I've handled over three dozen appellate matters in the last six years—more than some attorneys handle in a career. I can handle the workload with aplomb, and if nominated and appointed, I will strive to help others believe in the judiciary as much as I do.

28. Explain how your appointment would enhance the court.

The State of Iowa has dozens of administrative agencies that touch on almost all aspects of life. Citizens' interactions with those agencies are important, but they are often unseen and, when they *are* seen, can seem byzantine or confusing when the disputes reach the district court or appellate courts. My experience with and knowledge of administrative law and agencies would fill a niche of knowledge that is underrepresented on the bench.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

Although I do not consider it necessary to disclose that Commissioners may have been opposing *counsel* in a matter, Commissioner Leon Spies was an opposing *party* in *Rush v. Reynolds*—listed as part of Matter #2 in question #12 above.

Additionally, in both *Rush v. Reynolds* and *Duff v. Reynolds*, I represented Commissioner Dan Huitink in his official capacity as a Commissioner. Our interactions during the case were sparse.

During my short time at the Nyemaster Goode firm (listed above in question #6), I worked on some matters for Commissioner Kristina Stanger. To my knowledge, none of those matters remain pending.

Finally, I currently represent State Court Administrator Robert Gast in the pending federal lawsuit captioned *Raak Law v. Gast*, which is a constitutional challenge to the statutory method for electing Commissioners.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed:  Date: September 23, 2022

Printed name: David M. Ranscht

Writing Sample #1

Article published in UNLV Gaming Law Journal

Responsive to Question #19

PROBLEM GAMBLING IS FUNNY

David M. Ranscht*

"This is so silly—I started playing again!"[1]

I. INTRODUCTION

At the outset, I must confess: I don't *actually* think problem gambling is funny—at least, not categorically. But that title sure is attention grabbing, isn't it? Just as casinos are designed with flashy lights and aesthetically pleasing interiors to attract customers and keep them playing,[2] I fully admit my title is meant to hook the reader. Did it work?

With that confession out of the way, let's get on to the important stuff. In 2013, the American Psychiatric Association (APA) released the fifth edition of its landmark Diagnostic and Statistical Manual (DSM-5).[3] The DSM-5 features a major revision that affects the gaming law field: it reclassifies problem gambling[4] from an "Impulse Control Disorder"—alongside pyromania and

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* Law Clerk for the Honorable Daryl Hecht, Supreme Court of Iowa; J.D., Drake University Law School, 2014. The views expressed in this essay are personal to the author only, and do not necessarily reflect the views of Justice Hecht, the Supreme Court of Iowa, or the State of Iowa. I would like to thank Keith Miller, Ellis and Nelle Levitt Distinguished Professor of Law at Drake Law School, for sparking my interest in gaming law, and Kate Ono Rahel and Maggie White for their willingness to read and critique my rougher drafts.

[1] *Family Guy: The Son Also Draws* (Fox Television Broadcast May 9, 1999).

[2] *See generally* NATASHA DOW SCHÜLL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS 37–51 (2012) (describing how important interior design is to casino developers).

[3] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5]. *See also DSM-5 Overview: The Future Manual*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/about/Pages/DSMVOverview.aspx (last visited June 19, 2015) (giving a brief history of the development of the DSM-5, and stating that it was released in May 2013).

[4] "Officially changing the name ['Pathological Gambling'] to 'Gambling Disorder' is a welcome revision for many researchers and clinicians who have expressed concern that the label 'pathological' is a pejorative term that only reinforces the social stigma of being a problem gambler." CHRISTINE REILLY &

kleptomania—to a "Substance-Related and Addictive Disorder."[5] The APA also changed the diagnostic criteria for gambling disorder, lowering the threshold for a diagnosis.[6] This is one of many signs that problem gambling is being taken seriously after years of being ignored or minimized.[7] At least three states have debuted problem gambling courts that mirror drug courts or other similar treatment programs;[8] other states have taken legislative steps to provide additional assistance for problem gamblers within their borders.[9]

NATHAN SMITH, NAT'L CTR. FOR RESPONSIBLE GAMING, THE EVOLVING DEFINITION OF PATHOLOGICAL GAMBLING IN THE DSM-5, at 4 (2013), *available at* http://www.ncrg.org/sites/default/files/uploads/docs/white_papers/ncrg_wpdsm5_may2013.pdf. I recognize that the various labels—"problem gambling," "pathological gambling," "gambling disorder," "gambling addiction," "compulsive gambling," and other similar permutations—are generally considered to have different meanings. *See, e.g.*, Ashley Grace, Comment, *Why One Size Doesn't Fit All: A Critique of Casino Voluntary Self-Exclusion Programs and Recommendations for Improvement*, 82 UMKC L. REV. 233, 234 (2013) ("A problem gambler is a person who experiences a combination of negative consequences due to gambling but does not rise to the level of a pathological gambler."); Amaia Guenaga, Note, *Improving the Odds: Changing the Perception of Problem Gambling and Supporting the Growth of Problem Gambling Courts*, 2 UNLV GAMING L.J. 133, 134–35 (2011) ("Although the general public uses the term 'compulsive gambler,' treatment professionals use the term 'pathological gambler.'"); Irina Slavina, Note, *Don't Bet on It: Casinos' Contractual Duty to Stop Compulsive Gamblers from Gambling*, 85 CHI.-KENT L. REV. 369, 369 n.1 (2010) (stating that compulsive gambling is a subset of problem gambling). However, for this article's purposes, all these terms will be use interchangeably.

[5] DSM-5, *supra* note 3, at 585; REILLY & SMITH, *supra* note 4, at 3; *see also* Kathleen V. Wade, Note, *Challenging the Exclusion of Gambling Disorder as a Disability under the Americans with Disabilities Act*, 64 DUKE L.J. 947, 961–63 (2015) (differentiating impulse disorders from addictive disorders).

[6] *See* REILLY & SMITH, *supra* note 4, at 4.

[7] For example, the American Gaming Association (AGA) seems to view problem gambling as relatively insignificant, because it refers to studies indicating that "the prevalence rate of pathological gambling [is] close to 1 percent of the U.S. adult population" and has stayed low even as gambling options have expanded in recent years. *Gambling Disorders*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/gambling-disorders (last visited June 19, 2015). *But see* Joy Wolfe, Comment, *Casinos and the Compulsive Gambler: Is There a Duty to Monitor the Gambler's Wagers?*, 64 MISS. L.J. 687, 688 (1995) (referring, twenty years ago, to compulsive gambling as a disease).

[8] Guenaga, *supra* note 4, at 143–47 (describing programs available in New York, Louisiana, and Nevada).

[9] *See, e.g.*, IND. CODE §§ 4-35-8.8-2, -3 (2014) (requiring licensees to pay an annual problem gambling fee that is used to prevent and treat problem gambling); KAN. STAT. ANN. § 79-4805(a)–(c) (2014) (establishing a grant fund used to provide problem gambling treatment and subsidize "research regarding the impact

But pop culture hasn't fully caught up. Gambling disorder or gambling addiction is often portrayed onscreen as just the setup to a joke, a method of creating hijinks from which characters must extract themselves, or even for purposely bucking traditional notions about gambling demographics. Often, problem gambling is merely a device for delivering a laugh—rather than a serious problem, it's a "silly," easily dismissed happenstance.[10] Even in the real world, Iowa provides a recent example showing that, despite awareness and treatment efforts within the state, problem gambling remains an afterthought for many people.[11] Perhaps one reason problem gambling remains a relatively niche disorder is because many people don't even think about it—or if they do, they rarely consider it serious.

This article briefly defines problem gambling before exploring a few short examples of the generally flippant manner in which problem gambling is portrayed. It then evaluates possible ways to change the perception of problem gambling outside the industry itself, and discusses the benefits and shortfalls of each of them. Finally, it concludes that, while problem gambling is no joke, progress must be made measuredly to avoid turning resultant programs or litigation into a laughingstock.

II. DEFINING PROBLEM GAMBLING

"Any discussion of [gambling disorder] needs to begin by defining the problem and measuring its scope. What is meant by the term 'gambling problem,' or 'gambling disorder?'"[12] Professor Keith Miller provides a flexible, yet practicable definition:

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of gambling on residents of Kansas"); MD. CODE ANN., STATE GOV'T § 9-1A-33(b) (LexisNexis 2014) (establishing a "Problem Gambling Fund" to be used to "develop and implement problem gambling treatment and prevention programs"); 4 PA. CONS. STAT. § 1509(b) (2014) (establishing a "Compulsive and Problem Gambling Treatment Fund"); WASH. REV. CODE § 43.20A.890 (2014) (establishing a treatment program); IOWA DEP'T OF PUB. HEALTH, OFFICE OF PROBLEM GAMBLING TREATMENT AND PREVENTION 2 (2014), *available at* https://www.legis.iowa.gov/docs/APPS/AR/E273A8C1-E91A-490E-914B-7C328801C3E1/IDPH%20Jan%202014%20Gambling%20Treatment%20and%20Prevention%20Report.pdf (noting the Iowa Department of Public Health receives "an appropriation from the State General Fund for problem gambling services," which totaled $3.1 million in the 2014 budget); NEB. REV. STAT. §§ 9-1001 to 9-1005 (creating the Nebraska Commission on Problem Gambling and tasking it with providing problem gambling treatment services, among other duties).

[10] *See The Son Also Draws*, *supra* note 1.

[11] *See infra* Part III.B.

[12] Keith C. Miller, *How Should the Past Inform the Future? Reviewing Regulating Internet Gaming: Challenges and Opportunities*, 5 UNLV GAMING L.J. 49, 67 (2014) (book review).

> [A] gambling problem may be characterized by gambling behavior that creates a disruption in a person's psychological, physical, social, or vocational life. Such actions as preoccupation with gambling, "chasing losses," loss of control over gambling in spite of serious negative consequences in a person's life, and lying about one's gambling are characteristics of a problem gambler. Perhaps in a sense, there is a "know it when you see it" quality to identifying a person whose gambling activity has created chaos in some aspect of his or her life.[13]

Additionally, the DSM-5 contains diagnostic criteria that indicate problem gambling, including escalation in wagers and withdrawal symptoms when attempting to cut down.[14] But perhaps most succinctly, problem gambling manifests itself when players enter a trancelike escapist state of affective calm—"the zone."[15]

Prevalence is another matter. There is some debate about whether the AGA's one-percent number is accurate:

> Lifetime prevalence rates are higher than annual rates, and are a better reflection of the fact that gambling problems may wax and wane over the years. But the bigger problem with the 1 percent number, some critics assert, is that it is expressed as a share of the adult population *generally*, not those adults who gamble regularly. It is misleading to say that 1 percent of adults have a gambling disorder when a large percentage of adults don't gamble at all, or gamble only rarely. The more relevant percentage for measurement is among those who gamble *regularly*, and that number is much higher than 1–3 percent, critics argue.[16]

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[13] *Id.* (citations omitted); *see also* Guenaga, *supra* note 4, at 136 ("Financially, mortgage, rent, electricity and other bills may be late because of . . . problem gambling, and in some cases individuals lose their homes, cars and other personal belongings. Thus, problem gambling not only affects the gambler, but it can have devastating effects on the family as well.").

[14] *See* REILLY & SMITH, *supra* note 4, at 2–4 (listing the DSM-IV criteria and noting the changes made for the DSM-5).

[15] SCHÜLL, *supra* note 2, at 18–19; *see also* CHARLES DUHIGG, THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS 250 (2012) (describing a problem gambler who, when gambling, felt "numb and excited, all at once, and her anxieties grew so faint she couldn't hear them anymore"); Grace, *supra* note 4, at 233 (noting that "identifying who might have a gambling problem is a difficult task," but suggesting one example is "the woman in the back corner of the casino playing a video poker machine for at least two hours straight without so much as turning her head").

[16] Miller, *supra* note 13, at 68 (footnotes omitted); *see also* SCHÜLL, *supra* note 3, at 14–15.

This debate need not be resolved here. It suffices to say that problem gambling is more than a specter because examples—often featuring eye-popping numbers or circumstances—keep recurring.[17]

III. PUNCHLINE AND AFTERTHOUGHT

"Gambling disorder is a relatively new—or newly understood—disorder."[18] But "although the scientific community changed its conception of gambling from 'gambling as sin' to 'gambling as sick,' . . . societal acceptance still lags behind."[19] That may be true in part because "[a]ddiction has been absorbed into the popular vernacular as a term meant to refer to nothing more than frequent use or enjoyable habits."[20] A few episodes of some popular TV shows—along with one real-life experience—provide some exemplary barometers illustrating this principle.

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[17] *See, e.g.*, Wells v. SmithKline Beecham Corp., 601 F.3d 375, 377 (5th Cir. 2010) ("From September 2005 . . . until January 2006, Wells surrendered $10 million to the Nevada gaming tables—including $4 million in January alone."); *In re* Briese, 196 B.R. 440, 452 (Bankr. W.D. Wis. 1996) ("After payment of income taxes, a few bills and a few small improvements to their house (a modest home undoubtedly bursting at the seams given the presence of two adults and five children), [Mrs. Briese] had $15,000.00 left. In the throes of her addiction, she returned to the casino looking to ride her 'roll' a little longer. Unfortunately, she only added to her losses, and ultimately found it necessary to file bankruptcy."); Caesars Riverboat Casino, LLC v. Kephart, 934 N.E.2d 1120, 1122 (Ind. 2010) ("In a single night of gambling Kephart lost $125,000 . . . ."); NOLA 180 v. Harrah's Operating Co., 94 So. 3d 886, 887 (La. Ct. App. 2012) ("Ms. Thompson, the school's financial officer, embezzled approximately $667,000 from NOLA 180 . . . to support her gambling habit."); SCHÜLL, *supra* note 3, at 226 (describing a woman who gambled away her son's $45,000 life insurance policy); Alexandra Berzon, *The Gambler Who Blew $127 Million*, WALL ST. J. (Dec. 5, 2009), http://www.wsj.com/articles/SB125996714714577317 ("During a year-long gambling binge at the Caesars Palace and Rio casinos in 2007, Terrance Watanabe managed to lose nearly $127 million. The run is believed to be one of the biggest losing streaks by an individual in Las Vegas history."); Elaine Meyer, *Gambling with America's Health: The Public Health Costs of Legal Gambling*, PAC. STANDARD (Sept. 15, 2014), http://www.psmag.com/navigation/health-and-behavior/las-vegas-nevada-legal-gambling-with-americas-public-health-policy-90625/ (describing a man who "embezzled $7 million from his employer to gamble," and when that sum was exhausted, continued to gamble with money "from his family's savings, his 401(k), and his children's college fund").

[18] Stacey A. Tovino, *Lost in the Shuffle: How Health and Disability Laws Hurt Disordered Gamblers*, 89 TUL. L. REV. 191, 196 (2014).

[19] Wade, *supra* note 6, at 978.

[20] *Id.* at 979; *see also* Tovino, *supra* note 19, at 246 ("Gambling disorder was previously thought to be a social, not a medical problem.").

A. Television Examples

The broad notion of popular legal culture examines the relationship between entertainment media "about law or lawyers . . . which are aimed at a general audience," and its effect on what the average person thinks about prevalent legal issues.[21] This article, however, is concerned with a subset of entertainment media that includes satire and other comedy. Humor isn't meant to be serious, of course, but satire can be more applicable to legal issues than one might think.[22] Indeed, satire can provide frequent commentary on legal issues and "forge a new way of thinking about the world in which we live."[23] It

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[21] Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1580 (1989) (explaining two uses for the term "popular legal culture"); *see also* Kimberlianne Podlas, *Homerus Lex: Investigating American Legal Culture Through the Lens of The Simpsons*, 17 SETON HALL J. SPORTS & ENT. L. 93, 106 (2007) ("As evidenced by its centrality in American life, television is our culture's most powerful medium.").

[22] *See, e.g.*, Kimberlianne Podlas, *Funny or No Laughing Matter?: How Television Viewers Interpret Satires of Legal Themes*, 21 SETON HALL J. SPORTS & ENT. L. 289, 290 (2011) [hereinafter Podlas, *Funny or No Laughing Matter*] ("[T]elevision plays a part in both cultivating public opinion about the law and constructing legal culture."); Kimberlianne Podlas, *Respect My Authority! South Park's Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 541 (2009) ("[E]ven 'non-legal,' 'non-serious' programs like *South Park* frame issues of legal regulation and advance ideologies of law. Indeed, *South Park*'s brilliant use of satire enables it to go straight to the heart of culture's most contentious issues . . . ."); Steven Keslowitz, Note, *The Simpsons, 24, and the Law: How Homer Simpson and Jack Bauer Influence Congressional Lawmaking and Judicial Reasoning*, 29 CARDOZO L. REV. 2787, 2806 (2008) ("The fact that legal scholars have chosen to make use of [TV] references in law journals demonstrates that . . . these shows provide (or are least perceived to provide) serious and noteworthy commentary on specific legal ideas."); David M. Ranscht, Note, *Guidance from an Unlikely Source: Why a Hollywood Satire Can Help Resolve the Circuit Split over Whether Mandatory Graphic Cigarette Package Warning Labels Violate the First Amendment*, 62 DRAKE L. REV. 267, 310–12 (2013) (suggesting the 2005 film *Thank You For Smoking* is, perhaps strangely, applicable to the more recent legal debate over cigarette package warning labels); *cf.* Friedman, *supra* note 21, at 1588 ("Popular culture is . . . involved with law; and some of the more obvious aspects of law are exceedingly prominent in popular culture."). Of course, "traditional" media—as opposed to entertainment media—can also sculpt public perception on a particular issue. *See generally* Robert Bejesky, *How Security Threat Discourse Can Precipitate a Press Clause Death Spiral*, 63 DRAKE L. REV. 1, 3 (2015) (suggesting that when news media "abets the policy agenda of the government," it makes "citizen preferences . . . more amenable to forthcoming policy actions"). But my focus here is on the less obvious influence.

[23] Keslowitz, *supra* note 23, at 2790; *see also* Podlas, *supra* note 21, at 95

"can often make serious or incendiary issues more palatable," and "provides viewers with a safe harbor of reaction."[24] However, there is a potential drawback in embedding legal issues within a TV comedy because satire "cuts both ways: [it] can cut to the quick or help connect with audiences, but it can also enhance the wrong message, produce unintended consequences, or cause viewers to process peripherally and, thus, devote less attention and thought to the message conveyed."[25] Problem gambling may have suffered exactly the unintended consequences Professor Podlas mentions because, until recently, comedies have often portrayed gambling disorder as trifling—a throwaway plot event compared to the real satirical commentary on family, race, or politics.[26]

For example, the "lesson" of a 1999 *Family Guy* episode is ostensibly one of father-son bonding, or of supporting one's family rather than attempting to relive childhood vicariously through one's kids.[27] Gambling addiction makes an appearance, but it functions chiefly as an afterthought. During a family road trip to get son, Chris Griffin, readmitted to the Youth Scouts, the family stops at a casino for a restroom break.[28] In the short time this break takes, wife Lois begins to play video poker.[29]

When her husband returns after a few minutes, Lois looks disheveled and responds to all conversation with a dismissive "yeah" while continuing to play the machine.[30] Eventually she literally holds on to the machine to prevent herself from being dragged out of the casino.[31] Once she leaves, she admits two things: First, she remarks how easy it was to get in "the zone," saying "all those lights go off and you just feel so good inside!"[32] Second, she confesses she ran

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("As the media has increased its dominance in American society . . . pop legal culture has emerged as a valid area of inquiry.").

[24] Podlas, *supra* note 21, at 100.

[25] Podlas, *Funny or No Laughing Matter*, *supra* note 22, at 330; *cf.* Katherine Lee Klapsa, Comment, *Lawyers Bring Big Screen Drama to the Courtroom: How Popular Culture's Influence on the Law Has Created the Need for "Professional Witnesses,"* 18 BARRY L. REV. 355, 356 (2013) (noting "it is expected, and accepted," that many citizens' understanding of the entire legal system comes in part from entertainment media).

[26] *See* Podlas, *Funny or No Laughing Matter*, *supra* note 23, at 330; *see also* Keslowitz, *supra* note 23, at 2798–99 (exploring "cultivation theory," which "hypothesizes that viewers' perceptions of reality are cultivated in a manner consistent with the programming to which they are exposed").

[27] *See generally Family Guy: The Son Also Draws*, *supra* note 1.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* This is an even greater juxtaposition because right before playing, she had spoken to a slot attendant judgmentally and stated she does not "approve of gambling." *Id.*

out of money so she wagered (and lost) the family car.[33]

Lois's actions demonstrate classic signs of problem gambling—namely, the escalating wagers and the trancelike state she quickly enters. But in the episode, this isn't a major issue, nor is it given any sort of serious treatment. Rather, it serves as hijinks that simply set up the rest of the episode's plot—to get the car back from the Native American casino, Chris and his father go on a vision quest,[34] and everything is neatly resolved in twenty-two minutes. Moreover, Lois becomes addicted very quickly and exhibits a rapid turnaround from disapproving of gambling to losing the car.[35] The way Lois's actions are portrayed, and then easily forgotten, could certainly give viewers the impression that problem gambling is fleeting and therefore not serious. In other words, the episode encourages viewers to process problem gambling peripherally—creating (or perhaps supporting) the notion that it's only a peripheral problem.[36]

South Park provides an even more substantive example. A 2003 episode titled *Red Man's Greed* provided commentary on indigenous relations, with a subplot involving the disease SARS.[37] The two plots intertwine when a new Indian casino opens near the town of South Park, Colorado, but soon makes plans to expand its player base by building a superhighway extending from the casino to Denver.[38] Visiting the new casino, many South Park residents are dazzled by its extravagance and gamble some modest sums.[39] When the townspeople compare their experiences, however, Gerald Broflovski reveals he has already lost $26,000 in one night.[40] He goes on to say, "I forgot to tell you—I have a gambling problem," and urgently insists he needs to win back his losses.[41] In pursuit of that goal, he convinces the casino to lend him credit and offers his house as collateral.[42] Inevitably, he loses that sum too and subsequently begs the casino for another extension of credit.[43]

Again, some symptoms of problem gambling are there—principally,

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[33] *Id.*

[34] *See id.*

[35] *See id.*

[36] *See* Podlas, *Funny or No Laughing Matter*, *supra* note 22, at 330; *see also* Keslowitz, *supra* note 22, at 2802–03 ("[If an] audience watches specific episodes without an appreciation for the satire . . . cultivation theory provides that the audience will have an inaccurate perception [of what is being satirized].").

[37] *South Park: Red Man's Greed* (Comedy Central television broadcast April 30, 2003).

[38] *See id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

escalating wagers and chasing losses, along with a general sense that Gerald lost all this money almost without consciousness that he was doing so. He played blackjack for a while and, poof, he lost $26,000—only realizing the amount once he emerged from the "zone."[44] But again, the gambling problem is brushed aside as a mere plot device. As it turns out, the casino nefariously plans to acquire title to *every* house in South Park so it can eventually raze the town to make way for the superhighway, and the residents must band together to save their "historic" hometown.[45] Thus, Gerald's gambling addiction quickly gives way to the real commentary on indigenous relations. Moreover, having a gambling problem is so insignificant and easy to forget that—oops—it just slips someone's mind altogether.[46]

But the problem gambling references in this episode don't end there. Later, in a last-ditch effort to save the town, the South Park residents pool all their remaining money—only $10,000.[47] But they need thirty times that amount, so they decide to wager the entire ten thousand on roulette—resembling a real-life bankruptcy debtor who gambled her last $15,000.[48] Improbably, the wager on a particular number is successful, but the people wagering can't simply take the win; they let it ride, and predictably lose everything.[49] One kid who questions the decision to keep playing is admonished because he just doesn't "understand the fine points of gambling."[50] At face value, this statement could indicate—to both the person in the episode, and to viewers—that a person's gambling habits are not even worth thinking about or questioning.

Of course, I do not suggest that these shows' characters should in fact be medically diagnosed with gambling addiction, or that the shows' creators erred gravely in creating characters with problem gambling tendencies. I also do not suggest that showcasing gambling addiction as if it was a one-time ailment is, in and of itself, problematic. Part of the appeal these shows have is that everything is (or can be) reset for every episode, leaving the characters free to tackle new subjects or travails without continuity constraints.[51] Further, I do not suggest that these comedies should consider problem gambling "off limits."[52] I

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[44] *See id.*

[45] *Id.*

[46] *See id.*

[47] *Id.*

[48] *Id.*; *see In re* Briese, 196 B.R. 440, 452 (Bankr. W.D. Wis. 1996).

[49] *South Park: Red Man's Greed*, *supra* note 36.

[50] *Id.*

[51] *See* Podlas, *supra* note 21, at 103 (noting that animated comedies "can go anywhere and do anything to advance the narrative," which "prompts viewers to consider issues without the hindrance of self-interest").

[52] *See id.* at 132 ("*The Simpsons* is not merely the most successful cartoon in history, but a pop culture chronicle that uses satire to explore a variety of social

recognize it makes sense that comedies treat problem gambling less seriously, because they treat *every* subject less seriously.[53] What I do suggest is that by portraying problem gambling flippantly, these media examples are either cultivating or reflecting societal indifference toward the disease—and perhaps it's a little of both.[54]

B. A Real-World Example

A recent example from Iowa bears out this kind of community antipathy. In the state, before a new casino can submit a licensing application to the Iowa Racing and Gaming Commission (IRGC), residents of the county where the casino will be located must assent to the presence of gambling in that county through a referendum.[55] If the referendum is successful, prospective licensees submit proposals to the IRGC. The IRGC evaluates numerous licensing criteria,[56] but also holds a public meeting in the county and solicits public comment on the proposal.

After an August 2013 referendum in Greene County (a rural county in west central Iowa with a total population under 10,000) approved gambling by a three-to-one margin,[57] the IRGC held its meeting and public comment session

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issues. No subject is immune from its scrutiny, and the law is no different.").

[53] *See* Keslowitz, *supra* note 22, at 2803 n.90 ("Inaccurate presentations of social realities . . . are a given . . . .").

[54] *See* Emily Battersby & Wolfgang G. Robinson, *Paradise Lost: Media in ~~In~~justice and ~~In~~justice in Media*, 22 SETON HALL J. SPORTS & ENT. L. 29, 31 (2012) (acknowledging "the chicken-or-the-egg causality dilemma between media and law"); Keslowitz, *supra* note 22, at 2819 ("[T]elevision shows . . . both reflect and influence social realities."); *see also* Kevin K. Ho, Comment, *"The Simpsons" and the Law: Revealing Truth and Justice to the Masses*, 10 UCLA ENT. L. REV. 275, 276 (2003) (noting *The Simpsons* has both "reflected *and* shaped American culture" since it debuted (emphasis added)).

[55] IOWA CODE § 99F.7(11)(a) (2015) ("A license to conduct gambling games . . . in a county shall be issued only if the county electorate approves the conduct of the gambling games . . . ."). Although the referendum requirement does not prevent prospective licensees from making preliminary plans, it can certainly scuttle those plans if the referendum is unsuccessful. *See Gambling Games Referendums*, IOWA RACING & GAMING COMM'N, http://iowa.gov/irgc/CommReferendum.htm (last visited June 19, 2015) (noting voters in Warren County, Iowa rejected the referendum in a May 2013 vote).

[56] IOWA CODE §§ 99F.5 to .7; IOWA ADMIN. CODE r. 491-1.7 (2015); *see also* Sean McGuinness et al., *Gaming Regulatory Jurisdiction: The Dual Criteria of Location Acceptability and Applicant Suitability*, 62 DRAKE L. REV. DISCOURSE 34, 36–38 (2014), http://students.law.drake.edu/lawReview/docs/lrDiscourse201404-mcguinness.pdf (providing an overview of Iowa's licensing requirements).

[57] *See* Douglas Burns, *Greene County Casino Rolls 3 to 1 at Polls*, DAILY TIMES HERALD (Aug. 7, 2013), *available at* http://carrollspaper.com/Content/Local

for the Greene County proposal in Jefferson, the county seat, in May 2014.[58] Attendance was high; the auditorium was packed full, and so was an overflow room featuring a closed-circuit broadcast of the proceedings.[59] At the meeting, at least sixty-five individuals or representatives of particular groups provided their comments on the proposed casino, including local business owners, law enforcement officials, current and former legislators, other in-state casino officials, journalists, and numerous citizens from the county.[60] Supportive comments followed a major theme: a new casino would create a destination center in rural west central Iowa, thereby acting as a catalyst for additional economic development throughout the region.[61] Further, it would bring additional revenue to the county, and some of that money would be distributed back to the community through the casino's partnership with a nonprofit qualified sponsoring organization.[62] Comments opposing the proposed casino

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-News-Archive/Local-News/Article/Greene-County-casino-rolls-3-to-1-at-polls/1/1/16181; *see also Gambling Games Referendums*, *supra* note 55.

[58] *Jefferson Casino Plan Draws Hundreds to Hearing*, SIOUX CITY J. (May 29, 2014), http://siouxcityjournal.com/news/state-and-regional/iowa/Jefferson-casino-plan-draws-hundreds-to-hearing/article_8f1b76b2-8792-5067-8e91-f7d05ba63714.html; *see also Meeting of the Iowa Racing & Gaming Commission: Minutes* 1 (May 29, 2014) [hereinafter *May 2014 IRGC Minutes*], *available at* http://iowa.gov/irgc/Min%20May%2029%202014%20.pdf (noting the meeting took place after a tour of the proposed casino site).

[59] I attended the meeting and took notes, so my description of the atmosphere and proceedings is culled both from my memory and my notes. *See generally* Notes from May 29, 2014 Greene County Public Comment Session (on file with Author) [hereinafter Author Notes]. Of course, the IRGC's official minutes of the meeting supplement my own account insofar as they reflect the comments made. *See May 2014 IRGC Minutes*, *supra* note 58.

[60] Author Notes, *supra* note 59. One particularly interesting—and somewhat curious—citizen comment that was repeated multiple times involved parents supporting the casino project because it would provide event space they might be able to book for their child's future wedding reception. *See id.* For example, one woman said she would jump at the chance to book the event space for her daughter's wedding reception, but then divulged (while still at the microphone) that her daughter wasn't yet engaged. *Id.*

[61] Author Notes, *supra* note 59; *see May 2014 IRGC Minutes*, *supra* note 58, at 2. In particular, the Mayor of Jefferson envisioned the city becoming "a regional hub of entertainment." *May 2014 IRGC Minutes*, *supra* note 58, at 1.

[62] *See* IOWA CODE § 99F.5 (stating prospective licensees may apply for licensure after entering an agreement with a qualified sponsoring organization); *see also* McGuinness et al., *supra* note 56, at 38 n.15 ("[O]rganizational sponsorship . . . is a prerequisite to filing a gaming license application in Iowa."). Iowa's dual licensure system is unique among states. *See* Victor J. Frankiewicz, Jr., Comment, *States Ante Up: An Analysis of Casino Gaming Statutes*, 38 LOY. L. REV. 1123, 1128 (1993) ("[T]he sponsoring organization serves as the owner of the gaming

project also followed one main strand: market studies indicated there was little to no remaining "uncaptured" gaming revenue in Iowa, and a new casino would simply cannibalize existing ones rather than increase overall gaming revenue in the state.[63]

But, most importantly, only one of the nearly seventy speakers even mentioned problem gambling.[64] That speaker was a local pastor who considers gambling a menace to society.[65] She stated she was concerned about how a casino would affect "the least among us," and specifically noted pathological gamblers in that category.[66] She urged the IRGC to deny the license application.[67]

Clearly, this pastor objected to the casino for moral and spiritual reasons in addition to the problem gambling concern she raised. Perhaps her objection was predominantly religious rather than pragmatic. But it is noteworthy that she was the only one to address problem gambling at all. Of course, a new casino, especially a smaller one in a rural county, likely would not singlehandedly cause problem gambling to rise exponentially.[68] However, apart from the pastor, nobody else even *mentioned* it. Rather than acknowledging the potential costs of problem gambling[69] as one factor to balance against the benefits of expanding gaming into a new geographic area, proponents and opponents alike seemingly preferred to consider the issue out of sight and therefore out of mind.

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enterprise while a professional gaming entrepreneur is the sponsor's operating/management contractor.").

[63] Author Notes, *supra* note 59; *May 2014 IRGC Minutes*, *supra* note 58, at 3; *see* MARQUETTE ADVISORS, IOWA GAMING MARKET ANALYSIS 54 (2014), *available at* http://iowa.gov/irgc/Study%202014-Marquette.pdf ("[W]e find that the Iowa casino supply is approaching maximum penetration within the existing market."); UNION GAMING ANALYTICS, IOWA RACING & GAMING COMMISSION GAMING MARKET STUDY 8 (2014), *available at* http://iowa.gov/irgc/Study%202014-Union.pdf.

[64] Author Notes, *supra* note 59; *see May 2014 IRGC Minutes*, *supra* note 58, at 3 (noting generally that this concern was raised at least once).

[65] Author Notes, *supra* note 59.

[66] *Id.*

[67] *Id.*

[68] One literature review notes the problem gambling rate "appears to be fairly stable across regions." STRATEGIC ECON. GRP. & SPECTRUM GAMING GRP., THE SOCIOECONOMIC IMPACT OF GAMBLING ON IOWANS 48 (2014) [hereinafter IOWA SOCIOECONOMIC REPORT], *available at* http://iowa.gov/irgc/StudySocioeconomicImpact2014.pdf. "However, there is some evidence to indicate that the rate might be higher in closer proximity to casinos." *Id.* For example, "in [fiscal year] 2013, residents in [Iowa's] casino counties accounted for 40% of the state's population yet they comprised 61% of the state's . . . client-treatment count." *Id.* at 249.

[69] Tovino, *supra* note 18, at 245 ("Disordered gamblers produce significant economic costs that are borne by society.").

Moreover, the fact the pastor's comments were isolated may have *reinforced* a latent societal impression that problem gambling is a peripheral issue only fervently religious people care about.

IV. CHANGING THE PERCEPTION

But as the DSM-5's revisions make clear, despite these examples of problem gambling being trivialized, the disorder is not irretrievably confined to the periphery.[70] Media is changing,[71] governments are adapting, and lawyers and policymakers are thinking creatively about the next steps.

For example, despite *South Park*'s earlier treatment of problem gambling, a more recent episode truly portrayed gambling addiction as a debilitating, uncontrollable habit.[72] In the episode, Stan Marsh downloads and becomes addicted to a game on his smartphone that asks him to make repeated purchases of in-game currency using real money. Despite the tangible price tag, Stan misses school to play the game all day, and even tells his friends the game is a "cool way to zone out"[73]—demonstrating two key attributes of problem gambling: the state of affective calm and a disruption in daily life activities.[74] To be sure, just as before, the habit creates the plot the rest of the episode follows—but this time, the addictive attributes are not simply forgotten as though they were a mere precursor.

Upon discovering the significant charges on the phone bill, Stan's father Randy bemoans the fact that Stan is exhibiting traits the family has struggled with before. He likens Stan's addiction to Randy's own father, who "always had a gambling problem—he's got total addiction tendencies."[75] In an attempt to show Stan why he should rein in his spending, Randy takes Stan to the local

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[70] *See supra* notes 3–6; *see also* Friedman, *supra* note 21, at 1588 (recognizing that media is not always "an accurate mirror of the actual state of living law"); Guenaga, *supra* note 4, at 138 ("[T]he existence of problem gambling courts suggests that the perception of problem gambling . . . is changing."); Tovino, *supra* note 18, at 196 (noting gambling disorder is "newly understood").

[71] *See* Friedman, *supra* note 21, at 1589–90 (exploring analogous historical changes in television portrayals of women and racial minorities that simply reflected evolving social norms).

[72] *South Park: Freemium Isn't Free* (Comedy Central television broadcast Nov. 5, 2014).

[73] *Id.*

[74] *See supra* Part II.

[75] *South Park: Freemium Isn't Free*, *supra* note 72. Randy's concern is perhaps exaggerated to indicate his own hypocrisy—throughout the episode, he demonstrates a potential alcohol addiction but continues to insist the addictive tendencies skipped a generation from Randy's father to Stan. Nonetheless, the episode's treatment of the problem gambling issue remains noteworthy, in part because it is not subsumed *within* the other humor. *Id.*

casino.[76] He points out that Stan's grandfather—Randy's father—spends most of his time there, flushing away money, and admonishes Stan that he doesn't want him to end up doing the same.[77] At first, Stan denies he has a problem at all.[78] Eventually, however, he admits, "okay, I need help."[79] This marks one of the few times gambling addiction has been treated seriously despite a comedic background.

And if pop culture and satire are beginning to catch up, perhaps they are reflecting the efforts made elsewhere.[80] For example, some states have problem gambling courts, reflecting "a recognition that problem gamblers who engage[] in illegal activity in order to fund their gambling need[] treatment for their underlying disorder, not just punishment in the form of jail time."[81] In other words, these programs provide "evidence of the shift in perception of problem gambling from a character flaw which must be punished to an illness or addiction which should be treated."[82] Notwithstanding the benefits these courts provide, however, they are not a complete solution because they only target problem gamblers who commit crimes in furtherance of their addiction.[83] The courts do not encompass gamblers whose lives are adversely affected yet resort only to legally permissible means—such as additional credit card applications or cashing out insurance policies—to maintain their bankroll. While "disordered gamblers are more likely than the rest of the population to engage in criminal behavior,"[84] not all disordered gamblers in fact do so[85]—but they

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* THE FRONTIER TORTS PROJECT, HARVARD LAW SCHOOL, COMPULSIVE GAMBLING: DO CASINOS SHARE RESPONSIBILITY? 20 (2013) [hereinafter HARVARD WHITE PAPER], *available at* http://learning.law.harvard.edu/frontiertorts/wp-content/uploads/2014/02/Casino%20Liability%20Whitepaper%20Final.pdf (noting several recent articles about problem gambling and suggesting there is "not only a growing awareness of the issue, but public acknowledgement that there might be factors other than an individual's personal choice at play").

[81] Guenaga, *supra* note 4, at 144; *see also* Ronald J. Rychlak & Corey D. Hinshaw, *From the Classroom to the Courtroom: Therapeutic Justice and the Gaming Industry's Impact on Law*, 74 MISS. L.J. 827, 830–31 (2005) (explaining the idea behind problem gambling court is "that it is better to seek real solutions to the problems facing compulsive gamblers than merely to mete out punishment").

[82] Guenaga, *supra* note 4, at 147.

[83] *See id.* at 144 (noting New York's problem gambling court program is only available to criminal defendants charged with "misdemeanors of $1,000 or less, or felonies in which charges have been reduced through plea bargains").

[84] IOWA SOCIOECONOMIC REPORT, *supra* note 68, at 48.

[85] *See* Tovino, *supra* note 19, at 201–02 (explaining that the DSM-5 revision removed a criterion for diagnosis "relating to the commission of illegal acts,"

need treatment too. Thus, problem gambling courts must be only the beginning of innovation and progress in this area.

Perhaps one way to fill the void and provide assistance to individuals ineligible for problem gambling courts is simply for states to continue making problem gambling a focus of their public health funding and resources. As noted above, some states are doing this.[86] For example, several different organizations in Iowa offer problem gambling treatment services and receive at least partial funding from the Iowa Department of Public Health.[87] "However, there is no research [in Iowa] . . . that tests the *efficacy* of government or industry sponsored funding for the treatment of gambling disorders."[88] Further, "only 678 people received treatment through the [Iowa]-funded program in [fiscal year] 2013."[89] Perhaps these statements are related; if the treatment is ineffective, then it seems logical few people would take advantage of it. But perhaps not; maybe the treatment actually is effective, and low participation is simply due to the low awareness discussed throughout this article. And, of course, low participation in state-funded programs does not foreclose problem gamblers from receiving treatment privately.[90] Perhaps when dealing with addiction disorders, an "every little bit helps" mentality is appropriate—and as awareness increases, participation is likely to follow.[91] No solution can be immediately and totally successful or eliminate problem gambling altogether, but increasing use of treatment programs like this is a good start.

Further, regulatory agencies have been taking notice of problem gambling violations. Again using Iowa as an example, the IRGC has fined casinos several

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because there is a "lack of empirical evidence showing that assessing criminal behavior helps diagnose individuals with gambling disorder").

[86] *See supra* note 10 and accompanying text.

[87] *See generally Iowa Gambling Treatment Program: Directory of Treatment Providers*, IOWA DEP'T OF PUB. HEALTH, http://www.idph.state.ia.us/webmap/default.asp?map=gambling_treatment (last visited June 19, 2015).

[88] IOWA SOCIOECONOMIC REPORT, *supra* note 68, at 51 (emphasis added). *Editor's Note*: There are ongoing studies in numerous states analyzing the efficacy of government and/or gaming industry funded treatment programs for gambling disorder treatment programs. *See generally, e.g.*, Press Release, Univ. of Nev., Las Vegas, UNLV Doctoral Student Receives Prestigious Award from the Nevada Council on Problem Gambling (May 1, 2015), *available at* https://www.unlv.edu/news-story/unlv-doctoral-student-receives-prestigious-award-nevada-council-problem-gambling; *Current Projects*, UCLA GAMBLING STUD. PROGRAM, http://uclagamblingprogram.org/research/index.php (last visited June 19, 2015).

[89] IOWA SOCIOECONOMIC REPORT, *supra* note 68, at 205.

[90] *See id.* at 210.

[91] *See id.* at 253–54 (reproducing comments from several treatment providers who indicated they would perform better if funding increased and if they could have a greater presence in their respective geographic areas).

times over the past few years for not following patron exclusion protocols.[92] Depending on how egregious the violation is, the IRGC can impose any monetary penalty within a preset range and can consider as an aggravating factor whether the casino has committed any other violations of the same type in the recent past.[93] Similarly, other states, like Mississippi, require all casinos to "[e]nsure that self-excluded persons do not receive . . . targeted mailings, telemarketing promotions, player club materials or other promotional materials."[94] Continued fines and other affirmative requirements imposed on casinos reflect a focus on addressing problem gambling issues, and can certainly prompt changes in casino marketing practices.[95]

Perhaps the most high-profile and headline-grabbing method of raising public awareness about problem gambling—and ideally, of reducing the problem—is litigation, usually sounding in tort. Several lawsuits have been initiated, and have been almost uniformly unsuccessful.[96] For example, a

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[92] *See, e.g.*, Dar Danielson, *Osceola, Waterloo Casinos Fined for Violations Involving Self-Banned Players*, RADIOIOWA (Oct. 10, 2014), http://www.radioiowa.com/2014/10/10/osceola-waterloo-casinos-fined-for-violations-involving-self-banned-players/ (describing two violations, one involving promotional mailings and one involving a casino paying out a jackpot without cross-checking the exclusion list); Dar Danielson, *Two Casinos in Eastern Iowa Pay Penalties for Gambling Violations*, RADIOIOWA (July 31, 2014), http://www.radioiowa.com/2014/07/31/two-casinos-in-eastern-iowa-pay-penalties-for-gambling-violations/ (noting that a casino self-reported when it discovered "a man who had excluded himself from gambling entered the casino and tried to redeem a promotional coupon" that had been mistakenly mailed to him); Dar Danielson, *Lakeside Casino Fined $5,000 by Regulators*, RADIOIOWA (Nov. 16, 2012), http://www.radioiowa.com/2012/11/16/lakeside-casino-fined-5000-by-regulators/ (noting a casino received an elevated fine after its second instance of sending promotional material to an excluded patron in the previous 365 days).

[93] *See* IOWA ADMIN. CODE r. 491-5.4(12)(b)(5) (2014) (requiring licensees to develop policies with "[p]rocedures for preventing reentry of problem gamblers").

[94] 13-3 MISS. CODE R. § 10.4(c)(4) (LexisNexis 2015). Mississippi also requires casinos to implement employee training programs that provide information about problem gambling. 13-3 MISS. CODE R. § 10.6 (LexisNexis 2015). However, the rule specifically provides that the requirement "shall not be construed to impose a duty upon employees of casinos to identify problem gamblers nor to impose any liability for failure to do so." *Id. See also* N.J. ADMIN. CODE § 13:69G-2.4(a)(4) (2015) (detailing the duties of casino licensees to self-excluded persons); 58 PA. CODE § 503a.4(a)(4) (2015) (stating that slot machine licensees cannot send advertising materials to persons on the self-excluded list).

[95] *See* MO. CODE REGS. ANN. tit. 11, § 45-17.010(4)(A) (2012) (allowing the Missouri Gaming Commission to discipline casino licensees if the licensee knows an excluded person is present yet allows them to gamble).

[96] *See* Wolfe, *supra* note 7, at 695 ("[C]ourts which have addressed the issue have uniformly held that the gambler cannot recover under tort law due to the

gambler in Indiana argued that a casino "owed her a common law duty to protect her from its enticements to gamble because it knew she was a pathological gambler."[97] The Indiana Supreme Court disagreed, noting that because the state had a statutorily authorized voluntary exclusion program, "the legislature intended pathological gamblers to take personal responsibility to prevent and protect themselves against compulsive gambling."[98] Therefore, the casino owed no duty of care to potential problem gamblers, and the gambler could not state any negligence-based claim.[99] Additionally, Nevada provides by statute that gambling disorder is no defense to an action to collect a gambling debt, nor can gambling disorder constitute grounds to make a counterclaim against a casino.[100] There are also several cases indicating that casinos owe no duty of care to *third parties* who are harmed when a person embezzles money from the third party to fund a gambling bankroll.[101]

But other potential causes of action remain and have occasionally been pursued. For example, a Nebraska company whose employee embezzled over

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absence of a duty on the part of the casino to recognize a compulsive gambler and, thereafter, monitor his betting activity."); *see also* Matthew J. Dowd, Comment, *A New Leader in the World of Legalized Gambling: What the Illinois General Assembly Should Do to Protect Pathological Gamblers from the Rapidly Expanding Industry*, 31 N. ILL. U. L. REV. 439, 441 (2011) (noting pathological gamblers usually do not have any recourse against a casino).

[97] Caesars Riverboat Casino, LLC v. Kephart, 934 N.E.2d 1120, 1122 (Ind. 2010)

[98] *Id.* at 1124.

[99] *See id.*; *see also* Williams v. Aztar Ind. Gaming Corp., 351 F.3d 294, 300 (7th Cir. 2003) (rejecting a RICO claim and also noting the district court had granted summary judgment to the casino on related state-law tort claims); Merrill v. Trump Ind., Inc., 320 F.3d 729, 733 (7th Cir. 2003) ("Indiana law does not protect a drunk driver from the effects of his own conduct, and we assume that the Indiana Supreme Court would take a similar approach with compulsive gamblers."); Taveras v. Resorts Int'l Hotel, Inc., No. 07-4555 (RMB), 2008 WL 4372791, at *6 (D.N.J. Sept. 19, 2008) (concluding all claims sounding in tort failed to state a claim for relief, because "[i]n allowing, even encouraging, Plaintiff to continue gambling, [the casino] acted well within the bounds of the community norms reflected in state law").

[100] NEV. REV. STAT § 463.368(6) (2014); *see also* 13-3 MISS. CODE R. § 10.6 (LexisNexis 2015) (stating licensees have no duty to identify problem gamblers).

[101] *See, e.g.*, Colombo Candy & Tobacco Wholesale Co. v. Ameristar Casino Council Bluffs, Inc., 972 F. Supp. 2d 1103, 1107–09 (D. Neb. 2013); NOLA 180 v. Harrah's Operating Co., 94 So. 3d 886, 889 (La. Ct. App. 2012) ("Our reading of the statutes regulating gambling in this state leads us to the conclusion that Jazz Casino is relieved of any duty to identify and recognize compulsive gamblers. . . . [W]e do not find that NOLA 180's petitions state a cause of action against Jazz Casino."); NOLA 180 v. Treasure Chest Casino, LLC, 91 So. 3d 446, 452 (La. Ct. App. 2012).

$4 million she used to gamble[102] alleged the casino was the recipient of a fraudulent transfer and had also been unjustly enriched—both these allegations survived a motion to dismiss.[103] Further, at least one commentator has suggested that in light of the DSM-5 revisions, Congress should amend the Americans with Disabilities Act (ADA) and bring gambling disorder within the Act's coverage.[104] While such a change would not provide problem gamblers with an avenue for recovery *against a casino*, it would reflect the changing understanding of problem gambling as a disease and prevent employers from discriminating against a problem gambler based on their addiction.[105] Most

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[102] *See* Todd Cooper, *$4.1 Million Embezzlement: Big Theft Brings Big Prison Term for Ex-Accountant from Gretna*, OMAHA WORLD-HERALD, Mar. 18, 2014, at C4, *available at* http://www.omaha.com/news/m-embezzlement-big-theft-brings-big-prison-term-for-ex/article_0e2dce83-d747-5f52-83fc-d564a08429cf.html (noting the employee in question was criminally charged, convicted, and sentenced to a prison term of fourteen to twenty years).

[103] *Colombo Candy*, 972 F. Supp. 2d at 1109–10. This case was ultimately dismissed without prejudice on motion of the Plaintiff. Order of Dismissal, Colombo Candy & Tobacco Wholesale Co. v. Ameristar Casino Council Bluffs, Inc., No. 8:13-cv-00148 (D. Neb. Oct. 3, 2014).

[104] Wade, *supra* note 5, at 988–89; *see* 42 U.S.C. § 12211(b)(2) (2012) (providing that compulsive gambling is not a disability, but listing compulsive gambling alongside kleptomania and pyromania); Trammell v. Raytheon Missile Sys., 721 F. Supp. 2d 876, 882–83 (D. Ariz. 2010) (applying the existing statutory exclusion to a claim that an employer discriminated on the basis of depression manifesting as compulsive gambling).

[105] Wade's proposal is appealing because the three disorders are no longer classified together, and "good interpretation seeks to construe . . . words as connected, not unrelated." Mall Real Estate, L.L.C. v. City of Hamburg, 818 N.W.2d 190, 202 (Iowa 2012). *See* BLACK'S LAW DICTIONARY 1224 (10th ed. 2014) (explaining the canon of *noscitur a sociis*, which holds that the meaning of a word or phrase in a list "should be determined by the words immediately surrounding it"). However, even a legislative change would not necessarily provoke a stark change in the way courts decide ADA cases, because the ADA still allows employers to identify a legitimate nondiscriminatory reason for taking adverse action against an employee under the *McDonnell Douglas* burden-shifting framework. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (establishing the burden-shifting framework applicable to discrimination claims when there is no direct evidence of discrimination); *see also, e.g.*, Carter v. Pathfinder Energy Servs., 662 F.3d 1134, 1141 (10th Cir. 2011) (applying the *McDonnell Douglas* burden-shifting approach to an ADA discrimination claim); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997) (same). "[U]nreliability and absenteeism caused by gambling binges and the potential of theft or embezzlement to pay off gambling debts" certainly seem like legitimate nondiscriminatory reasons to take action against an employee. Wade, *supra* note 5, at 983–84. Nonetheless, an amended ADA would serve as yet another reflection of the changing understanding of problem gambling.

importantly, however, in 2010, the lottery commission in Quebec reached a multimillion-dollar settlement to resolve a class action lawsuit filed by thousands of Canadian compulsive gamblers.[106] While a settlement—especially one from another country—does not create legal precedent in the United States, a spokesman involved in the Quebec case believed "other jurisdictions have had their eyes on the Quebec case."[107] He may have been right.

Recently, some other ideas have emerged. First, a torts project at the Harvard Law School released a White Paper recommending that states begin to enact laws creating strict liability or negligence liability for casinos that fail to prevent self-excluded patrons from entering the premises and gambling.[108] Like problem gambling courts, however, this solution has its own inherent limitation—it would only apply to gamblers who have placed themselves on an exclusion list. Thus far, "no American court has yet ruled in favor of . . . plaintiffs" alleging a casino's failure to prevent them from gambling breached a self-exclusion contract.[109]

Second, some advocates have proposed that products liability lawsuits, along the lines of decades-old litigation against tobacco and cigarette companies, may be viable.[110] These claims would assert that, like tobacco companies, gaming companies depend on revenue from addicted patrons to survive, run ads glamorizing their offerings, and even target youth.[111] But most

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[106] *Loto-Quebec Reaches Settlement With Gambling Addicts*, CTV NEWS (Jan. 7, 2010, 6:33 PM), http://www.ctvnews.ca/loto-quebec-reaches-settlement-with-gambling-addicts-1.471416.

[107] *Id.* For an overview of gambling addiction lawsuits in other countries, see Joseph M. Kelly & Alex Igelman, *Compulsive Gambling Litigation: Casinos and the Duty of Care*, 13 GAMING L. REV. & ECON. 386, 389–402 (2009).

[108] HARVARD WHITE PAPER, *supra* note 80, at 32–33.

[109] Slavina, *supra* note 4, at 370.

[110] *See, e.g.*, John Warren Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 MANAGERIAL & DECISION ECON. 17, 18 (2001) ("[This article] predicts that in the future the gambling industry will be held financially liable by the states for the social and economic impact gambling has on US [sic] society."); Meyer, *supra* note 17 (noting these types of lawsuits are "part of a growing movement of activists, academics, lawyers, and former gambling addicts who are trying to spotlight the health, economic, and social costs of gambling"). *See also* Harry Esteve, *Oregon Lottery: Games, Like Tobacco Earlier, Could Face Liability Lawsuits*, OREGONLIVE (Nov. 22, 2013, 9:15AM), http://www.oregonlive.com/politics/index.ssf/2013/11/oregon_lottery_games_like_toba.html; Sue Zeidler, *U.S. Lawyers Plot Gambling Addiction Suits as Casinos Go Online*, REUTERS, May 2, 2013, *available at* http://www.reuters.com/article/2013/05/02/casinos-litigation-idUSL2N0DC0M920130502.

[111] *See* Meyer, *supra* note 17; Zeidler, *supra* note 110. Regarding the "addiction-dependent" portion, compare *South Park: Freemium Isn't Free*, *supra*

importantly, these lawsuits would draw as many parallels as possible between the addictive qualities of cigarettes and slot machines.[112] In particular, neuroscience research indicates a possible connection between certain aspects of slot machines and reward center activity in the brain—perhaps a scientifically testable analog to the demonstrable chemical effects of nicotine in cigarettes.[113] Further, material rewards such as room and meal comps may also condition the brain.[114] There is one major obstacle, however: these types of "claims have never been tried before."[115]

But the law doesn't progress without innovation, so the fact that these types of lawsuits are new does not necessarily mean they are destined to fail.[116] We will know soon how the first effort is resolved; a widow in Ohio has already filed a lawsuit against slot manufacturer IGT and a West Virginia casino alleging their products and advertising enticed her gambling-addicted husband to wager (and lose) millions of dollars—and that the significant losses eventually drove him to commit suicide.[117] The suit asserts that slot machines are "designed to cause and foster the loss of will power and rational decision-

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note 72 (featuring a character worried that "all our money comes from people with problems," and being told "don't think about that; think about all the money!").

[112] An amicus brief filed in a Massachusetts case comprehensively attempts to accomplish this task. Indeed, the amicus brief goes even farther and attempts to equate the gambling and tobacco *industries* as a whole, not just particular characteristics of specific products within them. *See* Brief for Public Health Advocacy Institute as Amicus Curiae in Support of Appellants, Abdow v. Attorney General, 468 Mass. 478 (2014) [hereinafter PHAI Brief], *available at* https://hestrpryn.files.wordpress.com/2014/06/sjc-11641_06_amicus_public_health_advocacy_brief2.pdf.

[113] HARVARD WHITE PAPER, *supra* note 80, at 15–16 (describing the type of brain conditioning that occurs); *see also* PHAI Brief, *supra* note 112, at 18 (asserting that intermittent small wins or rewards condition the brain because they are a feedback mechanism).

[114] HARVARD WHITE PAPER, *supra* note 80, at 16.

[115] Meyer, *supra* note 17; *see also* William N. Thompson et al., *Remedying the Lose-Lose Game of Compulsive Gambling: Voluntary Exclusions, Mandatory Exclusions, or an Alternative Method?*, 40 J. MARSHALL L. REV. 1221, 1239 (2007) (suggesting casino critics' "hopes that a law suit may accomplish" a sea change in liability for problem gambling are "only a very remote dream"); Wolfe, *supra* note 7, at 701 ("[I]t appears that the compulsive gambler seeking to recoup his losses will face a bitter struggle in establishing his claim.").

[116] Wolfe, *supra* note 7, at 701 ("[A]s the gaming industry experiences new growth, more claims are sure to emerge.").

[117] Linda Harris, *Gambling Addict's Widow Claims WV Casino Exploited Her Husband's Out-of-Control Behavior*, ST. J. (Sept. 10, 2014, 4:54 AM), http://www.statejournal.com/story/26236710/gambling-addicts-widow-claims-casino-exploited-her-husbands-out-of-control-behavior.

making capacities."[118] No matter the eventual result, the proceedings will assuredly be watched closely—and rightly so.

Whether these lawsuits can succeed is contingent on myriad questions. I pose several non-exhaustive ones here in hopes they will stimulate further discussion and research, but I express no opinion as to the answers. First, are the chemical effects of nicotine and the neurological effects of slot machine lights and sounds truly analogous? The subject may require expert testimony to explain the comparison. Second, will the proper defendants always be twofold? In other words, will a pleading always have to assert the slot machine manufacturer created the addiction with its device and the casino's advertising or conduct exacerbated the addiction? If so, could a casino operator successfully argue their own conduct did not legally cause the plaintiff's addiction—or at the very least, successfully assert that under any sort of comparative fault regime, they should be apportioned a lower percentage of fault because they did not design the machine? And third, should plaintiffs prevail only when they were *known* problem gamblers?[119] In other words, would liability any more expansive than that foster an untenable or paternalistic notion that *all* consumers need to be shielded from potentially tempting advertising?[120]

Ultimately, to avoid this paternalism concern, the best option—at least for now[121]—seems to be states continuing to devote funding, resources, and attention to problem gambling.[122] Slowly but surely, the tide is turning. This

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[118] Complaint for Damages at 8, Stevens v. MTR Gaming Grp., No. 5:14-cv-104 (N.D. W. Va. Aug. 7, 2014), *available at* http://www.scribd.com/doc/236704638/Lawsuit#scribd. *Cf. South Park: Freemium Isn't Free*, *supra* note 72 (featuring a character decrying a mobile gaming company by stating it "built an addiction machine" that caters to human weaknesses).

[119] *See* Dowd, *supra* note 96, at 464 (suggesting any duty or liability imposed on a casino "should not only require knowledge that a gambler is exhibiting pathological tendencies toward gambling, but also some sort of malice" on the casino's part).

[120] *See* Thompson et al., *supra* note 115, at 1241 (recognizing that although "artificial factors . . . probably do cause people to game more than they planned or wished to," so does the layout of a grocery store or the ambient music played at a shopping mall).

[121] I leave room for the possibility that products liability lawsuits might someday be successful. Given the "no duty" rulings on most negligence claims thus far, new lawsuits face an uphill battle, but of course each case must be judged on its individual merits, on a well-developed record. As the Iowa Supreme Court has stated, "[o]ur law is constantly evolving and hopefully improving because talented attorneys are willing to fight uphill battles." Barnhill v. Iowa Dist. Court, 765 N.W.2d 267, 279 (Iowa 2009).

[122] *See* Thompson et al., *supra* note 115, at 1239–40 (proposing increased awareness campaigns and "societal education about the signs of troubled gaming");

type of measured progress, while incremental, will prevent problem gambling from reverting to being an issue that makes society laugh.

V. CONCLUSION

The public has tended to view problem gambling as a peripheral issue, perhaps due in part to its trivial treatment in the media. But that may no longer be true, because there are significant efforts underway to change how problem gambling is diagnosed, treated, and avoided. Whether these efforts are successful or not, the legal landscape is likely to change in the coming years—and as it has already begun to do, the media is likely to follow. Perhaps in the future we'll wonder why it took so long for the change to occur. We might look back and laugh—indicating, at least in that respect, that problem gambling *is* funny.

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see also Grace, *supra* note 4, at 253 ("[G]ambling awareness curriculum would be appropriate for health and wellness courses."). Of course, even with heightened awareness of the problem, no solution that devotes additional resources to problem gambling treatment will work without problem gamblers who are willing to participate. *See* Wolfe, *supra* note 7, at 690 ("[I]mplementation of a full-scale treatment program will not [necessarily] eliminate the problem, since many compulsive gamblers will not avail themselves of treatment.").

Writing Sample #2

Brief filed in *Moriarty v. State Public Defender*

Responsive to Question #19

IN THE SUPREME COURT OF IOWA

No. 18–1151

JAMES P. MORIARTY,

Appellant,

vs.

STATE PUBLIC DEFENDER,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE MICHAEL HUPPERT, JUDGE

APPELLEE'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES PRESENTED FOR REVIEW 12

ROUTING STATEMENT 18

STATEMENT OF FACTS & PROCEDURAL BACKGROUND 18

ARGUMENT 35

I. TERMINATING AN INDEPENDENT CONTRACTOR'S INDIGENT DEFENSE CONTRACT DOES NOT IMPLICATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST..... 40

A. Moriarty Raises a Liberty Interest at Most 41

B. SPD Did Not Publicize Moriarty's Termination 44

C. SPD Did Not Make Any Stigmatizing Allegations 45

II. IF A LIBERTY INTEREST IS AT STAKE, THE AVAILABLE INTRA-AGENCY RECONSIDERATION AND APPEAL FRAMEWORK AFFORDS SUFFICIENT DUE PROCESS 49

A. A Post-Termination Hearing Was Sufficient. 50

B. Moriarty Received Notice and an Opportunity to Be Heard 51

III. COURT ORDERS ARE SUBSTANTIAL EVIDENCE SUPPORTING CONTRACT TERMINATION. 61

CONCLUSION 68

CONDITIONAL REQUEST FOR ORAL ARGUMENT 69

CERTIFICATE OF COMPLIANCE 69

PROOF OF SERVICE 70

CERTIFICATE OF FILING 70

TABLE OF AUTHORITIES

Page No.

Cases

ABC Disposal Sys., Inc. v. Dep't of Natural Res., 681 N.W.2d 596 (Iowa 2004) 37

Alfredo v. Iowa Racing & Gaming Comm'n, 555 N.W.2d 827 (Iowa 1996) 52, 58

Anderson v. Low Rent Housing Comm'n, 304 N.W.2d 239 (Iowa 1981) 18, 44, 45, 46

Aponte v. Calderon, 284 F.3d 184 (1st Cir. 2002) 54

Arora v. Iowa Bd. of Med. Exam'rs, 564 N.W.2d 4 (Iowa 1997) 38

Baker v. City of Iowa City, 867 N.W.2d 44 (Iowa 2015) 52, 55, 59

Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 41, 48

Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989) 42, 44, 51, 60

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074 (1976) 44

Blantz v. Cal. Dep't of Corr. & Rehab., 727 F.3d 917 (9th Cir. 2013) 48, 52

Blumenthal Inv. Trusts v. City of W. Des Moines, 636 N.W.2d 255 (Iowa 2001) 59

Bollow v. Fed. Reserve Bank, 650 F.2d 1093 (9th Cir. 1981) 48

Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002) 38, 42, 50, 52

Bright v. Gallia Cty., 753 F.3d 639 (6th Cir. 2014) 43, 49

Butt v. Iowa Bd. of Med., No. 12-1118, 2013 WL 2637283 (Iowa Ct. App. June, 2013) 39

Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) 50, 51

Cannon v. Sixth Dist. Public Defender Office, No. 09-2164, 2009 WL 5198188 (W.D. La. Dec. 23, 2009) 43

Carleton v. Cty. of Los Angeles, 372 F. App'x 806 (9th Cir. 2010) 44

Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n, 464 N.W.2d 478 (Iowa Ct. App. 1990) 58

Churchill Truck Lines, Inc. v. Transp. Regulation Bd., 274 N.W.2d 295 (Iowa 1979) 38

Citizen's Aide/Ombudsman v. Rolfes, 454 N.W.2d 815 (Iowa 1990) 54

City of Annapolis v. Rowe, 717 A.2d 976 (Md. Ct. Spec. App. 1998) 56

City of Cedar Rapids v. Mun. Fire & Police Ret. Sys., 526 N.W.2d 284 (Iowa 1995) 56

City of Clinton v. Loeffelholz, 448 N.W.2d 308 (Iowa 1989) 41

Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993) 50

Farr v. Chesney, 437 F. Supp. 521 (M.D. Pa. 1977) 68

Filipelli v. Iowa Racing & Gaming Comm'n, No. 16-0301, 2017 WL 1088101 (Iowa Ct. App. Mar. 22, 2017) 18

GE Money Bank v. Morales, 773 N.W.2d 533 (Iowa 2009) 64

Ghost Player, L.L.C. v. State, 860 N.W.2d 323 (Iowa 2015) 51, 52, 55, 56

Gordon v. Cmty. First State Bank, 587 N.W.2d 343 (Neb. 1998) 49

Gordon v. Hansen, 168 F.3d 1109 (8th Cir. 1999) 50

Greenwood Manor v. Iowa Dep't of Pub. Health, 641 N.W.2d 823 (Iowa 2002) ..... passim

Harvey v. Care Initiatives, Inc., 634 N.W.2d 681 (Iowa 2001) 54

Hill v. Hamilton Cty. Pub. Hosp., 71 F. Supp. 2d 936 (N.D. Iowa 1999) 60

Hurd v. Iowa Dep't of Human Servs., 580 N.W.2d 383 (Iowa 1998) ... 57, 60

In re C.M., 652 N.W.2d 204 (Iowa 2002) 53

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery, 871 N.W.2d 109 (Iowa 2015) 23

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs, ___ N.W. 2d ___ (Iowa 2018) 23, 65

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Turner, ___ N.W.2d ___ (Iowa 2018) 65

Jackson v. St. Joseph State Hosp., 840 F.2d 1387 (8th Cir. 1988) 60

Jones v. Madison Cty., 492 N.W.2d 690 (Iowa 1992) 55

Jones v. Nev. Comm'n on Judicial Discipline, 318 P.3d 1078 (Nev. 2014) 54

Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013) ..... passim

Koelling v. Bd. of Trustees, 259 Iowa 1185, 146 N.W.2d 284 (1966) 39

Kopecky v. Iowa Racing & Gaming Comm'n, 891 N.W.2d 439 (Iowa 2017) 42, 61

LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015) 36

Master Builders of Iowa, Inc. v. Polk Cty., 653 N.W.2d 382 (Iowa 2002) ..... passim

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) 50, 52, 53, 55

Midwest Auto. III, LLC v. Iowa Dep't of Transp., 646 N.W.2d 417 (Iowa 2002) 35

Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982) 61

N.D. Comm'n on Med. Competency v. Racek, 527 N.W.2d 262 (N.D. 1995) 54

Pena v. Kindler, 863 F.3d 994 (8th Cir. 2017) 50, 59

Portman v. Cty. of Santa Clara, 995 F.2d 898 (9th Cir. 1993) 42, 49

Ramsey v. Iowa Dep't of Transp., 576 N.W.2d. 103 (Iowa 1998) 37

Randall v. Buena Vista Cty. Hosp., 75 F. Supp. 2d 946 (N.D. Iowa 1999) 43, 60

Riggins v. Goodman, 572 F.3d 1101 (10th Cir. 2009) 57

Schmitz v. Iowa Dep't of Human Servs., 461 N.W.2d 603 (Iowa Ct. App. 1990) 39

Schroeder Oil Co. v. Iowa State Dep't of Revenue & Fin., 458 N.W.2d 602 (Iowa 1990) 55

SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 104 S. Ct. 2720 (1984) 56

Shaw v. City Council of Marshalltown, 104 N.W. 1121 (Iowa 1905) 48

Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446 (Iowa 2017) 37

Simonson v. Iowa State Univ., 603 N.W.2d 557 (Iowa 1999) ... 42, 44, 45, 54

Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ., 659 N.W.2d 563 (Iowa 2003) 38

Smith v. Iowa Dep't of Human Servs., 755 N.W.2d 135 (Iowa 2008) 67

State v. Bean, 239 N.W.2d 556 (Iowa 1976) 67

State v. Izzolena, 609 N.W.2d 541 (Iowa 2000) 53

State v. Kennedy, 846 N.W.2d 517 (Iowa 2014) 40

State v. McKinley, 860 N.W.2d 874 (Iowa 2015) 62, 63

State v. Prusha, 874 N.W.2d 627 (Iowa 2016) 36

State v. Rimmer, 877 N.W.2d 652 (Iowa 2016) 40

State v. Scott, No. 10-0661, 2011 WL 662683 (Iowa Ct. App. Feb. 23, 2011) 68

State v. Tejeda, 677 N.W.2d 744 (Iowa 2004) 28

State ex rel. Miller v. Smokers Warehouse Corp., 737 N.W.2d 107 (Iowa 2007) 41

Stewart v. Sisson, 766 N.W.2d 800 (Iowa Ct. App. 2009) 36

Sutton v. Bailey, 702 F.3d 444 (8th Cir. 2012) 60

United States v. Espino, 317 F.3d 788 (8th Cir. 2003) 63

United States v. Lott, 310 F.3d 1231 (10th Cir. 2002) 62

Wedergren v. Bd. of Dirs., 307 N.W.2d 12 (Iowa 1981) 41, 57

White v. Office of Pers. Mgmt., 787 F.2d 660 (D.C. Cir. 1986) 48, 49

White-Ciluffo v. Iowa Dep't of Educ., No. 16-0309, 2017 WL 2469216 (Iowa Ct. App. June 7, 2017) 18, 36

Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010) 40

Statutes

Iowa Code § 13B.4(1) 20

Iowa Code § 13B.4(3) (2015) 19, 21, 42, 56

Iowa Code § 13B.4(4) 22

Iowa Code § 13B.4(8) 21, 56

Iowa Code § 13B.5 20

Iowa Code § 13B.8(1) 20

Iowa Code § 13B.8(2) 20

Iowa Code § 13B.9(4)(*a*) 21

Iowa Code § 17A.14(1) 37

Iowa Code § 17A.19 35

Iowa Code § 17A.19(8)(*a*) 38

Iowa Code § 17A.19(10)(*a*), (*f*) 19

Iowa Code § 17A.19(10)(*f*) 36

Iowa Code § 17A.19(10)(*f*)(1) 67

Iowa Code § 17A.19(10)(*f*)(3) 67

Iowa Code § 815.10(1)(*b*) 26

Iowa Code § 815.10(2) 21

Other

U.S. Const. amt. VI 21

Iowa Const. art. I, § 10 21

Iowa R. App. P. 6.1101(3) 18

Iowa R. Evid. 5.801(*d*)(2) 65

Iowa R. Evid. 5.803(2) 65

Iowa Admin. Code r. 441–95.12(3) 60

Iowa Admin. Code r. 493–11.2(6) 21, 43

Iowa Admin. Code r. 493–11.2(11) 43

Iowa Admin. Code r. 493–11.3 ..... 22, 23

Iowa Admin. Code r. 493–11.4(5) 22, 23

Iowa Admin. Code r. 493–11.6 23

Iowa Admin. Code r. 493–11.7-.8 ..... 19, 21, 43

Iowa Admin. Code r. 493–11.7(2)(*b)* 32

Iowa Admin. Code r. 493–11.8 ..... 23, 61

Iowa Admin. Code r. 493–11.8(4) 33, 46, 61

Iowa Admin. Code r. 493–11.8(6) 64

Iowa Admin. Code r. 493–11.8(11) 33, 61

Iowa Admin. Code r. 493–11.9 33

Iowa Admin. Code r. 493–11.9(3) 33

Iowa Admin. Code r. 493–11.9(4) 34

Iowa Admin. Code r. 493–11.11(1) 35

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DOES THE STATE PUBLIC DEFENDER'S DECISION TO TERMINATE AN INDIGENT DEFENSE CONTRACT IMPLICATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST?

Authorities

Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010)

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II. IF A CONSTITUTIONALLY PROTECTED INTEREST IS AT STAKE, DOES THE STATE PUBLIC DEFENDER'S INTRA-AGENCY APPEAL FRAMEWORK AFFORD CONTRACT ATTORNEYS SUFFICIENT PROCESS?

Authorities

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Gordon v. Hansen, 168 F.3d 1109 (8th Cir. 1999)

Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999)

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Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989)

Baker v. City of Iowa City, 867 N.W.2d 44 (Iowa 2015)

Alfredo v. Iowa Racing & Gaming Comm'n, 555 N.W.2d 827 (Iowa 1996)

Blantz v. Cal. Dep't of Corr. & Rehab., 727 F.3d 917 (9th Cir. 2013)

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In re C.M., 652 N.W.2d 204 (Iowa 2002)

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City of Cedar Rapids v. Mun. Fire & Police Ret. Sys., 526 N.W.2d 284 (Iowa 1995)

City of Annapolis v. Rowe, 717 A.2d 976 (Md. Ct. Spec. App. 1998)

Wedergren v. Bd. of Dirs., 307 N.W.2d 12 (Iowa 1981)

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Greenwood Manor v. Iowa Dep't of Pub. Health, 641 N.W.2d 823 (Iowa 2002)

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Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n, 464 N.W.2d 478 (Iowa Ct. App. 1990)

Blumenthal Inv. Trusts v. City of W. Des Moines, 636 N.W.2d 255 (Iowa 2001)

Hill v. Hamilton Cty. Pub. Hosp., 71 F. Supp. 2d 936 (N.D. Iowa 1999)

Sutton v. Bailey, 702 F.3d 444 (8th Cir. 2012)

Jackson v. St. Joseph State Hosp,, 840 F.2d 1387 (8th Cir. 1988)

Randall v. Buena Vista Cty. Hosp., 75 F. Supp. 2d 946 (N.D. Iowa 1999)

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III. ARE DISTRICT COURT FINDINGS AND ORDERS SUBSTANTIAL EVIDENCE SUPPORTING SPD'S DECISION TO TERMINATE AN INDIGENT DEFENSE CONTRACT?

Authorities

Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982)

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GE Money Bank v. Morales, 773 N.W.2d 533 (Iowa 2009)

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Smith v. Iowa Dep't of Human Servs., 755 N.W.2d 135 (Iowa 2008)

State v. Bean, 239 N.W.2d 556 (Iowa 1976)

Iowa Admin. Code r. 493–11.8

Iowa Admin. Code r. 493–11.8(4), (11)

Iowa Admin. Code r. 493–11.8(6)

Iowa R. Evid. 5.801(*d*)(2)

Iowa R. Evid. 5.803(2)

Iowa Code § 17A.19(10)(*f*)(1)

Iowa Code § 17A.19(10)(*f*)(3)

ROUTING STATEMENT

Because *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239 (Iowa 1981) and *Jones v. University of Iowa*, 836 N.W.2d 127 (Iowa 2013) foreclose the due process claim made here, the State Public Defender recommends transfer to the Court of Appeals. *See* Iowa R. App. P 6.1101(3). Furthermore, while the rules challenged in this case are relatively new, the legal principles involved in the challenge are not—so transfer is appropriate. *See White-Ciluffo v. Iowa Dep't of Educ.*, No. 16–0309, 2017 WL 2469216, at *5 (Iowa Ct. App. June 7, 2017) (resolving a constitutional challenge to an administrative rule even though that rule had not previously been cited in any published decision); *Filipelli v. Iowa Racing & Gaming Comm'n*, No. 16-0301, 2017 WL 1088101, at *1–2 (Iowa Ct. App. Mar. 22, 2017) (deciding a case that involved newly-enacted statutes but not new legal principles).

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Appellant James Moriarty worked as an independent contractor for the State Public Defender (SPD) under an indigent defense contract, accepting court appointments to represent indigent defendants in criminal cases. In 2015, SPD learned that over the span of a few months that spring and summer, several different district court judges granted motions in criminal cases to

remove Moriarty from representing the defendants in those cases. Each removal featured a common negative factor: the defendants indicated Moriarty belittled, disrespected, or insulted them, making it impossible to communicate and to prepare a defense to the charge or charges. (ALJ Decision at 4, App. 10.) In each case, a district court judge entered an order formally finding that the communication deficiencies undermined the attorney–client relationship. At least one judge concluded communication deficiencies occurred on a continual and regular basis.

SPD determined the district court's removal of Moriarty as counsel for the defendant in several cases within a short time constituted grounds to terminate Moriarty's indigent defense contract. *See* Iowa Code § 13B.4(3) (2015) ("[SPD] *may* contract with persons admitted to practice law in this state . . . for the provision of legal services to indigent persons." (emphasis added)); Iowa Admin. Code rs. 493—11.7–.8 (setting forth contract termination procedures and a nonexhaustive list of grounds for termination). Moriarty appealed his termination within the agency and then sought judicial review in the district court, asserting that terminating his contract was unconstitutional and the decision to terminate was unsupported by substantial evidence. *See* Iowa Code § 17A.19(10)(*a*), (*f*).

At each stage, the decision maker ruled against Moriarty. (ALJ Decision at 7–11, Final Agency Decision at 18–50, Dist. Ct. Ruling at 13–18; App. 13–17, 36–68, 82–87.) This Court should rule against him too. Terminating an indigent defense contract does not implicate any constitutionally protected interest, and even if it does, SPD's decision and the subsequent appeal proceedings afforded Moriarty sufficient process. Furthermore, each decision below was supported by substantial evidence. As the district court phrased it, Moriarty's arguments otherwise are "beyond implausible." (Dist. Ct. Ruling at 16, App. 85.) The Court should affirm.

A. Indigent Defense Contract Framework.

SPD has a statutory duty to "coordinate the provision of legal representation of all indigents under arrest or charged with a crime." Iowa Code § 13B.4(1). To carry out that statutory duty, SPD establishes and maintains local public defender offices across the state, *id.* § 13B.8(1), and hires assistant public defenders to staff them, *id.* § 13B.5. Those assistant public defenders are State employees removable for cause. *Id.* § 13B.8(2). Including support staff, just under 250 full-time State employees worked for SPD across all its statewide offices in 2016. (ALJ Hearing Transcript at 224–25, App. 281–82.)

Of course, sometimes the important constitutional mandate that indigent defendants receive legal representation requires more attorneys than the State alone can provide. *See* U.S. Const. amt. VI (affording defendants in "all criminal prosecutions" the right to assistance of counsel); Iowa Const. art. I, § 10 (same). Thus, SPD may contract with licensed Iowa attorneys in private practice to provide indigent defense services as well. Iowa Code § 13B.4(3). Those attorneys are appointed by the court if the local public defender's office cannot represent a defendant due to a conflict of interest or to a high caseload. *Id.* §§ 13B.9(4)(*a*), 815.10(2). At any given time, SPD contracts with between 900 and 1100 attorneys in this way. (ALJ Hearing Transcript at 227, App. 284.)

Attorneys who accept court appointments under indigent defense contracts are not State employees. Instead, their contracts are subject to SPD's administrative rules, *see id.* § 13B.4(3), which SPD promulgates through its rulemaking power, *id.* § 13B.4(8). Most relevant here are the rules setting forth termination procedures and grounds for termination, Iowa Admin. Code rs. 493—11.7–.8, and the rule stating that each contracting attorney is "an independent contractor and shall not be an agent or employee of the state of Iowa," *id.* r. 493—11.2(6). Paragraph 6 and paragraphs 10 through 15 of the

standard indigent defense contract incorporate those rules, either by citing the relevant rule or reproducing language from it. (Indigent Defense Contract [State's Exhibit 36] ¶¶ 6, 10–15, App. 241–43.)

In carrying out its statutory duty to coordinate indigent legal defense, SPD fulfills a gatekeeper role. It has statutory authority to establish fee limitations for, and to review (and reduce as necessary) all claims submitted by contract attorneys. Iowa Code § 13B.4(4). (ALJ Hearing Transcript at 222–23, App. 279–80.) It also establishes minimum experiential qualifications for attorneys seeking a contract. Iowa Admin. Code r. 493—11.3. (ALJ Hearing Transcript at 227–28, App. 284–85.) It does so to ensure that attorneys who are State contractors are at least minimally competent in the areas of law in which they practice. *See id.*

That threshold inquiry, however, does not mean SPD guarantees a contract to every attorney who meets those qualifications. Iowa Admin. Code r. 493—11.4(5). It also does not mean SPD manages contract attorneys' day-to-day performance and work product, critiques their court appearances, or otherwise undertakes any supervisory role. (ALJ Hearing Transcript at 229, 241; ALJ Decision at 6; App. 12, 286, 288.) Typically, SPD becomes aware of contract attorneys' performance issues only when repeated problems

surface and someone—a judge, another lawyer, court staff, or perhaps even a client—reaches out. (ALJ Hearing Transcript at 243–45, App. 289–91.) SPD can only address individual cases as they arise; its overarching guideline is to act in the best interests of the State. *See, e.g.*, Iowa Admin. Code rs. 493—11.3, .4(5), .6, .8. (ALJ Hearing Transcript at 246, App. 292.) And sometimes the best interests of the State lead SPD to stop contracting with someone. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 114–15 (Iowa 2015) (noting SPD terminated an attorney's contract because she exhibited prolonged absenteeism); *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs*, ___ N.W.2d ___, ___ (Iowa 2018) (noting SPD decided "it was not appropriate to renew" one person's contract).

B. Moriarty's Removal as Counsel in Five Criminal Cases.

SPD contracted with Moriarty for several years and renewed that agreement, subject to the terms of the standard indigent defense contract, effective January 1, 2015. (11/20/2014 Contract Renewal, App. 245.) However, between January and August 2015, the district court ordered Moriarty removed from representing five criminal defendants, often over Moriarty's vociferous resistance. Each order was based upon Moriarty's failure to communicate effectively with the clients, and in some

circumstances, actions he took that were inconsistent with the clients' best interests.

1. *Destiny Brown*. Moriarty was appointed to represent Destiny Brown in spring 2015. On March 18, he filed a motion to commit Brown to a medical facility for a determination of her mental competence. (Motion to Examine Defendant for Mental Competency [State's Exhibit 30], App. 220–21.) At the hearing on the motion, Moriarty stated his conclusion that Brown either suffered from "psychological issues, or she's just very, very rude." (Transcript on Motion for Evaluation [State's Exhibit 31] at 3, App. 224.) The court also invited comment from assistant local public defender Karen Hart Lundy,[1] who attended the hearing because she concurrently represented Brown in parallel probation revocation proceedings and Brown requested she attend this hearing as well. (Transcript on Motion for Evaluation [State's Exhibit 31] at 4; 9/22/15 Swaim/Hart Emails [State's Exhibit 35]; ALJ Hearing Transcript at 269–70; App. 225, 239–40.)

Hart agreed that Brown "is a little combative at some times," but expressed concern that committing Brown would not be in Brown's best

[1] The transcript of the hearing on Moriarty's motion for evaluation refers to Ms. Hart Lundy as Ms. Hart. (Transcript on Motion for Evaluation at 4, App. 225.) Accordingly, SPD refers to her as Hart for consistency's sake.

interests. (Transcript on Motion for Evaluation [State's Exhibit 31] at 5, App. 226.) Hart recommended that "the court inquire into the relationship between Mr. Moriarty and Ms. Brown, and if their relationship has crumbled to the point where she has totally disengaged from assisting him in any defense, that may be the best alternative, would be to appoint . . . a new attorney." (Transcript on Motion for Evaluation [State's Exhibit 31] at 5, App. 226.)

The court denied the motion for evaluation because it could not "find under [the relevant statute] that probable cause has been established." (Transcript on Motion for Evaluation [State's Exhibit 31] at 8; Order on Motion for Evaluation [State's Exhibit 32]; App. 229, 231.) That afternoon, hours after the hearing concluded, Brown handwrote a letter to the court "requesting new counsel" and asking the court "to do whatever needs to be done." (Brown Request for New Counsel, App. 235.) The court ordered a hearing. (4/8/15 Order [State's Exhibit 33], App. 233.) At the hearing, Brown "informed the court that there has been tension between [her] and Mr. Moriarty." (4/21/15 Order [State's Exhibit 34] at 1, App. 236.) She described several communication breakdowns, told the court she "does not have a lot of trust in" Moriarty, and asserted "her opinion does not matter to him." (4/21/15 Order [State's Exhibit 34] at 1, App. 236.) Over Moriarty's

resistance, the court granted the request for new counsel "based upon matters presented by [Brown], as well as her physical reactions to Attorney Moriarty in court." (4/21/15 Order [State's Exhibit 34] at 1–2, App. 236–37.)

SPD received word of the removal and considered it troubling, but did not immediately take action against Moriarty's contract because Brown's case, standing alone, did not suggest that Moriarty acted out of spite or in bad faith. (ALJ Hearing Transcript at 266, App. 303.) However, SPD opened a file and waited to see if it received further complaints about Moriarty. (ALJ Hearing Transcript at 266–67, App. 303–04.) And unfortunately, SPD soon had to supplement that file.

2. *Paul Knudsen.* Mr. Knudsen was charged with a class C felony, and Moriarty was appointed to represent him. (ALJ Hearing Transcript at 92, App. 263.) However, the charge was later enhanced to a class A felony, which entitled Knudsen to two defense lawyers. Iowa Code § 815.10(1)(*b*). (ALJ Hearing Transcript at 92, App. 263.) After some uncertainty about whether Moriarty would remain appointed at all following the amended enhanced charge (2/5/15 Swaim/Moriarty Emails [State's Exhibit 19], App. 197–99), the court appointed Michael Bandy as co-counsel. (2/17/15 Order [State's Exhibit 20], App. 200). When the court appoints two lawyers for a class A

felony under section 815.10, neither the lawyers nor SPD has input as to who the court appoints. (ALJ Hearing Transcript at 55–57, 68–69, 235; App. 248–50, 257–58, 287.)

After several months of preparing the defense, Knudsen filed a motion for new attorney. (Motion for New Attorney [State's Exhibit 22], App. 202–03.) The motion asserted Moriarty had been "extremely condescending and disrespectful," making Knudsen feel inferior and making it impossible to communicate with Moriarty or assist in his own defense. (Motion for New Attorney [State's Exhibit 22] at 1, App. 202.) This caused some strife between Moriarty and Bandy, and Moriarty ultimately resisted the request for new counsel. (7/14/15 Moriarty/Bandy Emails; Motion for Immediate Hearing [State's Exhibit 23]; 8/20/15 Letter from Bandy to Gregg/Swaim [State's Exhibit 25] at 2; ALJ Hearing Transcript at 78, 165; App. 133, 136–41, 204–06, 212, 259, 271.)

While the district court judge was considering the motion for new attorney, the judge's law clerks alerted him that they had noticed a recent pattern of requests for new counsel in cases where Moriarty was appointed, and that all of them involved defendants feeling belittled or excoriated. (ALJ Hearing Transcript at 59–61, App. 251–53.) Knowing that "sufficient cause

must be shown to justify replacement," *State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004), the judge instructed the law clerks to collect orders removing Moriarty as counsel from other cases in the same judicial district within the previous several months. (ALJ Hearing Transcript at 63–64, App. 254–55.) That would inform the judge's findings and ensure "Mr. Knudsen wasn't just pulling [communication issues] out of thin air, that this appeared to be a pattern." (ALJ Hearing Transcript at 61, App. 253.)

After reviewing the orders the law clerks collected and discerning "a pattern of yelling, belittling behavior, failure to communicate, and instilling in clients an uncomfortable feeling" (ALJ Decision at 4, App. 10), the court granted Knudsen's motion for a new attorney. (8/6/15 Order [State's Exhibit 24] at 2, App. 209.) The order concluded Moriarty's "inability to communicate with his client(s) appears to undermine the attorney–client relationship [on] a regular basis." (8/6/15 Order [State's Exhibit 24] at 2, App. 209.) Bandy wrote to SPD, forwarding the court's order and describing his experience as co-counsel with Moriarty. (8/20/15 Letter from Bandy to Gregg/Swaim [State's Exhibit 25], App. 211–14.)

3. *Susan Jones.* Moriarty was appointed to represent Susan Jones on a felony charge. On April 8, 2015, Jones sent a letter to the court asking "to be

re-assigned" to a new defense lawyer. (4/8/15 Jones Letter [State's Exhibit 27], App. 217.) Jones's letter stated her negative experience with Moriarty:

> My first phone call with him, he got mad and yelled at me and went into a rant. The second call was pretty much the same attitude. I don't think I can work with someone like that for fear any comment I make could make him madder. I know I can't choose my own lawyer but am familiar with [some other lawyers in the area]. I am asking this of you as soon as possible.

(4/8/15 Jones Letter [State's Exhibit 27], App. 217.) The district court held a hearing and, over Moriarty's resistance, ordered him to withdraw. (4/24/15 Order [State's Exhibit 28], App. 218.) The court's order in the *Knudsen* case refers to Jones's request as an example of Moriarty's communication failures. (8/6/15 Order [State's Exhibit 24] at 1, App. 208.)

4. *Tyray Smith.* Moriarty was appointed to represent Tyray Smith on an OWI charge. The appointment occurred after Moriarty had been removed from representing Knudsen. (ALJ Hearing Transcript at 275, App. 306.) On August 13, 2015, the court granted Smith new counsel "due to client/attorney breakdown in relationship." (8/13/15 Pretrial Conference Order [State's Exhibit 11] at 1–2, App. 190–91.) Local assistant public defender Aaron Hawbaker, who was in court for another matter that day, observed Moriarty's interaction with Smith and the court, and later testified the exchange between Moriarty and Smith "was inappropriate and unprofessional" because it

included audible arguments between attorney and client and because Moriarty made "adversarial comments about his client to the court in open court." (9/21/15 Hawbaker/Swaim Email [State's Exhibit 12], App. 193.)

Smith was later charged with another crime, and Moriarty was appointed but filed a declination of appointment. (11/6/15 Ruling and Order [State's Exhibit 16] at 1, App. 194.) Smith personally appeared at a hearing and requested new counsel because his experience with Moriarty was negative. (11/6/15 Ruling and Order [State's Exhibit 16] at 1, App. 194.) The judge found a pattern of communication failures between Moriarty and his clients, concluded that pattern "undermines the attorney–client relationship on a continual and regular basis," and granted the request for new counsel. (11/6/15 Ruling and Order [State's Exhibit 16] at 1–2, App. 194–95.)

5. *Ashley Ahrens.* Moriarty was appointed to represent Ashley Ahrens on a public intoxication charge. (ALJ Hearing Transcript at 509, App. 337.) Moriarty then discovered Ahrens was facing another, more serious charge in a nearby county, where Michael Bandy represented her. (ALJ Hearing Transcript at 510, App. 338.) Moriarty notified Bandy that he had been appointed and that the case was open because it could affect Ahrens's pre-trial release in Bandy's case, if she had obtained one. (8/6/15 Moriarty/Bandy

Email, App. 154.) In his own discussions with Ahrens, Bandy learned that Ahrens felt Moriarty acted disrespectfully toward her. (ALJ Hearing Transcript at 126, App. 268.) Bandy agreed to represent Ahrens in the public intoxication case pro bono, filed an appearance, and asked the Court to allow Moriarty to withdraw. (ALJ Hearing Transcript at 126, App. 268.) Moriarty indeed withdrew. (ALJ Hearing Transcript at 511, App. 339.) Although the record does not reflect whether the contact occurred before or after Moriarty's withdrawal (Final Agency Decision at 44, App. 62), at some point Moriarty contacted the prosecutor on the more serious charge to notify him that Ahrens also had a pending misdemeanor charge in another county. (ALJ Hearing Transcript at 126–27, App. 268–69.) Bandy testified that was not in Ahrens's best interests because it could have derailed her pretrial release on the more serious charge and even affected her job and schooling. (ALJ Hearing Transcript at 127, App. 269.)

C. SPD Collects Information and Issues a Default Notice.

After SPD received the order in *Knudsen*, then-State Public Defender Adam Gregg requested that First Assistant State Public Defender Kurt Swaim "conduct an investigation of Mr. Moriarty's conduct and fitness to continue contracting with" SPD, and reach a final decision on the matter. (8/20/15

Gregg/Swaim Emails [State's Exhibit 1], App. 92.) Swaim reviewed documents and contacted several individuals who interacted with Moriarty during the cases in which he was removed, including Bandy and Hart. (9/8/15 Swaim/Williams Email [State's Exhibit 26] at 1–2; 9/22/15 Hart/Swaim Emails [State's Exhibit 35] at 1–2; ALJ Hearing Transcript at 248–49, 251, 253–55, 257, 265–66, 274–76, 282; App. 215–16, 239–40, 293–99, 302–03, 305–07, 311.) Swaim did not contact the clients themselves because their discussions with Swaim would not be privileged and Swaim could then be called to testify in the clients' criminal matters, some of which were still ongoing at the time. (10/31/15 Request for Reconsideration at 8; ALJ Hearing Transcript at 67, 280–81; App. 111, 256, 309–10.)

On October 19, 2015, SPD sent Moriarty a notice of default containing SPD's allegations that he had defaulted in performance of his indigent defense contract under the provisions of the contract and the relevant administrative rules. (10/19/15 Default Notice [State's Exhibit 2], App. 93–103.) SPD set forth five incidents of default involving Smith, Knudsen, Jones, Brown, and Ahrens, and provided Moriarty ten days to cure the default. *See* Iowa Admin. Code r. 493—11.7(2)(*b*). (10/19/15 Default Notice [State's Exhibit 2], App. 93–103.) SPD considered those five instances grounds for termination

because they demonstrated (1) unprofessional conduct or conduct otherwise harmful to indigent representation, and (2) other behavior implicating Moriarty's effectiveness in practicing indigent defense. *See id.* r. 493—11.8(4), (11). (10/19/15 Default Notice [State's Exhibit 2] at 2, App. 94.) The letter also notified Moriarty that SPD would terminate his contract at will under rule 493—11.7(1), effective in thirty days. (10/19/15 Default Notice [State's Exhibit 2] at 2, App. 94.) On October 31, Moriarty requested that SPD reconsider its decision, asserting that his representation of the respective clients did not actually constitute default. *See id.* r. 493—11.9. (10/31/15 Request for Reconsideration, App. 104–15.)

SPD agreed to reconsider, agreed to participate in an informal conference, and stayed the date of termination pending reconsideration. (11/24/15 Termination Letter [State's Exhibit 4] at 1–2, App. 168–69.) *See id.* r. 493—11.9(3). The informal conference occurred on December 22, 2015, and included both Moriarty and his retained counsel. (1/4/16 Reconsideration Decision at 1; ALJ Hearing Transcript at 294–95; App. 170, 315–16.)

D. Final Termination Decision and Subsequent Agency Appeal.

On January 4, 2016, following the informal conference, SPD issued a reconsideration decision terminating Moriarty's indigent defense contract for

cause and at will. (1/4/16 Reconsideration Decision at 1, App. 170.) *Id.* r. 493—11.9(4). The decision lifted the stay, thereby terminating Moriarty's contract to accept new court appointments. (1/4/16 Reconsideration Decision at 3, App. 172.) SPD left to the respective judges in Moriarty's pending cases the decision whether to allow him to continue representing those clients. (1/6/16 Letter from Moriarty to Swaim [State's Exhibit 6]; 1/7/16 Email from Swaim to David Brown [State's Exhibit 7]; App. 173–74.)

Moriarty requested a contested case hearing, which occurred July 18 through 20, 2016, before an Administrative Law Judge (ALJ). (1/14/16 Request for Contested Case Hearing at 1; App. 175.) Witnesses included Bandy, Swaim, Hart, and Judge Joel Dalrymple, the district court judge who granted Knudsen's motion to remove Moriarty from representing him. (ALJ Hearing Transcript at 47, 87–88, 216–17, 379–80; App. 247, 261–62, 277–78, 323–24.) On November 21, the ALJ affirmed the termination of Moriarty's contract both for cause and at will. (ALJ Decision at 1–12, App. 7–18.)

Moriarty requested an intra-agency appeal. (12/6/16 Request for Review & Appeal.) At SPD's request, Governor Branstad appointed a substitute decisionmaker, Bob Bird, to serve as the final agency

decisionmaker. (2/1/16 Request for Substitute Final Decision-Maker [State's Exhibit 9]; 2/3/16 Bird Appointment [State's Exhibit 10]; App. 188–89.) Mr. Bird issued a thorough ruling on August 25, 2017, affirming the Proposed Decision and concluding Moriarty's constitutional arguments were not persuasive. (Final Agency Decision at 10–18, 50; App. 28–36, 68.)

Moriarty then sought judicial review in the district court. *See* Iowa Code § 17A.19 (providing the exclusive means for reviewing agency action); Iowa Admin. Code r. 493—11.11(1) (making SPD's decision to terminate a contract "reviewable pursuant to Iowa Code chapter 17A"). The district court "carefully examined the record as a whole, including both the proposed and final decisions," complimented Mr. Bird's "extraordinarily thorough and thoughtful" final agency decision, and ultimately affirmed the decision to terminate Moriarty's contract. (Dist. Ct. Ruling at 4–5, 18; App. 73–74, 87.) Moriarty now appeals.

ARGUMENT

Error Preservation: Moriarty raises three general categories of grounds for reversal: constitutional grounds, evidentiary grounds, and a catchall assertion that SPD acted unreasonably, arbitrarily, or capriciously. *See Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa

2002) ("The issues raised . . . on appeal, although multi-faceted, can be placed into three general categories . . . ."). Because the district court ruled on those grounds, Moriarty has preserved error on them, but he hasn't preserved anything else. While he purports to say that grounds for reversal "include, but are not limited to" the three grounds he raised below (Moriarty Br. at 9), he cannot reserve issues to develop for the first time in a reply brief or on appeal. *See id.* (refusing to consider an argument first made in a reply brief); *State v. Prusha*, 874 N.W.2d 627, 630 (Iowa 2016) (concluding an argument developed for the first time on appeal "comes too late").

Standard of Review: For the constitutional grounds, de novo review is appropriate. *See LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 854 (Iowa 2015). However, Moriarty bears a heavy burden because "[t]he party attacking the constitutionality of an administrative rule must overcome a *presumption* of constitutionality." *White-Ciluffo*, 2017 WL 2469216, at *4 (emphasis added); *accord Stewart v. Sisson*, 766 N.W.2d 800, 805 (Iowa Ct. App. 2009).

The standard of review for the evidentiary challenges is set forth in Iowa Code section 17A.19(10)(*f*), which defines substantial evidence and other material phrases related to the record. *See* Iowa Code § 17A.19(10)(*f*).

Importantly, however, an "agency's decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). Furthermore, a court conducting a substantial evidence review asks "not whether the evidence supports a different finding but whether the evidence supports the findings actually made." *Ramsey v. Iowa Dep't of Transp.*, 576 N.W.2d 103, 106 (Iowa 1998).

Additionally, hearsay evidence is admissible in administrative proceedings. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 470 (Iowa 2017); *see also* Iowa Code § 17A.14(1) (allowing agency decisions to be based on evidence that "would be inadmissible in a jury trial"). As Moriarty recognizes (Moriarty Br. at 15), the limiting principle governing hearsay evidence in administrative proceedings is merely that administrative findings must rest "upon the kind of evidence upon which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs." Iowa Code § 17A.14(1).

As to the catchall grounds, the Court has explained the meaning of the terms "unreasonable," "arbitrary," and "capricious" in this context:

> "Unreasonableness" is defined as action in the face of evidence as to which there is no room for difference of opinion among

> reasonable minds . . . . An agency's action is "arbitrary" or "capricious" when it is taken without regard to the law or facts of the case.

Arora v. Iowa Bd. of Med. Exam'rs, 564 N.W.2d 4, 7 (Iowa 1997) (citation omitted); *see also Churchill Truck Lines, Inc. v. Transp. Regulation Bd.*, 274 N.W.2d 295, 299 (Iowa 1979) ("The terms 'arbitrary' and 'capricious,' when applied to test the propriety of agency action[,] are practically synonymous . . . ."). "An abuse of discretion is synonymous with unreasonableness." *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 566 (Iowa 2003).

Ultimately, "[t]he burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(*a*). Moriarty has not satisfied that burden.

Argument Summary: Moriarty's status as an at-will independent contractor forecloses his due process claim because terminating his contract does not implicate any constitutionally protected interest. *See Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002) ("[The] first inquiry in a procedural due process analysis is whether a protected liberty or property interest is involved."). But even if the Court finds a constitutionally protected interest is at stake, it should still affirm because Moriarty received

notice and an opportunity to be heard both before and after his contract was terminated.

As to the non-constitutional grounds Moriarty raises, the record squarely refutes his assertions of defects in the process. The contract termination did not violate Moriarty's constitutional rights or otherwise offend chapter 17A just because SPD "considered statements made by persons who did not appear or testify." *Butt v. Iowa Bd. of Med.*, No. 12–1118, 2013 WL 2637283, at *9 (Iowa Ct. App. June 12, 2013); *see also Koelling v. Bd. of Trustees*, 259 Iowa 1185, 1201, 146 N.W.2d 284, 294 (1966) ("We do not believe the failure to have . . . four witnesses present at the hearing before the trustees deprived plaintiff of an opportunity for a full and fair hearing."). Further, the fact that several witnesses *did* testify plainly means that not all the evidence against Moriarty was hearsay. Accordingly, the factor test established in *Schmitz v. Iowa Dep't of Human Services* does not apply. *See* 461 N.W.2d 603, 607 (Iowa Ct. App. 1990) (setting forth a test to be applied when the evidence in the agency record is *solely* hearsay). (Final Agency Decision at 23–24, App. 41–42.)

Put simply, it is well within SPD's authority to decide it doesn't want to contract any longer with an attorney who is willing to tell a client they are

an annoyance in his life and who responds to a letter from a client, even a misguided one, by simply returning it to the client with capitalized profanity scrawled across the top. (Voicemail from Moriarty to Timothy Miller; Letter from Miller to Moriarty at 1; ALJ Hearing Transcript at 566; App. 344, 351–52.)

I. TERMINATING AN INDEPENDENT CONTRACTOR'S INDIGENT DEFENSE CONTRACT DOES NOT IMPLICATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST.

The principal challenge in this case is due process. Moriarty raises both the United States Constitution and the Iowa Constitution, but does not propose a different standard under the Iowa Constitution. Accordingly, the Court should presume the claims are coterminous and apply the same analysis to both clauses. *See Zaber v. City of Dubuque*, 789 N.W.2d 634, 639 n.6 (Iowa 2010) (addressing due process but making "no distinction . . . between the state and federal constitutional claims"); *cf. State v. Rimmer*, 877 N.W.2d 652, 665 (Iowa 2016) ("The defendants do not argue for a different standard under . . . the Iowa Constitution. Accordingly, we apply the same standard as the Sixth Amendment . . . ."); *State v. Kennedy*, 846 N.W.2d 517, 522 (Iowa 2014) (declining to interpret the Iowa Constitution differently because the appellant did not propose a different standard).

Due process features "both substantive and procedural components." *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 111 (Iowa 2007). Moriarty's primary assertion is that he did not receive an investigative interview before he received the notice of default, and he does not claim SPD infringed upon any fundamental right, so he therefore raises only a procedural due process claim. *See City of Clinton v. Loeffelholz*, 448 N.W.2d 308, 311 (Iowa 1989) (concluding the appellant raised only a procedural due process claim because he did not "claim violation of a fundamental right"); *see also Master Builders of Iowa, Inc. v. Polk Cty.*, 653 N.W.2d 382, 398 (Iowa 2002) (recognizing a procedural due process claim because the appellants claimed they did not receive "sufficient notice or opportunity to be heard").

A. Moriarty Raises a Liberty Interest at Most.

"[T]he range of interests protected by procedural due process is not infinite." *Bd. of Regents v. Roth*, 408 U.S. 564, 570, 92 S. Ct. 2701, 2706 (1972); *accord Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 837 (Iowa 2002) ("[W]ith all procedural due process inquiries, we must first determine whether the party has a protected interest."). In other words, "[p]rocedural due process applies only if a liberty or property interest is implicated." *Wedergren v. Bd. of Dirs.*, 307 N.W.2d 12, 16 (Iowa 1981).

Moriarty does not identify whether he asserts a liberty interest or a property interest. However, his status as an at-will independent contractor forecloses the possibility of a protected property interest. *See Bennett v. City of Redfield*, 446 N.W.2d 467, 473 (Iowa 1989) ("Bennett did not have a property interest in continued employment under state law."); *see also Portman v. Cty. of Santa Clara*, 995 F.2d 898, 905 (9th Cir. 1993) ("Because . . . the public defender of Santa Clara County is an at-will employee, Portman had no property interest in his job."). A property interest requires "a legitimate claim of entitlement" to employment, which involves examining "state law and any contractual rights" provided. *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999); *accord Bowers*, 638 N.W.2d at 691. "[A]bstract desire or unilateral expectation of receiving a benefit [is] insufficient to establish an entitlement." *Greenwood Manor*, 641 N.W.2d at 837.

By using the word "may," state law provides that contracting with any private attorney is discretionary. Iowa Code § 13B.4(3); *cf. Kopecky v. Iowa Racing & Gaming Comm'n*, 891 N.W.2d 439, 443–44 (Iowa 2017) (finding dispositive the discretionary nature of the word "may"). Furthermore, the contract itself (Indigent Defense Contract [State's Exhibit 36], App. 241–44)

incorporates administrative rules providing that each attorney is a non-exclusive independent contractor, Iowa Admin. Code r. 493—11.2(6), (11), and that the contract is subject to termination for cause, at will, either, or both, *id.* rs. 493—11.7–.8. Accordingly, Moriarty has no legitimate claim of entitlement to a contract with SPD, and therefore no protected property interest. *See Bright v. Gallia Cty.*, 753 F.3d 639, 656–57 (6th Cir. 2014) (finding no "property interest in continued employment as a public defender," in part because the attorney was considered an independent contractor under the relevant services contract); *Randall v. Buena Vista Cty. Hosp.*, 75 F. Supp. 2d 946, 954 (N.D. Iowa 1999) (finding no property interest in continued employment because the relevant agreement "clearly provided that [the plaintiff] was an independent contractor, not an employee," and in any event provided for termination at will); *see also Cannon v. Sixth Dist. Public Defender Office*, No. 09-2164, 2009 WL 5198188, at *1 n.1 (W.D. La. Dec. 23, 2009) (finding no property interest in a public defender contract despite "long service as a contract attorney").

Having eliminated the possibility of a property interest, Moriarty's reliance on *Jones*, 836 N.W.2d at 146, and his emphasis on his reputation demonstrate that he asserts at most a liberty interest. Liberty interests can be

implicated if termination stigmatizes a person "by damaging [their] reputation so severely that associational or employment opportunities are impaired or foreclosed." *Simonson*, 603 N.W.2d at 564. However, terminating Moriarty's indigent defense contract does not rise to that level or foreclose future employment as an attorney, and so his procedural due process challenge fails. *Cf. Carleton v. Cty. of Los Angeles*, 372 F. App'x 806, 807 (9th Cir. 2010) (noting the "relevant universe" for a due process claim brought by an attorney is "the practice of law" overall, not a specific subset of the profession).

B. SPD Did Not Publicize Moriarty's Termination.

Terminating an employee only implicates a liberty interest if the reasons for termination "involve allegations of dishonesty, immoral or illegal conduct that call into question the [person]'s honesty, reputation, or good name." *Anderson*, 304 N.W.2d at 244–45; *accord Simonson*, 603 N.W.2d at 564 ("The requisite stigma will be found when [the accusations involve] dishonesty, immorality, criminality, racism, and the like."). The allegations must also be publicized. *See Bennett*, 446 N.W.2d at 471 (requiring as an element of a stigmatization claim that the stigmatizing statements were published); *see also Bishop v. Wood*, 426 U.S. 341, 348, 96 S. Ct. 2074, 2079 (1976) (finding no liberty interest at stake following "the discharge of a public

employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge"); *Simonson*, 603 N.W.2d at 564–65 (rejecting a stigmatization claim because no publication occurred). Because Moriarty cannot demonstrate any publication, his termination did not implicate any liberty interest.

C. SPD Did Not Make Any Stigmatizing Allegations.

Even beyond the publication element, however, Moriarty's termination did not involve the possible reputational harms that *Anderson* and *Simonson* contemplate; Moriarty's termination did not involve allegations of dishonesty, immorality, racism or illegal conduct. *See Simonson*, 603 N.W.2d at 564 (recognizing those types of allegations may implicate a liberty interest); *Anderson*, 304 N.W.2d at 244–45 (same). Furthermore, Moriarty was an independent contractor, not an employee, and there is no Iowa caselaw establishing that the standard set forth in *Anderson* and *Simonson* applies to non-employees. But even if it does, or even if Moriarty had been an employee, the standard is not met here.

The plaintiff in *Anderson* received a termination letter that contained "five reasons for her discharge," and "[s]everal of these reasons were published by the news media." *Anderson*, 304 N.W.2d at 243–44. The

reasons essentially amounted to "inability to get along with others, insubordination, and generally being a trouble maker." *Id.* at 245. The Court concluded those reasons for termination contained "no imputation of dishonesty, immorality, or illegality implicating Anderson's honesty, reputation, or good name." *Id.* It further cited cases which have held "that accusations of . . . unprofessional or unethical conduct do not violate a constitutionally protected liberty interest." *Id.* at 244.

The facts here fit squarely within *Anderson*. The default notice SPD sent to Moriarty expressly mentioned unprofessional or unethical conduct, which does not implicate a constitutionally protected interest as a matter of law. *See id.*; *see also* Iowa Admin. Code r. 493—11.8(4). (Default Notice, App. 93–103.) Indeed, the allegations of unprofessional or unethical conduct essentially amounted to "inability to get along with others"—exactly the allegation the *Anderson* Court concluded did not implicate a liberty interest. *Anderson*, 304 N.W.2d at 245. Under *Anderson*, Moriarty falls short of implicating a protected liberty interest.

Jones v. University of Iowa likewise defeats Moriarty's constitutional claim. *See* 836 N.W.2d at 146. In *Jones*, a university fired the dean of students following publication of a report that criticized how he handled a

student's sexual assault complaint. *Id.* at 137–39. The underlying report was "released to the public in its entirety" and the "entire matter, including Jones's termination, was highly publicized in the media." *Id.* at 138–39. Upon firing Jones, the university president "stated she had lost confidence in Jones's ability to fulfill his professional abilities" and "indicated that he had . . . demonstrated insensitivity." *Id.* at 146. The Court concluded those statements were insufficient to implicate a protected liberty interest as a matter of law, because while they "could undoubtedly be interpreted as accusations of professional incompetence, such accusations fall *substantially short* of the level of stigma required to establish a constitutionally protected liberty interest." *Id.* (emphasis added).

The facts here track closely with *Jones*; SPD terminated Moriarty's contract because it concluded he "demonstrated insensitivity" in working with clients who were dependent on his professional skills. *Id.* at 146. SPD's termination letter did not say Moriarty is dishonest, immoral, racist, or a criminal—just that he communicated unacceptably on five occasions. Under *Jones*, that falls "substantially short." *Id.* As in *Jones*, no procedural due process violation occurred here because the termination did not implicate any constitutionally protected liberty interest.

Indeed, "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he . . . remains as free as before" to practice law and represent clients. *Roth*, 408 U.S. at 575, 92 S. Ct. at 2708. Moriarty has not lost his law license, only his indigent defense contract. *See Bollow v. Fed. Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981) (rejecting an attorney's liberty-interest claim because even if he could not continue practicing banking law, he "retained his license to practice law" in general). No person has a constitutional right "to be employed by a particular person or in a particular line of service." *Shaw v. City Council of Marshalltown*, 104 N.W. 1121, 1124 (Iowa 1905). More specifically, terminating an independent contractor's relationship with a government agency does not implicate a liberty interest because people do not have liberty interests in a specific employer:

> Blantz has not alleged that she has been unable to find work as a nurse, only that she has been unable to obtain work *with the CDCR*. Because Blantz's liberty interest is in her profession as a nurse, not her placement with a particular employer, this allegation is insufficient to trigger the due process protections of the Fourteenth Amendment.

Blantz v. Cal. Dep't of Corr. & Rehab., 727 F.3d 917, 925–26 (9th Cir. 2013) (footnote omitted) (citation omitted); *accord White v. Office of Pers. Mgmt.*, 787 F.2d 660, 664–65 (D.C. Cir. 1986) (rejecting an attorney's assertion that he possessed a liberty interest in serving specifically as an administrative law

judge because it involved only the "government's relationship with an applicant for a particular job," not for the entire practice of law).

SPD's decision does not prevent Moriarty "from practicing law . . . or working as a defense attorney; it merely prevents him from doing so as an independent contractor" for SPD. *Bright*, 753 F.3d at 658; *see also Portman*, 995 F.2d at 908 (concluding that terminating a public defender did not implicate a liberty interest because doing so did not altogether exclude him from the practice of law); *White*, 787 F.2d at 665 ("We simply do not believe that lawyers who wish to become administrative law judges . . . possess a liberty interest in mere pursuit of that employment."). Preventing Moriarty from continuing to contract with SPD does not implicate a protected liberty interest. *Cf. Gordon v. Cmty. First State Bank*, 587 N.W.2d 343, 354 (Neb. 1998) ("We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm."). Accordingly, his constitutional challenges fail.

II. IF A LIBERTY INTEREST IS AT STAKE, THE AVAILABLE INTRA-AGENCY RECONSIDERATION AND APPEAL FRAMEWORK AFFORDS SUFFICIENT DUE PROCESS.

If the Court finds that terminating an SPD contract implicates a constitutionally protected interest, it must then determine what process is due.

See Jones, 836 N.W.2d at 145 (setting forth factors to balance "if . . . a protected interest is at stake"). Alternatively, the Court can affirm on this question without deciding whether a cognizable interest is at stake. *See Master Builders*, 653 N.W.2d at 398; *Bowers*, 638 N.W.2d at 691; *see also Gordon v. Hansen*, 168 F.3d 1109, 1114 (8th Cir. 1999) ("[A]ssuming that Gordon can establish a protected liberty interest in his employment . . . , the facts show that Gordon received the procedural safeguards that the Due Process Clause requires.").

A. A Post-Termination Hearing Was Sufficient.

To determine what process is due, the Court "look[s] to the nature of the liberty interest involved." *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999). "The requirements of due process are flexible . . . ." *Id.* at 189. "The full panoply of due process rights are not necessary for administrative proceedings to pass constitutional scrutiny." *Covia v. Robinson*, 507 N.W.2d 411, 415 (Iowa 1993). Any hearing that occurs "need not be akin to a court trial with the various protections and access to evidence that such a forum entails." *Pena v. Kindler*, 863 F.3d 994, 998 (8th Cir. 2017); *accord Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909 (1976) ("The judicial model . . . is neither a required, nor the most effective, method of decisionmaking in

all circumstances."); Most importantly, however, "[j]ust because another procedure may seem fairer or wiser, does not mean the procedure provided violates due process." *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 330 (Iowa 2015).

The level of procedure that is constitutionally required depends on the interest at stake. *Callender*, 591 N.W.2d at 190. But even if Moriarty has identified a protected liberty interest, the post-termination contested case hearing he received was sufficient. When a property interest is at stake, "a pretermination hearing is required," but where only a "liberty interest is at issue, a post-termination hearing is sufficient." *Bennett*, 446 N.W.2d at 471. Moriarty asserts a liberty interest at most, so the post-termination hearing he received was sufficient under *Bennett* as a matter of law.

B. Moriarty Received Notice and an Opportunity to Be Heard.

In any event, Moriarty received ample process even though his termination implicated no protected interest. Under the factor test established in *Mathews*, the Court evaluates three factors to determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S. Ct. at 903. Iowa courts have often applied the *Mathews* test. *See, e.g.*, *Baker v. City of Iowa City*, 867 N.W.2d 44, 55 (Iowa 2015); *Ghost Player*, 860 N.W.2d at 330; *Jones*, 836 N.W.2d at 145–46. It essentially boils down to a simple benchmark: whether a person receives notice and an opportunity to be heard. *Alfredo v. Iowa Racing & Gaming Comm'n*, 555 N.W.2d 827, 833 (Iowa 1996).

The private interest SPD's termination decision affects is Moriarty's interest in practicing law as a contractor for the State. As his contract made clear, that interest was always subject to termination. Moriarty does not assert any fundamental right is affected, so the private interest here is no more than the interest in practicing law as a contractor of the State. *See Bowers*, 638 N.W.2d at 692 (identifying carefully the interest affected, and rejecting the appellant's attempt to frame the issue more broadly by claiming the fundamental rights to vote and to engage in political speech were affected). That interest is insignificant as a matter of law. *Blantz*, 727 F.3d at 925–26.

The value of additional procedural safeguards is low. Moriarty identifies only one proposed additional safeguard: a pre-default notice

investigative interview. But even if that happened in this context, contract attorneys like Moriarty would still be entitled to a subsequent agency appeal hearing, which indicates the probable value of that additional procedure is low and, correspondingly, so is the risk of erroneous deprivation. *See State v. Izzolena*, 609 N.W.2d 541, 553 (Iowa 2000) (finding the procedures for setting criminal restitution afforded sufficient process, in part because "even if a pre-imposition hearing was provided, defendants would also be entitled to a subsequent . . . hearing").

That is especially true given the third factor: SPD's competing interests and the fiscal or administrative burdens an additional procedural requirement would entail. *See Mathews*, 424 U.S. at 335, 96 S. Ct. at 903. One apparent interest is "to control the financial drain on the State caused by needlessly protracted proceedings." *In re C.M.*, 652 N.W.2d 204, 212 (Iowa 2002). Another "obvious burden would be the increased number of hearings." *Izzolena*, 609 N.W.2d at 553. Requiring investigative interviews not just for complete contract terminations, but also in the more common situations when SPD merely wants an attorney to cease appellate work, impose geographic limits on their practice, or limit the types of cases they undertake, is simply unworkable. (ALJ Hearing Transcript at 245, App. 291.) Balancing those

interests against the procedures Moriarty received indicates the process provided is sufficient under *Mathews*.

Moriarty's primary complaint is that he, an independent contractor, did not receive the same process that State employees receive, which can include, pursuant to a collective bargaining agreement, an investigative interview before any formal notice of discipline or termination. (ALJ Hearing Transcript at 226–27, 323–24; App. 283–84, 319–20.)[2] However, independent contractors are treated differently because they *are* different. *See Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 & n.3 (Iowa 2001) (differentiating between employees and independent contractors).

[2] Notably, the right to an investigative interview is a *contractual* obligation, not a constitutional one. *See Simonson*, 603 N.W.2d at 564–65 (concluding due process did not require a hearing for a university employee before a disciplinary investigation was complete); *Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 818–19 (Iowa 1990) (finding no due process requirement that an agency provide "a pre-investigation hearing"). Due process protects against *deprivations*, not against mere investigations. *See, e.g.*, *Aponte v. Calderon*, 284 F.3d 184, 193 (1st Cir. 2002) (concluding administrative investigations do not trigger due process rights); *Jones v. Nev. Comm'n on Judicial Discipline*, 318 P.3d 1078, 1083 (Nev. 2014) (finding "due process rights generally do not attach during the investigatory phase," before an agency or commission takes formal action); *N.D. Comm'n on Med. Competency v. Racek*, 527 N.W.2d 262, 266–67 (N.D. 1995) (finding no constitutional right to an investigatory hearing before an administrative agency files a complaint, and rejecting the "novel assertion" that due process protections attach to "the investigatory, pre-complaint stage").

Contract attorneys are different because SPD does not supervise or manage them in the same way it supervises and manages State employees. (ALJ Hearing Transcript at 296–97; App. 317–18.) The difference between categories of attorneys justifies the separate process that is available to each category. *See Schroeder Oil Co. v. Iowa State Dep't of Revenue & Fin.*, 458 N.W.2d 602, 604 (Iowa 1990) (concluding it was "more than justified on the basis of practical necessity" to allow no predeprivation hearing for businesses notified of delinquent tax assessments). (Final Agency Decision at 8; App. 26.) After all, "not all situations calling for procedural safeguards call for the same kind of procedure." *Jones v. Madison Cty.*, 492 N.W.2d 690, 695 (Iowa 1992); *accord Mathews*, 424 U.S. at 348, 96 S. Ct. at 909.

Regardless, just because affording independent contractors the same disciplinary framework as employees may be fairer or wiser doesn't mean the procedure available for independent contractors violates due process.[3] *Baker* 867 N.W.2d at 55; *Ghost Player*, 860 N.W.2d at 330. Indeed, under federal law, an administrative agency does not violate due process by "gather[ing]

[3] Moriarty's assertion that he receives less process than the criminal defendants he represents is unavailing. Criminal defendants receive greater procedural protections because unlike Moriarty, their physical liberty interests *are* at stake in a criminal proceeding.

evidence adverse" to a person under investigation without notifying the investigation's "target." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741–42, 104 S. Ct. 2720, 2725 (1984). That's exactly what happened here. Likewise, just because Mark Smith testified he would probably interview a contract attorney before sending a notice of default (ALJ Hearing Transcript at 208–09, App. 275–76) does not mean that pre-default interviews are constitutionally required. *See Ghost Player*, 860 N.W.2d at 330.

Instead, the due process inquiry boils down to notice and opportunity to be heard, and Moriarty received those things. "The entire process is covered in rules promulgated by [SPD] pursuant to its statutory authority." *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.*, 526 N.W.2d 284, 290 (Iowa 1995); *see* Iowa Code § 13B.4(3), (8) (granting SPD statutory authority to promulgate rules). The default notice was just that—a notice. (ALJ Hearing Transcript at 287, App. 313.) It was proposed action, not final action, because it allowed Moriarty time to cure the default and to retain counsel. *See Master Builders*, 653 N.W.2d at 398 (finding "no evidence in the record to . . . support the assertion that the Board had predetermined" the result about which the appellants complained); *City of Annapolis v. Rowe*, 717 A.2d 976, 983 (Md. Ct. Spec. App. 1998) (finding a city was not constitutionally

required to afford an employee a hearing prior to the date of a termination notice). Furthermore, the default notice explained the reasons for default rather than omitting them and forcing Moriarty to guess. *See Wedergren*, 307 N.W.2d at 16 (finding no due process concern when the notice gave "a list of ten reasons and specific examples of Wedergren's shortcomings"). A decision from the Tenth Circuit Court of Appeals is easily adaptable to describe the default notice's practical effect:

> In effect, it was as if Riggins was told, "I have made a recommendation that you will be discharged effective February 6 unless you can give us a good reason not to terminate you. Here is how you can present your reasons why the proposed termination should not occur, and we will postpone the effective date of your termination while you provide these reasons."

Riggins v. Goodman, 572 F.3d 1101, 1109 n.4 (10th Cir. 2009).

After receiving the default notice, Moriarty had multiple opportunities "to be heard before and after" his termination was final. *Master Builders*, 653 N.W.2d at 398. Before the termination, Moriarty submitted information to SPD (SPD "would have accepted anything," ALJ Hearing Transcript at 293; App. 314) to assert that the circumstances SPD described did not actually constitute default. *See Greenwood Manor*, 641 N.W.2d at 838 (concluding applicants received due process in part because they could "submit written statements to be considered"); *Hurd v. Iowa Dep't of Human Servs.*, 580

N.W.2d 383, 388–89 (Iowa 1998) (finding no due process concerns when an agency offered an informal conference that, while "not a formal contested case-type hearing," afforded "an opportunity . . . to present evidence or information"). Furthermore, Moriarty was able to (and successfully did) request a stay of the termination pending further discussions with SPD. (10/31/15 Moriarty Request for Reconsideration at 1; 11/24/15 Letter from Swaim to Moriarty at 1–2; ALJ Decision at 9–10; App. 15–16, 104, 168–69.) And yet the process was *still* not complete.

SPD afforded Moriarty a three-day contested case hearing, during which both Moriarty and the State presented testimony and evidence. That hearing afforded Moriarty sufficient process. *See, e.g.*, *Greenwood Manor*, 641 N.W.2d at 838 (concluding the ability to participate in a hearing afforded sufficient due process); *Alfredo*, 555 N.W.2d at 833–34 (finding no due process violation, in part because the agency "conducted a sixteen-hour hearing at which Alfredo responded to questions and presented exhibits"); *Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n*, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990) ("The hearing lasted two days. All parties were entitled to present evidence or call and question witnesses as they felt necessary.").

Finally, Moriarty also received an opportunity to file a brief and to participate in oral argument before the final agency decision maker. *See, e.g.*, *Greenwood Manor*, 641 N.W.2d at 838–39 (concluding applicants received due process because they could ask the agency to reconsider "or seek judicial review"); *Master Builders*, 653 N.W.2d at 398 (concluding appellants received due process because they had "opportunity to seek redress . . . in the court system"); *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 264 (Iowa 2001) (finding no due process violation, in part because "state law provided an opportunity . . . to obtain judicial review"). The multitude of steps at the agency level, and Moriarty's ability to initiate this judicial review action in the court system, afforded sufficient process. *See Pena*, 863 F.3d at 998 (concluding a pre-termination notice that afforded "opportunities for Pena to tell his side of the story," an available post-termination review procedure, and the appellant's "actual utilization of these opportunities *easily* pass constitutional muster" (emphasis added)); *Baker*, 867 N.W.2d at 55 (concluding a "probable cause hearing, followed by a hearing on the merits and a meaningful . . . appeal process" eliminated any due process concerns).

It's true that Moriarty did not receive an interview before receiving the default notice, but he requested and received one before the termination.

"[N]o more was required." *Hill v. Hamilton Cty. Pub. Hosp.*, 71 F. Supp. 2d 936, 948 (N.D. Iowa 1999). The conference was informal, but a due process hearing or meeting "need not be elaborate." *Jones*, 836 N.W.2d at 146; *see also Sutton v. Bailey*, 702 F.3d 444, 448 (8th Cir. 2012) (concluding an informal meeting "included the essential elements of [a] minimal pre-termination hearing"). "Due process . . . does not require predecision hearings. It only requires an opportunity to be heard prior to the termination of benefits." *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988); *accord Randall*, 75 F. Supp. 2d at 954 n.3. Here, the termination of benefits—Moriarty's ability to receive additional court appointments—did not occur until after the informal conference.

Indeed, the informal conference available under SPD's rules (and that Moriarty received) is materially similar to the available informal conference with the Child Support Recovery Unit preceding disclosure of delinquent child support obligations, which the Court has held affords sufficient due process. *See* Iowa Admin. Code r. 441—95.12(3); *Hurd*, 580 N.W.2d at 388–89. Furthermore, the informal conference provided Moriarty more process than he was entitled to receive, because he asserts only a liberty interest, not a property interest. *See Bennett*, 446 N.W.2d at 471. As in *Master Builders*,

the Court should "struggle to find how" Moriarty was "truly denied notice and opportunity to be heard." *Master Builders*, 653 N.W.2d at 398.

III. COURT ORDERS ARE SUBSTANTIAL EVIDENCE SUPPORTING CONTRACT TERMINATION.

In determining whether to terminate a contract, SPD (like many State agencies) has "broad authority to determine what practices are harmful or detrimental and what constitutes unworthiness." *Milholin v. Vorhies*, 320 N.W.2d 552, 554 (Iowa 1982); *see also* Iowa Admin. Code r. 493—11.8; *Kopecky*, 891 N.W.2d at 443–44 (noting another agency's considerable discretion to weigh factors and make decisions). The factors are non-exhaustive. *See* Iowa Admin. Code r. 493—11.8. In terminating Moriarty's contract, SPD concluded that repeated instances of communication difficulties or breakdowns with clients, as set forth in several district court orders, satisfied two of the enumerated factors: unprofessional conduct harmful or detrimental to indigent representation and other behavior implicating an attorney's competence, effectiveness, or trustworthiness in the practice of indigent defense. *Id.* r. 493—11.8(4), (11).

Failing to communicate effectively and respectfully with clients is a shortcoming for any attorney. (Final Agency Decision at 47, App. 65.) After all, "[t]rust and good communication are crucial features of an attorney–client

relationship." *State v. McKinley*, 860 N.W.2d 874, 880 (Iowa 2015). All clients have an "interest in maintaining a relationship of trust with counsel," *id.*, and an attorney who cannot maintain that relationship of trust "threatens serious consequences for an indigent defendant and for the judicial process" as a whole. (Final Agency Decision at 47, App. 65.) As the United States Court of Appeals for the Tenth Circuit has explained, an attorney who does not maintain that relationship of trust may jeopardize the client's overall defense:

> A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense.

United States v. Lott, 310 F.3d 1231, 1250 (10th Cir. 2002). This understanding of the necessary collaborative relationship between the defendant and counsel is much more compelling than Moriarty's cramped view that the only decisions a defendant makes are how to plead, whether to have a jury trial or bench trial, and whether to testify in their own defense. (ALJ Hearing Transcript at 515, App. 340.)

For SPD, the State's best interests demand careful attention to the client's perspective, because "an indigent defendant has no right to demand

of a court that a particular attorney, or particular attorneys, be appointed to represent him." *United States v. Espino*, 317 F.3d 788, 798–99 (8th Cir. 2003). (ALJ Hearing Transcript at 278; ALJ Decision at 3; Final Agency Decision at 46; App. 9, 64, 308.) Clients who must start over with a new defense attorney experience significant stress as their cases are delayed further and remain unresolved. (ALJ Hearing Transcript at 278, App. 308.) That's why Iowa law both protects a defendant's relationship with appointed counsel, once established, and acknowledges it is proper to remove counsel "when circumstances require it." *McKinley*, 860 N.W.2d at 880. Because courts determined multiple times that circumstances required Moriarty's removal as counsel, SPD decided "it was not in the best interest of the State to have Mr. Moriarty forced on clients" any longer because the upheaval in the clients' cases if Moriarty continued to face removals would be harmful to overall indigent defense. (ALJ Hearing Transcript at 278, App. 308.)

The district court orders that removed Moriarty as counsel in the respective cases are important for another reason: they constitute substantial evidence supporting termination, even if they are hearsay. Moriarty's objection that all of SPD's evidence is not the kind of evidence on which reasonably prudent persons rely to conduct their serious affairs requires

indulging the assumption that *court orders* are not the kind of evidence upon which reasonable people rely. That assumption contradicts the fundamental purpose of the entire court system. Proving that point, another ground for terminating an indigent defense contract (not implicated in this case) is "[a]n attorney's failure to abide by a court order." Iowa Admin. Code r. 493—11.8(6). There is no reasonable argument that reasonably prudent persons do not rely on court orders in planning, organizing, and conducting their serious affairs.

The Court has cited chapter 17A's evidentiary standard to conclude that billing statements "are the kind of evidence that reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs." *GE Money Bank v. Morales*, 773 N.W.2d 533, 540 (Iowa 2009). Reasonably prudent persons would rely on billing statements because they are sent to a specific recipient and bear insignia of authority. *See id.* "Any person receiving such statements would consider them genuine and take some action in response to receiving them." *Id.* The same is true for court orders. They contain the court's seal and a judge's signature and any person receiving them *should* consider them genuine and take some action in response. *See id.* In fact, requiring a responsive action is the entire purpose of many court orders.

Further emphasizing how important court orders are, "[a]ny Iowa lawyer should be concerned about receiving one rebuke from a judge." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Turner*, ___N.W.2d ___, ___ (Iowa 2018). Moriarty received five. "Continuing to make the same mistakes without correcting behavior invariably leads to trouble, as shown here." *Id.* Just because someone normally drives under the speed limit doesn't mean they can never face consequences for speeding. Likewise, Moriarty's ability to represent many clients without alienating them does not mean he should face no consequences when he does—especially when a judge expressly takes notice in a court order. *Cf. Mathahs*, ___ N.W.2d at ___ (disciplining an attorney for his billing inaccuracies in doing contract work for SPD, even though the attorney regularly earned favorable outcomes for his clients).

Even apart from the district court orders, Moriarty is simply wrong that the evidence presented at the ALJ hearing was solely hearsay. Some of it (such as Bandy recalling what Moriarty said to him) are statements of a party opponent. *See* Iowa R. Evid. 5.801(*d*)(2). Other pieces fit hearsay exceptions—such as an investigator's statements to Bandy, which Mr. Bird concluded were excited utterances, *see id.* r. 5.803(2). (Final Agency Decision at 22, App. 40.)

But most importantly, multiple witnesses testified in person during the hearing, subject to Moriarty's cross examination, including a sitting district court judge testifying about his decision-making process. Other live witnesses included Hart relaying her personal observations of the competency hearing in the *Brown* matter, Hawbaker relaying his personal observations of an in-court interaction between Moriarty and Smith, and Bandy discussing his experience as co-counsel with Moriarty in the *Knudsen* matter. That *by definition* means the evidence was not solely hearsay. In fact, Moriarty acknowledges as much, noting that even though both witnesses to the verbal exchange between Moriarty and Smith did not testify, Hawbaker did. (Moriarty Br. at 25.)

Mr. Bird's final agency decision reflects his conclusion that the evidence was substantial:

> [T]he record evidence . . . shows sufficient cause for [SPD]'s termination of the contract with [Moriarty]. The evidence shows five distinct cases during a portion of calendar year 2015 in which [Moriarty] failed to communicate appropriately with indigent defense clients. While the degree and severity of these failures vary, they reflect two central problems: a manner of speech and behavior . . . that some clients found intimidating or demeaning, and that inhibited trust and candid communication; and an undue preoccupation with asserting control of the professional relationship. [Moriarty]'s behavior caused . . . breakdowns in the attorney-client relationship that ultimately resulted in appointment of

> replacement counsel. These incidents, forming a pattern within a relatively brief period, show that [SPD] cannot rely upon [Moriarty] to provide all his appointed clients with proper indigent defense services.
>
> . . . .
>
> The finding of cause for termination of [Moriarty]'s contract is substantiated by a preponderance of the evidence.

(Final Agency Decision at 45, 47; App. 63, 65.)

It's true that none of Moriarty's clients testified, but the clients' absence does not mean SPD's decision lacked substantial evidence.[4] Multiple non-hearsay witnesses testified, and their testimony plus the district court's removal orders constitute substantial evidence supporting SPD's decision because "a neutral, detached, and reasonable person would find it sufficient to establish" Moriarty's default. *Smith v. Iowa Dep't of Human Servs.*, 755 N.W.2d 135, 137 (Iowa 2008); *see* Iowa Code § 17A.19(10)(*f*)(1). When the record is viewed as a whole, *see* Iowa Code § 17A.19(10)(*f*)(3), it contains

[4] Indeed, calling clients to testify likely would not have resulted in any substantive testimony. The attorney–client privilege applies to those clients' conversations with Moriarty. That "privilege belongs to the client and the client alone can waive it." *State v. Bean*, 239 N.W.2d 556, 560 (Iowa 1976). Had SPD subpoenaed clients, they could have simply refused to waive the privilege. Further, if clients were called to testify in the administrative proceeding, and their criminal case was still ongoing, the clients could (and likely should) assert their constitutional right against self-incrimination to avoid their testimony being used against them in their criminal case.

substantial, reliable evidence supporting SPD's decision. (Final Agency Decision at 23, App. 41.)

CONCLUSION

SPD understands that some clients are challenging, and that sometimes challenging clients simply want a new lawyer who will tell them what they want to hear. But whether the client is challenging or deferential, no client deserves to be excoriated, belittled, or insulted. *See State v. Scott*, No. 10–0661, 2011 WL 662683, at *2 (Iowa Ct. App. Feb. 23, 2011) ("Scott filed a renewed pro se motion to remove and replace attorney Moriarty, alleging Moriarty . . . repeatedly called Scott stupid."). If Moriarty believes tough love is an effective way to interact with clients, he can do so with his private clients—but SPD isn't willing to subject indigent criminal defendants to that kind of representation from contractors of the State. *See Farr v. Chesney*, 437 F. Supp. 521, 532 (M.D. Pa. 1977) ("There is no constitutional right for an independent contractor working for a public agency to conduct him or herself in a manner which conflicts with the desires of that agency.").

SPD's decision to terminate Moriarty's contract accomplishes that goal. Termination implicated no constitutionally protected interest, afforded Moriarty due process in any event, and is supported by substantial evidence

of the kind upon which prudent persons rely in conducting their serious affairs. This Court should affirm.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

SPD believes oral argument is not an urgent requirement in this case. However, if the Court holds oral argument, SPD asks to be heard.

CERTIFICATE OF COMPLIANCE

This 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 Times New Roman in 14-point font and contains 11,144 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

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PROOF OF SERVICE

I, David M. Ranscht hereby certify that on the 18th day of October, 2018, I or a person acting on my behalf did serve Appellee's Final Brief and Conditional Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, David M. Ranscht, hereby certify that on the 18th day of October, 2018, I or a person acting on my behalf filed Appellee's Final Brief and Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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Writing Sample #3

Brief filed in *Carter v. Dep't of Natural Resources*

Responsive to Question #19

IN THE SUPREME COURT OF IOWA

No. 18–0087

RUSSELL M. CARTER,

Appellant,

vs.

IOWA DEPARTMENT OF NATURAL RESOURCES,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE JEANIE VAUDT, JUDGE

APPELLEE'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUE PRESENTED FOR REVIEW 11

ROUTING STATEMENT 17

STATEMENT OF FACTS & PROCEDURAL BACKGROUND 18

ARGUMENT 34

I. HUNTING TROPHY BUCKS IS NOT AN INALIENABLE RIGHT 35

II. IF HUNTING TROPHY BUCKS IS AN INALIENABLE RIGHT, IOWA'S DEER TAG FRAMEWORK IS A REASONABLE REGULATION 41

A. The word "reasonable" does not require heightened scrutiny 42

B. Hunting and wildlife regulations are within the police power 45

C. Issuing a limited number of any-sex deer tags is reasonable 47

III. IOWA'S DEER TAG FRAMEWORK DOES NOT VIOLATE ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION 55

A. Nonresident landowners like Carter are not similarly situated to resident landowners 56

B. The legislature could have believed there was a rational basis for distinguishing between nonresident landowners and resident landowners 57

CONCLUSION 62

CONDITIONAL REQUEST FOR ORAL ARGUMENT 63

CERTIFICATE OF COMPLIANCE 63

PROOF OF SERVICE 64

CERTIFICATE OF FILING 64

TABLE OF AUTHORITIES

Page No.

Cases

Albrecht v. Gen. Motors Corp., 648 N.W.2d 87 (Iowa 2002) 60

Alford v. Finch, 155 So. 2d 790 (Fla. 1963) 37

Allen v. McClellan, 405 P.2d 405 (N.M. 1965) 38

Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006) 36, 41

Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 98 S. Ct. 1852 (1978) 31, 39, 50

Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) 60

Brakke v. Iowa Dep't of Natural Res., 897 N.W.2d 522 (Iowa 2017) ...17, 51

Campbell v. Iowa Beer & Liquor Control Dep't, 366 N.W.2d 574 (Iowa 1985) 26

Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc., 178 N.W.2d 343 (Iowa 1970) 45

Cent. Bank v. Hogan, 891 N.W.2d 197 (Iowa 2017) 34

City of Ames v. Gerbracht, 189 N.W. 729 (Iowa 1922) 35, 48, 49, 50

City of Sioux City v. Jacobsma, 862 N.W.2d 335 (Iowa 2015) 36, 43

Collopy v. Wildlife Comm'n, 625 P.2d 994 (Colo. 1981) 46

Cook v. State, 74 P.2d 199 (Wash. 1937) 54

DeMasters v. Montana, 656 F. Supp. 21 (D. Mont. 1986) .....passim

Democko v. Iowa Dep't of Natural Res., 840 N.W.2d 281 (Iowa 2013) .....passim

Diamond Auto Sales, Inc. v. Erbe, 251 Iowa 1330, 105 N.W.2d 650 (1960) 49, 50, 51, 55

Freeman v. Grain Processing Corp., 895 N.W.2d 105 (Iowa 2017) 52

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) .....passim

Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995) 42, 43, 44, 45, 53

Gross v. Miller, 61 N.W. 385 (Iowa 1894) 62

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002) 56

Hamilton v. Williams, 200 So. 80 (Fla. 1941) 37, 48

Hartley Hill Hunt Club v. Cty. Comm'n of Ritchie Cty., 647 S.E.2d 818 (W. Va. 2007) 46

Iowa Ins. Inst. v. Core Grp., 867 N.W.2d 58 (Iowa 2015) 25

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery, 871 N.W.2d 109 (Iowa 2015) 58

King v. State, 818 N.W.2d 1 (Iowa 2012) 59

Loftus v. Dep't of Agric., 232 N.W. 412 (Iowa 1930) 45

LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015) 33, 57, 59, 60

Maddox v. State, 312 S.E.2d 325 (Ga. 1984) 46

May's Drug Stores v. State Tax Comm'n, 242 Iowa 319, 45 N.W.2d 245 (1950) 41, 45

Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396 (Iowa 2007) 42, 52

Morris v. Brandenburg, 376 P.3d 836 (N.M. 2016) 41

New Midwest Rentals, LLC v. Iowa Dep't of Commerce, 910 N.W.2d 643 (Iowa Ct. App. 2018) 56

NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30 (Iowa 2012) 58

O'Brien v. State, 711 P.2d 1144 (Wyo. 1986) 47

Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011) ...60

Pa. Game Comm'n v. Marich, 666 A.2d 253 (Pa. 1995) 39

Qwest Corp. v. Iowa State Bd. of Tax Review, 829 N.W.2d 550 (Iowa 2013) 59, 60

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004) 42, 59

Salsbury Labs. v. Iowa Dep't of Envtl. Quality, 276 N.W.2d 830 (Iowa 1979) 25

Schulte v. Warren, 75 N.E. 783 (Ill. 1905) 37

Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005) 57, 58, 62

Seven Island Land Co. v. Me. Land Use Regulation Comm'n, 450 A.2d 475 (Me. 1982) 46

Shaw v. City Council of Marshalltown, 104 N.W. 1121 (Iowa 1905) 36

Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 65 N.W.2d 410 (1954) ...44

State ex rel. Mitchell v. Thompson's Sch. of Beauty Culture, Inc., 285 N.W. 133 (Iowa 1939) 39, 42

State ex rel. Sioux City v. Harrington, 296 N.W. 221 (Iowa 1941) 44

State v. Mallory, 83 S.W. 955 (Ark. 1904) 37, 47

State v. Nergaard, 102 N.W. 899 (Wis. 1905) 47, 48

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) 35

State v. Osborne, 154 N.W. 294 (Iowa 1915) 36, 39, 41

State v. Thompson, 33 P.3d 213 (Idaho Ct. App. 2001) 38, 49

State v. Ward, 152 N.W. 501 (Iowa 1915) 54

Steinberg-Baum & Co. v. Countryman, 247 Iowa 923, 77 N.W.2d 15 (1956) 37, 45, 51, 52

Timberland Partners XXI, LLP v. Iowa Dep't of Revenue, 757 N.W.2d 172 (Iowa 2008) 56

Van Norman v. Modern Bhd of Am., 121 N.W. 1080 (Iowa 1909) 62

Weatherill v. Weatherill, 238 Iowa 169, 25 N.W.2d 336 (1946) 62

Statutes

Iowa Code § 17A.9(1)(*a*) 24

Iowa Code § 17A.9(5) 25

Iowa Code § 17A.9(8) 25

Iowa Code § 17A.19 25

Iowa Code § 17A.19(10)(*n*) 43

Iowa Code § 455A.2 (2017) 17, 55

Iowa Code § 456A.23 .....17, 55

Iowa Code § 481A.1(21)(*h*) 17

Iowa Code § 481A.2 39

Iowa Code § 481A.5 48

Iowa Code § 481A.7 48

Iowa Code § 481A.38(1)(*a*) 48

Iowa Code § 481A.39 .....17, 55

Iowa Code § 481.A48 49

Iowa Code § 481A.84(1) 48

Iowa Code § 481A.91 48

Iowa Code § 481A.120 48

Iowa Code § 483A.1 .....39, 40, 46

Iowa Code § 483A.1A(10) 21

Iowa Code § 483A.3 21

Iowa Code § 483A.8(3)(*b*) 30

Iowa Code § 483A.8(3)(*c*) 22

Iowa Code § 483A.8(3)(*d*) 22

Iowa Code § 483A.8(3)(*e*) 23

Iowa Code § 483A.8(5) 23

Iowa Code § 483A.24B(1) 32

Iowa Code § 483A.24(2)(*a*)(2) 21

Iowa Code § 483A.24(2)(*a*)(3)(*a*) 21

Iowa Code § 483A.24(2)(*c*) 20

Iowa Code § 483A.24(2)(*c*)–(*d*) 21

Iowa Code § 657.2 52

Other

Iowa Const. art I, § 1 35

Iowa R. App. P. 6.1101(3) 18

Iowa Admin. Code r. 571–94.1 21

Iowa Admin. Code r. 571–94.5(1) 22

Iowa Admin. Code r. 571–94.5(1)(*d*)–(*e*), (*i*) 22

Iowa Admin. Code r. 571–94.6(1) 22

Iowa Admin. Code r. 571–94.8(1) 22

Iowa Admin. Code r. 571–94.8(2)(*a*) 24

Iowa Admin. Code r. 571–94.8(3) 23

Op. No. 72-2-3, 1972 WL 262260 (Iowa Att'y Gen. Feb. 2, 1972) 23

Mindy Larsen Poldberg, Note, *Deer and Management: A Comprehensive Analysis of Iowa State Hunting Laws and Regulations,* 3 Drake J. Agric. L. 279 (1998) 17, 19

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DOES ARTICLE I, SECTION 1 OF THE IOWA CONSTITUTION RECOGNIZE AN INALIENABLE RIGHT TO HUNT TROPHY BUCKS?

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Gacke v. Pork Xtra L.L.C., 684 N.W.2d 168 (Iowa 2004)

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Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006)

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II. IF HUNTING TROPHY BUCKS IS AN INALIENABLE RIGHT, DOES THE DEER TAG FRAMEWORK CONTAINED IN IOWA CODE CHAPTER 483A ENCROACH IMPERMISSIBLY ON THAT RIGHT?

Authorities

State v. Osborne, 154 N.W. 294 (Iowa 1915)

Gacke v. Pork Xtra L.L.C., 684 N.W.2d 168 (Iowa 2004)

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Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006)

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Democko v. Iowa Dep't of Natural Res., 840 N.W.2d 281 (Iowa 2013)

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Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)

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Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004)

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Loftus v. Dep't of Agric., 232 N.W. 412 (Iowa 1930)

Cedar Mem'l Park Cemetery Ass'n v. Pers. Assoc., Inc., 178 N.W.2d 343 (Iowa 1970)

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State v. Ward, 152 N.W. 501 (Iowa 1915)

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Iowa Code § 481A.84(1)

Iowa Code § 481A.48

Iowa Code § 657.2

Iowa Code § 455A.2

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Iowa Code § 481A.39

Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail, But Some Don't* 56 (Nook e-book ed. 2012)

III. DOES IOWA'S DEER TAG FRAMEWORK TREAT SIMILARLY SITUATED PEOPLE DIFFERENTLY WITHOUT JUSTIFICATION, CONTRARY TO ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION?

Authorities

Diamond Auto Sales, Inc. v. Erbe, 251 Iowa 1330, 105 N.W.2d 650 (1960)

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002)

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LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015)

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NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30 (Iowa 2012)

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Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980)

DeMasters v. Montana, 656 F. Supp. 21 (D. Mont. 1986)

ROUTING STATEMENT

The Iowa Department of Natural Resources (DNR or the Department) has "primary responsibility for state parks and forests, protecting the environment, and managing fish, wildlife, and land and water resources." Iowa Code § 455A.2 (2017); *see also id.* § 456A.23 (requiring DNR to "propagate, increase, and preserve the [State's] wild mammals"); Mindy Larsen Poldberg, Note, *Deer and Management: A Comprehensive Analysis of Iowa State Hunting Laws and Regulations*, 3 Drake J. Agric. L. 279, 289–90 (1998) [hereinafter Poldberg] ("[T]he DNR has . . . responsibility for monitoring, protecting, and controlling the deer population."). In carrying out those statutory mandates, the Department (along with the Natural Resources Commission) seeks to maintain biological balance, and to do so, it must "regulate taking conditions in accordance with sound . . . wildlife management principles." Iowa Code § 481A.39. Twice in recent years, this Court has addressed aspects of the Department's framework for managing a specific type of wildlife: cervids "such as elk or deer." *Id.* § 481A.1(21)(*h*); *see Brakke v. Iowa Dep't of Natural Res.*, 897 N.W.2d 522, 530 (Iowa 2017) (evaluating the scope of DNR's authority to quarantine deer infected with chronic wasting disease); *Democko v. Iowa Dep't of Natural Res.*, 840

N.W.2d 281, 291–94 (Iowa 2013) (concluding a distinction "between resident and nonresident landowners for purposes of granting special hunting privileges" does not violate the United States Constitution).

This case is the next chapter in that unfolding story. *See Democko*, 840 N.W.2d at 292 ("In recent years, challenges to nonresident hunting restrictions have resurfaced."). On the surface, it *appears* to present a question of first impression expressly left undecided in *Democko*—whether the framework for issuing deer hunting licenses violates the state constitution. *See id.* at 292 n.2 ("[T]here is no claim under the Iowa Constitution before us."). However, resolution of that question depends in large part on a statement of law from *Democko* that was *not* specific to the United States Constitution: the conclusion that "landownership in Iowa is not accompanied by the right to hunt on one's own land." *Id.* at 294. Accordingly, DNR recommends transfer to the court of appeals. *See* Iowa R. App. P. 6.1101(3).

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

The parties stipulated to most of the background facts. Appellant Russell Carter owns approximately 650 acres of land in Decatur County, Iowa. (Stipulated Facts ¶ 1, Appendix [App.] 322.) The land is titled in the

name of an LLC, and the LLC's only members are Carter and his two sons. (Stipulated Facts ¶ 1, App. 322.) The property's primary use is agricultural. (Stipulated Facts ¶ 1, App. 322.) However, it also lies in an area of the state that is generally regarded as prime deer hunting territory. (Stipulated Facts ¶¶ 10–11, App. 324–25.) *See* Poldberg, 3 Drake J. Agric. L. at 279 ("In the white tailed deer, citizens of Iowa have a state treasure . . . ."). This case addresses only that recreational hunting use.

Although he owns land in Iowa, Carter is not an Iowa resident. (Stipulated Facts ¶¶ 2, 7, App. 322–23.) Nonetheless, he has obtained a deer tag for use on his property every year since 2012. (Stipulated Facts ¶ 17, App. 326.) The regulatory framework for issuing deer tags each year differentiates between antlered deer (i.e. trophy bucks), and antlerless deer—which can be does, button bucks, spike bucks, or shed-antlered bucks.[1] (Stipulated Facts ¶ 8, App. 324; Dist. Ct. Transcript at 52–53, App. 423–24.) It also differentiates on the basis of residency. *See Democko*, 840 N.W.2d at

[1] Testimony in the district court explained that button bucks are male deer with "stubs" rather than full antlers, and spike bucks are male deer with a single nonforked antler on at least one side of the head. (Dist. Ct. Transcript at 52, 70–71; App. 423, 430–31.) Shed-antlered bucks are male deer that formerly had antlers, but shed them. (Dist. Ct. Transcript at 52, 70–71; App. 423, 430–31.)

287. Carter asserts the distinction based on antlers coupled with the distinction based on residency violates the Iowa Constitution.

A. General regulatory framework.

Democko offers a general description of Iowa Code chapter 483A, the Department's framework for issuing hunting licenses:

> As a general matter, chapter 483A distinguishes between residents and nonresidents for the purpose of licensure. . . . In certain instances, the number of resident licenses that may be issued each year is unlimited, while the number of nonresident licenses that may be issued each year is limited . . . .
>
> Chapter 483A also distinguishes between landowners and nonlandowners. For example, nonresidents who own land in Iowa may be given preference for obtaining a nonresident-antlerless-deer license if he or she was previously unsuccessful in obtaining a "nonresident antlered or any sex deer" license.

Id. at 287–88 (citations omitted). At a more granular level, however, the framework involves interplay between several provisions of law that are best understood in context by applying them specifically to Carter.

B. Specific provisions applied to Carter.

A person who owns a "farm unit" is entitled to apply for and receive an "antlered or any sex" deer tag on a yearly basis. Iowa Code § 483A.24(2)(*c*). The terms "antlered" and "any-sex" are interchangeable. (Dist. Ct. Transcript at 75, App. 435.) The word "or" in section

483A.24(2)(*c*) does not refer to two different licenses, but merely offers two ways to describe the same license. (Dist. Ct. Transcript at 75, App. 435.) An any-sex tag allows a hunter to harvest an antlered deer (or trophy buck), whereas antlerless tags do not.

A deer tag is required in addition to a general hunting license. *See id.* § 483A.3; Iowa Admin. Code r. 571—94.1. (Dist. Ct. Transcript at 69, App. 429.) Owners of farm units can receive up to two any-sex deer tags each year, so long as the person meets the statutory definition of owner and the land meets the statutory definition of a farm unit. Iowa Code § 483A.24(2)(*c*)–(*d*). (Dist. Ct. Transcript at 72, App. 432.)

Carter's land meets the definition of a farm unit because it is in tracts of two or more contiguous acres and is operated as a unit for agricultural purposes under the owner's lawful control. *Id.* § 483A.24(2)(*a*)(2). (Stipulated Facts ¶ 1, App. 322.) However, for deer tag purposes, ownership of a farm unit carries a specific statutory meaning that requires Iowa residency. *Id.* § 483A.24(2)(*a*)(3)(a) (" '*Owner*' means an owner of a farm unit who is a resident of Iowa . . . ."); *see also id.* § 483A.1A(10) (defining "resident" to mean either that the person's principal and primary residence and domicile are in Iowa, or that the person meets other criteria not relevant

here). Therefore, because Carter is not an Iowa resident, he is not an owner of a farm unit within the meaning of the law and is not entitled to receive an any-sex deer tag on a yearly basis. (Stipulated Facts ¶¶ 2, 7; App. 322–23.)

Instead, Carter qualifies as a nonresident. The Code imposes a cap of 6000 nonresident, any-sex deer licenses each year, and the number of *antlerless* licenses available to nonresidents varies. Iowa Code § 483A.8(3)(*c*). The 6000 any-sex licenses are allocated "among the zones based on the populations of deer." *Id.* § 483A.8(3)(*d*); *see* Iowa Admin. Code r. 571—94.6(1) (allocating the 6000 licenses among ten zones). The zones are established by administrative rule. *See* Iowa Admin. Code r. 571—94.5(1). The most populous zones for deer are in south central Iowa (where Carter's land lies) and in northeast Iowa. *See id.* r. 571—94.5(1)(*d*)–(*e*), (*i*) (demarcating zones 4 and 5 along the Missouri–Iowa border and zone 9 in northeast Iowa). (Dist. Ct. Transcript at 34, 76; App. 415, 436.) Consequently, those zones are allocated comparatively more of the 6000 nonresident any-sex licenses. *See id.* r. 571—94.6(1).

Applicants seeking one of the 6000 nonresident any-sex deer licenses are subject to a lottery-type system. *See id.* r. 571—94.8(1). (Stipulated Facts ¶ 9, App. 324; Dist. Ct. Transcript at 73, App. 433.) This system or

some variant of it has been in place for decades. *See* Op. No. 72–2–3, 1972 WL 262260, at *1–2 (Iowa Att'y Gen. Feb. 2, 1972) (opining the then-existing drawing for deer licenses did not constitute an illegal lottery). However, the system is unlike a true lottery in two significant respects. First, applicants have good overall odds (more than a 60% chance) of receiving a license—and the odds could vary depending on the zone in which they apply—because the department received 9537 applications for the 6000 licenses in 2017. (Harms Report [Exh. 3] at 1, App. 58.) *See DeMasters v. Montana*, 656 F. Supp. 21, 23 (D. Mont. 1986) (noting that under a Montana statute limiting the number of available nonresident elk licenses, a nonresident had "about a 63% chance of securing a . . . license"). Second, while the result of a true lottery drawing in no way depends on the previous ones, unsuccessful applicants in the nonresident-any-sex-deer-tag lottery in a given year are assigned "preference points" that increase their chances of obtaining a nonresident any-sex deer license the following year. Iowa Code § 483A.8(3)(*e*); Iowa Admin. Code r. 571—94.8(3). Furthermore, nonresident applicants who do not obtain an any-sex deer tag have priority in obtaining a nonresident *antlerless* license that same year, without participating in a lottery. *Id.* § 483A.8(5); Iowa Admin. Code r.

571—94.8(2)(*a*). Witnesses below could not recall any instances when a nonresident landowner unsuccessfully sought an antlerless tag; in other words, nonresident landowners always get an antlerless tag if they request one. (Dist. Ct. Transcript at 46, 74–75; App. 421, 434–35.)

In the six years between 2012 and 2017 (inclusive), Carter received a nonresident any-sex deer license through the lottery system four times (2012, 2014, 2015, and 2017), and obtained an antlerless-only license the other two years. (Stipulated Facts ¶ 17, App. 326; Dist. Ct. Transcript at 80–81, App. 437–38.) In other words, the Department has never prevented Carter from hunting on his own land, nor has it prevented him from hunting *deer* on his own land; the law merely limits the *type* of deer Carter may harvest and tag each year. (Dist. Ct. Transcript at 81, App. 438.) However, Carter believes that limitation inflicts a constitutional wrong upon him.

C. Proceedings before the agency and the district court.

Carter filed a petition for declaratory order with the Department on September 27, 2016. (Stipulated Facts ¶ 4, App. 323.) *See* Iowa Code § 17A.9(1)(*a*) (permitting any person to "petition an agency for a declaratory order as to the applicability to specified circumstances of a statute . . . within the primary jurisdiction of the agency"). Declaratory orders are "a practical

alternative to judicial declaratory judgments." *Iowa Ins. Inst. v. Core Grp.*, 867 N.W.2d 58, 65 (Iowa 2015). Carter requested that the Department either declare him an "owner" under section 483A.24—notwithstanding the residency requirement—or declare that *not* treating him as an owner violated his constitutional rights. (Stipulated Facts ¶ 4, App. 323.)

The Department neither issued an order within sixty days nor made arrangements with Carter to issue an order by a later specified time. *See* Iowa Code § 17A.9(5), (8). Accordingly, the petition for declaratory order was "deemed to have been denied." *Id.* § 17A.9(8). Therefore, Carter had two remaining options under the statute: he could "either seek judicial review or await further agency action." *Id.*

Carter did neither of those things, but instead filed a petition for declaratory judgment in the district court on December 21, 2016. (Petition, App. 5.) Iowa Code chapter 17A, the exclusive means for reviewing agency action or inaction, does not usually permit petitions for declaratory judgment. *See* Iowa Code § 17A.19 (establishing that chapter 17A is "the exclusive means" for reviewing agency action); *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835 (Iowa 1979) (concluding it would be inappropriate "if the provisions of section 17A.19 could be

discarded at will in favor of certiorari, declaratory judgment, or injunction"). However, an original declaratory judgment action was permissible here because it allowed the district court to rule on the substantive constitutional merits rather than limiting itself "to reviewing the issue of the [Department]'s refusal to issue a ruling." *Campbell v. Iowa Beer & Liquor Control Dep't*, 366 N.W.2d 574, 576 (Iowa 1985). The matter proceeded to a hearing before the district court, where several exhibits were introduced and two witnesses testified.

1. *Thien testimony.* David Thien testified on Carter's behalf. (Dist. Ct. Transcript at 9, App. 403.) Thien's companies manage land and farms for absentee landowners and investors, and Thien himself is also a land consultant, real estate broker, and real estate appraiser. (Dist. Ct. Transcript at 9–10, App. 403–04.) However, Thien has no background in wildlife ecology or deer population management. (Dist. Ct. Transcript at 46, App. 421.) Thien's testimony primarily served to explain two reports he authored. The reports set forth Thien's opinion first that data from six counties in Iowa could be reliably extrapolated to a statewide estimate, and second, that the data from those six counties indicated only a negligible impact on deer population if all nonresident landowners could obtain an any-sex tag every

year. (Dist. Ct. Transcript at 17, 39–40, 45–46; 4/27/17 Thien Report at 1; App. 43, 405, 416–17, 420–21.)

Thien self-selected the six counties on which he focused his analysis "based on location, hunting pressure, and population." (Dist. Ct. Transcript at 17, App. 405.) Thien believed those three factors meant the six sample counties could appropriately be extrapolated to the state as a whole. (4/27/17 Thien Report at 1, App. 403.) Thien then reviewed county assessor data from the sample counties, collecting all landowners, resident or nonresident, who owned thirty acres or more. (Dist. Ct. Transcript at 18, App. 406.) Thien did not seek data about smaller parcels; he self-selected the thirty-acre cutoff because he believed that "is the size needed to effectively hunt deer and have the habitat needed on the property." (Dist. Ct. Transcript at 18, App. 406.)

Using the county data and aggregate yearly deer harvest data from public DNR reports, Thien calculated the number of deer harvested per county, a ratio between does and bucks (or, more specifically, antlerless and antlered deer) harvested, the number of deer harvested by landowners, and "the antlered bucks harvested per square mile." (Dist. Ct. Transcript at 23; 4/27/17 Thien Report at 1; App. 43, 407.) Thien's calculations did not

differentiate between deer harvested with any-sex tags and deer harvested with antlerless tags.

Extrapolating the aggregate data to a statewide projection, Thien opined if nonresident landowners were entitled to any-sex deer licenses every year, Iowa would see only a minimal increase in the number of deer, and especially the number of trophy bucks, harvested. (Dist. Ct. Transcript at 27–34, App. 408–15.) In other words, Thien suggested that additional nonresident hunting licenses would not have a significant impact on deer population. (Dist. Ct. Transcript at 39–40, 45–46; App. 416–17, 420–21.) Rather, the increased harvest would, in Thien's opinion, be close to evenly divided between trophy bucks and antlerless deer. (Dist. Ct. Transcript at 45–46, App. 420–21.) In Thien's view, the more significant impact would be an increase in land values due to "more demand for recreational property in certain areas." (Dist. Ct. Transcript at 48, App. 422.)

2. *Harms testimony.* Tyler Harms testified on the Department's behalf. (Dist. Ct. Transcript at 65, App. 425.) Harms is a Ph.D. candidate in wildlife ecology and holds two previous degrees in animal ecology and wildlife ecology. (Dist. Ct. Transcript at 66, App. 426.) Those studies, and Harms's current employment as a wildlife biologist and biometrician,

include experience with wildlife population management, including management of deer specifically. (Dist. Ct. Transcript at 66–67, App. 426–27.) Harms's additional background in statistics qualifies him to perform wildlife population modeling, or "wildlife math." (Dist. Ct. Transcript at 67, App. 427.) His current employment is with the Department, where he provides population monitoring, modeling, and estimates for deer in Iowa. (Dist. Ct. Transcript at 68, App. 428.)

Like Thien, Harms's testimony primarily served to explain reports he authored. (Dist. Ct. Transcript at 82, App. 439.) As a threshold matter, Harms explained Iowa's deer tag framework allows more does to be harvested because does produce young on a yearly basis. (Dist. Ct. Transcript at 73, App. 433.) Therefore, because harvesting a doe guarantees that doe will not reproduce further, harvesting more does than antlered bucks each year ensures a variable with less fluctuation that allows the Department to estimate the deer population more accurately and institute any necessary population controls. (Dist. Ct. Transcript at 73, App. 433.)

Harms then explained that nonresident hunters target trophy bucks over antlerless deer at a high rate. (Dist. Ct. Transcript at 82, 91; App. 439, 447.) While nonresident hunters often obtain antlerless licenses, many do so

only because it is required. For example, all 6000 of those who obtain antlered licenses through the lottery system must purchase an antlerless license as well. Iowa Code § 483A.8(3)(*b*). However, if given the choice, these hunters generally prefer to target only trophy bucks. This is evident because 95% of the deer harvested specifically using any-sex tags (as opposed to the larger dataset of all deer harvested) are antlered bucks. (Dist. Ct. Transcript at 91, 109; App. 447, 455.)

Some hunters may not even utilize their antlerless tag. Indeed, Carter's trial brief states an antlerless tag "is of essentially no value" to him. (Carter Trial Br. at 2 n.1.) That explains why the State sees so few requests for antlerless licenses from nonresident landowners who do not receive an any-sex tag; it could be that nonresident landowners have no interest in hunting at all, but it's just as likely that they have no interest in hunting *only a doe*. (Dist. Ct. Transcript at 130–31, App. 465–66.)

Harms explained that harvesting trophy bucks at a high rate can affect deer population and structure, causing the population to skew younger (because older bucks have bigger antlers and are therefore more desirable hunting trophies) and female. (Dist. Ct. Transcript at 82–83, App. 439–40.) Further, if there are fewer bucks with significant antler racks in the

population because many of them are harvested in a given year, the absence of trophy bucks can reduce the quality of the hunt for all hunters in future years.[2] (Dist. Ct. Transcript at 83, App. 440; Harms Report [Exh. 3] at 1, App. 58.)

Armed with the knowledge that most hunters with any-sex tags prefer to target antlered bucks, Harms then identified trends in Iowa landownership, which reflected increased nonresident ownership over the last thirty years—from 6% in 1982 to 20% in 2012—with additional increases expected in the future. (Dist. Ct. Transcript at 85–86, App. 442–43.) Harms also noted that limiting analysis to parcels of thirty acres or more ignores the possibility that a smaller parcel could be adjacent to a well-developed deer habitat and therefore attractive to potential hunters. (Dist. Ct. Transcript at 94–95, App. 448.) Ultimately, Harms made three different projections (under models premised on increased nonresident landownership of 0.5%, 1%, and 5%, respectively) with a common theme: if the Department distributed more any-sex licenses each year, about 95% of the

[2] The quality of the hunt "is how the hunter perceives his [or her] experience," and is weighted significantly toward the achievement of actually obtaining a trophy buck. (Dist. Ct. Transcript at 83–84, App. 440–41.) *See Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388, 98 S. Ct. 1852, 1862 (1978) ("The mastery of the animal and the trophy are the ends that are sought . . . .").

deer harvested with those licenses would be antlered trophy bucks—leading to a significant shift in the makeup of the herd, damaging the attractiveness of the overall hunt in future years, and adding layers of difficulty to the Department's statutory mission of responsibly managing the deer population. (Dist. Ct. Transcript at 87–88, 90, 124, 141; App. 444–46, 462, 469.)

Harms acknowledged that the Department can deploy any number of potential strategies to manage and maintain the overall deer population, including instituting antlerless harvest quotas (statewide or in a particular region) or declaring special hunting seasons. (Dist. Ct. Transcript at 122–26, App. 460–64.) *See* Iowa Code § 483A.24B(1) ("The commission may establish a special season deer hunt for antlerless deer . . . ."). However, Harms cautioned that those strategies are not surefire successes; for example, in northwest Iowa, the Department has instituted antlerless quotas so that the overall deer population will rebound, but the response has been slower than anticipated. (Dist. Ct. Transcript at 157, App. 478.) Thus, Carter's proposed changes in the Department's practices (to offset his proposed increase in the number of any-sex tags issued to nonresident landowners) are not guaranteed to work—and indeed are contrary to the

well-established cautionary principle of wildlife population management to which the Department subscribes. (Dist. Ct. Transcript at 95–96, 141–42, 157; App. 448–49, 469–70, 478.)

4. *District court ruling.* The district court concluded the statutory framework for issuing deer hunting licenses does not violate the Iowa Constitution. (Dist. Ct. Ruling at 1, 20–21; App. 21, 40–41.) Specifically, the district court concluded the framework does not violate the inalienable rights clause of the Iowa Constitution (article I, section 1), because the right asserted is not inalienable and, even if it is, the framework imposes only a reasonable regulation. (Dist. Ct. Ruling at 17, App. 37.) The district court also concluded the framework does not violate article I, section 6.[3] (Dist. Ct. Ruling at 1, 20–21; App. 21, 40–41.) In making its factual findings, the district court found Harms's testimony "more credible and entitled to greater weight because his field of expertise is wildlife ecology," while Thien's expertise is not. (Dist. Ct. Ruling at 16, App. 36.) Carter now appeals.

[3] The Court has identified article I, section 6 both as the Iowa Constitution's "equal protection clause" and as the "equality provision." *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 858 n.6 (Iowa 2015).

ARGUMENT

Error Preservation: Unlike *Democko*, where the hunter waived a challenge under the state constitution, here Carter has raised the state constitution all along. *See Democko*, 840 N.W.2d at 292 n.2. However, Carter has abandoned any claim under the takings clause. His trial brief expressly does so (Carter Trial Br. at 4 n.2), and on appeal, Carter has likewise asserted only the inalienable rights clause and the equality provision. Thus, only those two constitutional provisions are before the Court.

Standard of Review: "Generally [the] standard of review for declaratory actions is determined by the nature of the action below." *Cent. Bank v. Hogan*, 891 N.W.2d 197, 199 (Iowa 2017). However, because the Court in this case is "reviewing the constitutionality of a statute, . . . review is de novo." *Democko*, 840 N.W.2d at 286. Nonetheless, the statute receives a presumption of constitutionality that is not easily overcome, and the court does not concern itself "with the wisdom of the policy decisions underlying the statute." *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004).

Argument Summary: *Democko* forecloses Carter's claims—but not just because it establishes what the federal constitution means. Rather, the principles from *Democko* are equally persuasive under the Iowa Constitution. *See State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010) (noting that decisions analyzing constitutional provisions other than those in the Iowa Constitution are applied to claims under the Iowa Constitution only to the extent they have persuasive value). *Democko* explains why the deer tag framework doesn't violate the Privileges and Immunities Clause of the United States Constitution. *See Democko*, 840 N.W.2d at 291–94. The framework satisfies the Iowa Constitution for the same reasons. *See City of Ames v. Gerbracht*, 189 N.W. 729, 732 (Iowa 1922) (grouping together analysis under the inalienable rights clause and under the federal Privileges and Immunities Clause). The Court should affirm.

I. HUNTING TROPHY BUCKS IS NOT AN INALIENABLE RIGHT.

The Iowa Constitution recognizes "certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1. The right to possess property has been extended to include use and enjoyment as well. *See Gacke*, 684 N.W.2d at

177; *State v. Osborne*, 154 N.W. 294, 301 (Iowa 1915). However, the caselaw addressing article I, section 1 of the Iowa Constitution offers "little about the substance of the constitutional guarantees or how they should be applied in a given case." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 351 (Iowa 2015).

Nonetheless, the Court has utilized a two-pronged test to determine whether a statute violates article I, section 1. The test first asks "whether the right asserted by the plaintiffs is protected," and if it is, evaluates whether the statute is a reasonable exercise of the State's police power. *Gacke*, 684 N.W.2d at 176; *see also Atwood v. Vilsack*, 725 N.W.2d 641, 652 (Iowa 2006) (concluding article I, section 1 "prevents only arbitrary, unreasonable legislative action that impacts an inalienable right"). If the asserted right is not protected by the inalienable rights clause, "it follows that there can be no inequality or injustice in the statute under consideration, [because] no right protected by the Constitution has been invaded." *Shaw v. City Council of Marshalltown*, 104 N.W. 1121, 1124 (Iowa 1905).

Here, Carter asserts a broadly-stated right to hunt on his own land, couched within his right to use and enjoy property. However, Carter has not lost the ability to hunt on his own land. (Dist. Ct. Ruling at 15, App. 35.)

Indeed, he can hunt some animals (other than deer) without any license whatsoever. *See Democko*, 840 N.W.2d at 288. DNR does not prohibit Carter from hunting, or even from hunting deer; the statutory framework merely provides the conditions under which he may hunt. *See Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 932, 77 N.W.2d 15, 20 (1956) ("Chapter 546A does not prohibit auctions. It merely regulates them by providing the conditions under which they may be held.").

Instead, this suit is about something narrower—a purported right to hunt specifically a trophy buck. That important level of particularity reveals why the out-of-state cases upon which Carter relies are inapposite here. In each of those instances, either the government prevented landowners from hunting *at all*, or the court enforced a landowner's right to hunt their land over a *trespasser's* competing desire to hunt on the same land—not over a government regulation. *See, e.g.*, *State v. Mallory*, 83 S.W. 955, 956 (Ark. 1904) (noting the relevant statute prohibited all nonresidents from hunting in Arkansas, even if they owned land in the state); *Alford v. Finch*, 155 So. 2d 790, 792 (Fla. 1963) (addressing the government's attempt to make land part of a refuge closed to *all* hunting); *Hamilton v. Williams*, 200 So. 80, 81 (Fla. 1941) (addressing one hunter's trespass on another hunter's land); *Schulte v.*

Warren, 75 N.E. 783, 783 (Ill. 1905) ("[T]he appellees . . . repeatedly trespassed upon the lands and hunted over the same and threatened to continue hunting thereon. The bill prayed for an injunction restraining appellees from hunting over the lands of appellant . . . ."); *Allen v. McClellan*, 405 P.2d 405, 406 (N.M. 1965) (addressing the government's inclusion of private land in a refuge and its corresponding order "that [the land] be closed to *all* hunting" (emphasis added)). Iowa Code chapter 483A does not close off all hunting on Carter's land, nor does it allow someone else to hunt on Carter's land instead of him. The regulation in this case is much more limited, because it merely prevents Carter from hunting a particular sex of deer on a yearly basis.

Furthermore, hunting trophy bucks involves only recreation, not livelihood. *See DeMasters*, 656 F. Supp. at 24 ("The right asserted by plaintiff is recreational in nature. He seeks the opportunity to engage in pure sport."). It is not "the stuff of constitutional necessity." *State v. Thompson*, 33 P.3d 213, 218 (Idaho Ct. App. 2001) (Schwartzman, C.J., concurring). The recreational nature of Carter's purported right is important because even *Osborne*, which discussed article I, section 1 of the Iowa Constitution as more than a "glittering generality," did so in the context of a person's "right

to pursue a useful and harmless *business*." *Osborne*, 154 N.W. at 300 (emphasis added); *see also State ex rel. Mitchell v. Thompson's Sch. of Beauty Culture, Inc.*, 285 N.W. 133, 136 (Iowa 1939) (striking down "an arbitrary interference with private business" under article I, section 1). Article I, section 1 does not make recreational hunting an inalienable right; no such right to hunt exists. *See Democko*, 840 N.W.2d at 294; *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) ("The recreational sport of hunting has not been recognized as a constitutionally protected . . . interest by state or federal law."); *cf. Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388, 98 S. Ct. 1852, 1863 (1978) (concluding that whatever rights may be fundamental, "hunting by nonresidents . . . is not one of them"). *Democko*'s recognition of several provisions in the Iowa Code explains why no such right to hunt exists.

"The title and ownership of all . . . wild game, animals, and birds," including deer outside of designated preserves, is "declared to be in the state." Iowa Code § 481A.2. Additionally, a deer is a "wild animal, bird, game, or fish, the protection and regulation of which is desirable for the conservation of resources of the state." *Id.* § 483A.1.

In *Democko*, the Court examined these two statutes and relied on them to conclude that even if the right to hunt on one's own property existed at common law, "the legislature has extinguished any such right." *Democko*, 840 N.W.2d at 293. The Court further explained why the statutes extinguished any such right:

> The clear implication of this unqualified statute [section 481A.2] is that a landowner has no title to or interest in wildlife within the state borders, even if the wildlife is on the landowner's property. The legislature has made clear the purpose[] of vesting ownership in all of the state's wildlife in the state is "for the conservation of resources of the state." Any common-law right to hunt based on property ownership would conflict with these broad and unqualified statutory provisions. We further note the legislature has created an extensive statutory scheme regulating the manner, places, and times in which certain species of wildlife may be taken and in what numbers.

Id. at 293–94 (quoting Iowa Code § 483A.1) (citations omitted).

Because "landownership in Iowa is not accompanied by the right to hunt on one's own land," *Democko*, 840 N.W.2d at 294—at all, much less for a specific sex of deer—Carter's claim must fail because it does not satisfy the first prong of the *Gacke* test, *see Gacke*, 684 N.W.2d at 176. No additional analysis under article I, section 1 is required. *Cf. Democko*, 840 N.W.2d at 293 ("We need only reach the initial inquiry."). But even if the Court reaches the second prong of the *Gacke* test, it should still affirm

because the limited number of nonresident any sex deer tags is a reasonable regulation.

II. IF HUNTING TROPHY BUCKS IS AN INALIENABLE RIGHT, IOWA'S DEER TAG FRAMEWORK IS A REASONABLE REGULATION.

DNR acknowledges that the Court has said article I, section 1 "is not a mere glittering generality without substance or meaning." *Osborne*, 154 N.W. at 300. Nonetheless, the clause has never been absolute. *Gacke*, 684 N.W.2d at 176. Instead, "[t]he rights guaranteed by this provision are subject to reasonable regulation by the state."[4] *Id.*; *see also Atwood*, 725 N.W.2d at 652 (concluding article I, section 1 "prevents only arbitrary, unreasonable legislative action"); *May's Drug Stores v. State Tax Comm'n*, 242 Iowa 319, 328, 45 N.W.2d 245, 250 (1950) (noting article I, section 1 "gives no right . . . free from regulation"). Reasonable regulations must only avoid imposing "oppressive burdens." *Osborne*, 154 N.W. at 300; *see Gacke*, 684 N.W.2d at 179 (concluding a statute imposed an oppressive

[4] That proposition holds true across most if not all states whose constitutions contain an inalienable or natural rights clause. *Morris v. Brandenburg*, 376 P.3d 836, 852 (N.M. 2016) ("[S]ome states, such as Iowa, treat their natural rights clauses as granting judicially enforceable rights. However, those cases generally acknowledge that natural rights provisions do not codify absolute or fundamental rights, but instead recognize that natural rights are still subject to reasonable regulation . . . ." (citation omitted)).

burden because it significantly impaired a protected right "without any corresponding benefit"). If the Court retreats from *Democko* and concludes Carter has articulated a right guaranteed by this provision, the regulation of that right is reasonable and not oppressive. *Cf. Midwest Check Cashing, Inc. v. Richey*, 728 N.W.2d 396, 403 (Iowa 2007) (concluding that although a statute impacted a property right, it was "far removed from the type of legislation that is arbitrary and unreasonable" under article I, section 1).

A. The word "reasonable" does not require heightened scrutiny.

The parties have disagreed about the proper standard for determining whether a statute is a reasonable regulation under article I, section 1. Carter asserts, for example, that the phrase "reasonably necessary" means something more than rational basis review. (Carter Br. at 29–34.) *See Gacke*, 684 N.W.2d at 177; *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995); *Thompson's Sch. of Beauty*, 285 N.W. at 135. But the caselaw doesn't bear that out. *Gravert*'s explanation that a litigant challenging the State's exercise of its police power under article I, section 1 must negate "every reasonable basis upon which the [statute] may be sustained" matches word for word the Court's application of rational basis review in the equal protection context. *Gravert*, 539 N.W.2d at 186; *see Racing Ass'n of Cent.*

Iowa v. Fitzgerald, 675 N.W.2d 1, 8 (Iowa 2004) (establishing that the burden of rebutting a presumption of constitutionality "includes the task of negating every reasonable basis that might support . . . disparate treatment"). *Gravert* also likens the analysis under article I, section 1 of the Iowa Constitution to the deferential standard applied in statutory judicial review actions when determining whether a state agency acted arbitrarily or capriciously. *Compare Gravert*, 539 N.W.2d at 186 ("[T]he challenger must demonstrate that the law is unreasonable, arbitrary, and capricious."), *with* Iowa Code § 17A.19(10)(*n*) (authorizing district courts to grant relief if an agency's action was "unreasonable, arbitrary, capricious, or an abuse of discretion"). And most tellingly, this Court noted just three years ago that analysis under article I, section 1 of the Iowa Constitution "is virtually identical to the rational-basis due process test or equal protection tests." *City of Sioux City*, 862 N.W.2d at 352.

It's true that the *Gacke* Court determined a statute was "unduly oppressive" and therefore violated article I, section 1. *Gacke*, 684 N.W.2d at 179. But logically, an unduly oppressive statute is not reasonable. *See id.* (concluding a statute was "unduly oppressive and, *therefore*, not a reasonable exercise of the state's police power" (emphasis added)).

Accordingly, "unduly oppressive" is just a synonym for what is unreasonable, not an independent measuring stick the Court must stringently apply. *See Gravert*, 539 N.W.2d at 188 ("[T]he Graverts have not shown the fence statute to be unduly oppressive and [we] therefore hold it also passes constitutional muster . . . .").

In other words, rather than a form of heightened scrutiny, *Gacke* suggests a double reasonableness inquiry: first evaluate whether the challenged law involves a reasonable *subject* of the police power, and then determine whether the *specific exercise* of the police power is reasonable. *See Gacke*, 684 N.W.2d at 178–79. In *Gacke*, the statute at issue passed the first inquiry but not the second; it was a valid subject for the police power (promoting agricultural production and investment), but the specific regulation was unreasonable.[5] *See id.*; *see also State ex rel. Sioux City v. Harrington*, 296 N.W. 221, 223 (Iowa 1941) (concluding that requiring a license to install water softeners was related to health—a valid subject of the

[5] Because the police power encompasses a range of subjects, many statutes likely would pass the first inquiry. But for an example of a law that *fails* the first inquiry, see *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 18, 65 N.W.2d 410, 416 (1954) (declining to decide firmly whether "legislation which practically prohibits the use of trading stamps" is within the police power, but suggesting it is not).

police power—but was an improper *exercise* of the police power over that subject). The statute in this case is not as troublesome.

Beyond the meaning of "reasonable" in this context, another important reminder is that analysis under article I, section 1 "is grounded on a presumption that the statute is constitutional." *Gacke*, 684 N.W.2d at 176. A challenger "can rebut this presumption only by negating every reasonable basis upon which the [statute] may be sustained." *Gravert*, 539 N.W.2d at 186. Furthermore, a law does not violate article I, section 1 just because it imposes *some* hardship or adverse effect. *Steinberg-Baum*, 247 Iowa at 932, 77 N.W.2d at 20; *May's Drug Stores*, 242 Iowa at 329, 45 N.W.2d at 250.

B. Hunting and wildlife regulations are within the police power.

There is no specific definition of the police power. *Loftus v. Dep't of Agric.*, 232 N.W. 412, 415 (Iowa 1930). However, the police power is not limited to promoting health, safety, and morals; it also includes "at least the promotion of prosperity and the general welfare." *Steinberg-Baum*, 247 Iowa at 930, 77 N.W.2d at 19; *see also Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc.*, 178 N.W.2d 343, 349 (Iowa 1970) ("In the exercise of its police power, the legislature not only has wide discretion in determining what conditions should be remedied but also in deciding what course is best

to accomplish that purpose."). Promoting prosperity and the general welfare includes managing and conserving the State's wildlife and other natural resources for all Iowans and for future generations—which is an express legislative goal. *See* Iowa Code § 483A.1 (stating the legislative policy that protecting and regulating wildlife "is desirable" for conservation purposes).

That understanding in Iowa is consistent with the prevailing understanding across the country that a state's police power permits wildlife regulation and conservation measures. *See, e.g., Collopy v. Wildlife Comm'n*, 625 P.2d 994, 1002 (Colo. 1981) (finding "no doubt" that protecting and enhancing "game population for the use, benefit and enjoyment of Colorado residents and visitors" is "within the purview of the state's police power"); *Maddox v. State*, 312 S.E.2d 325, 327 (Ga. 1984) ("It has long been the rule that the state may exercise its police power to enforce and exercise its sovereign capacity over wildlife in order to preserve and protect it for the public good."); *Seven Islands Land Co. v. Me. Land Use Regulation Comm'n*, 450 A.2d 475, 483 (Me. 1982) ("[P]reservation of wildlife is a valid object for the exercise of the police power . . . ."); *Hartley Hill Hunt Club v. Cty. Comm'n of Ritchie Cty.*, 647 S.E.2d 818, 824 (W. Va. 2007) (relying on a legislative declaration of policy to conclude that hunting

regulations are within the police power); *State v. Nergaard*, 102 N.W. 899, 901 (Wis. 1905) ("[T]he state has the right, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game . . . ."); *O'Brien v. State*, 711 P.2d 1144, 1148–49 (Wyo. 1986) (noting that because the state owns all wildlife within its borders, "in the exercise of its police power, the state may regulate the taking and use thereof").

C. Issuing a limited number of any-sex deer tags is reasonable.

Having established that the police power permits wildlife and hunting regulations, the next question is whether the particular framework for nonresident landowners wishing to hunt antlered deer is reasonable. Notably, even a commentator who otherwise advocates for constitutional protection of hunters' rights under the takings clause acknowledges that any right to hunt which is part of property ownership is "*clearly* subject to the regulations of the state." Kurtis B. Reeg, *Deer and Animal Breeding, Preserve Hunting, and Governmental Interference: The Dilution and Unconstitutional Taking of Private Property by the State*, 18 Drake J. Agric. L. 513, 517 (2013) (emphasis added). So do the cases upon which Carter relies for the proposition that a right exists in the first place. *See Mallory*, 83 S.W. at 959 (holding any right to hunt "must always yield to the state's

ownership and title" and is "subordinate" to the state's interest in "regulation and preservation for the public use"); *Hamilton*, 200 So. at 81 (holding the right to hunt is "subject to any lawful regulation by the State").

"[T]here are undoubted numerous requirements that may be lawfully prescribed" to regulate hunting in general. *City of Ames*, 189 N.W. at 733; *see also Nergaard*, 102 N.W. at 901–02 ("The modes in which the state may limit the amount to be legally taken are various."). For example, the Natural Resources Commission can establish game refuges or sanctuaries, and all hunting in those areas is prohibited. Iowa Code §§ 481A.5, 481A.7. Likewise, it can "alter, limit, or restrict the methods or means employed and the instruments or equipment used" to hunt, harvest, or collect certain wildlife. *Id.* § 481A.38(1)(*a*); *see also id.* § 481A.91 ("A person shall not kill a beaver, mink, otter, or muskrat with a shotgun or spear."); *id.* § 481A.120 (prohibiting hunting from aircraft or snowmobiles). Or, it can establish harvest limits; for example, "no person shall take more than four dozen frogs in any one day or have in possession at any one time more than eight dozen frogs." *Id.* § 481A.84(1). And as yet another example, the

legislature has prohibited hunting any of an enumerated list of animals (which includes deer) out of season. *Id.* § 481A.48.[6]

Limiting the number of nonresident any-sex deer tags is merely another arrow in the legislative quiver. *See City of Ames*, 189 N.W. at 733 (concluding a city could regulate "moving picture shows" in a variety of ways, including occupancy limits and hours of operation). Like other restrictions on the ability to hunt, the nonresident any-sex license quota is a population management tool. *See DeMasters*, 656 F. Supp. at 24 ("If the elk is to survive as a species, the game herds must be managed. . . . Any management tool designed to limit the annual kill necessarily involves the limitation of hunting opportunities."). If the Court recognizes a new right to hunt for nonresident landowners, however, many of the Department's deer management tools could become vulnerable or less effective.

From a numerical standpoint, the data reflects that nonresident hunters target trophy bucks at a high rate with an any-sex deer tag. Neither the Department nor the legislature should be forced to ignore that quantifiable practice. *See Diamond Auto Sales, Inc. v. Erbe*, 251 Iowa 1330, 1336–37,

[6] A similar prohibition on hunting deer out of season passes constitutional muster under Idaho's inalienable rights clause. *Thompson*, 33 P.3d at 216 (majority opinion).

105 N.W.2d 650, 653 (1960) (concluding a law prohibiting Sunday car sales did not violate article I, section 1, in part because "generally mechanics do not work on Sunday"); *City of Ames*, 189 N.W. at 733 (concluding ordinances regulating moving picture shows were constitutional because "the city council has a right to take into consideration the fact that many people attend such shows"). The limitation on the number of nonresident any-sex tags is a reasonable restriction because it avoids a disproportionate harvest of trophy bucks, maintains the herd's population balance over time, and allows the State to maintain its national renown as a prime location for deer hunting. *Cf. Baldwin*, 436 U.S. at 388, 98 S. Ct. at 1862 ("The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.").

Additionally, the nonresident any-sex deer tag quota serves the public interest by limiting the number of trophy bucks harvested each year. Under *Diamond Auto*, a legislative judgment that serves the public interest is not arbitrary. In *Diamond Auto*, the Court concluded a statute prohibiting Sunday auto sales did not violate article I, section 1. *Diamond Auto*, 251 Iowa at 1336–37, 105 N.W.2d at 653. The Sunday sales ban served the public interest by ensuring that buyers could have their cars examined by

independent mechanics, who usually did not work on Sundays. *Id.* at 1336, 105 N.W.2d at 653. It also served the public interest by ensuring that county recorders' offices were open during sales hours "so that title and liens can be checked." *Id.* at 1336–37, 105 N.W.2d at 653. Neither of those "conceivable state[s] of facts" were arbitrary bases for the law under article I, section 1. *Id.* at 1336–37, 105 N.W.2d at 652–53. Because it serves a similar public purpose, the preservation rationale in this case isn't arbitrary either.

The nonresident any-sex deer tag quota may cause Carter some minor inconvenience if he is unsuccessful in the lottery system for any given year. He misses out on a new trophy buck for the mantle. However, the constitution does not immunize Carter against mere inconvenience. *Steinberg-Baum*, 247 Iowa at 932, 77 N.W.2d at 20. And the inconvenience is minimal. Without an any-sex tag, Carter can still use his land, enjoy the camaraderie of hunting, and even harvest an antlerless deer (if he obtains an antlerless tag). *Cf. Brakke*, 897 N.W.2d at 549 ("Although the land cannot be used as a hunting preserve, it had value and other uses prior to becoming a hunting preserve and has value and other uses during the quarantine period."). The "police power is not arrested" just because a statute "causes

some inconvenience and expense" for those it affects. *Steinberg-Baum*, 247 Iowa at 932, 77 N.W.2d at 20; *see also Midwest Check Cashing*, 728 N.W.2d at 403 (concluding a statute did not violate the inalienable rights clause even though it was "not as protective as [the plaintiff] would like").

Gacke does not compel a different result. There, the statutory immunity for animal feeding operations meant that the plaintiffs whose property abutted a hog confinement facility bore the brunt of a possible nuisance without any corresponding personal benefit. *See Gacke*, 684 N.W.2d at 179. In other words, the statute violated article I, section 1 because it conferred on one person—the pork producer—a "right to use . . . property *without* due regard for the person and property rights of his neighbor." *Id.* Further, because the nuisance was an omnipresent mélange of noxious odors, it deprived the plaintiffs of *most* use and enjoyment on their property. *See id.* at 177 (concluding the asserted right was a "desire to enjoy . . . property free from noxious odors"); *see also* Iowa Code § 657.2 (establishing per se nuisances that include "noxious exhalations" and "unreasonably offensive smells"); *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 110 (Iowa 2017) (describing physical and olfactory intrusions from a nearby industrial facility that meant residents "could not open the

windows or enjoy the outdoors due to . . . smell and dust," and that could therefore constitute a nuisance).

Here, however, Carter retains practically all use and enjoyment of his land, *and* he gains corresponding benefits from the deer tag quota system—a better-managed deer population that ensures a quality hunt in future years when he obtains an any-sex tag, and possibly an increase in the value of his land should he decide to sell it. Furthermore, unlike the rights of landownership discussed and protected in *Gacke*, Carter's inability to harvest an antlered deer on his property every year does not confer on someone else the ability to disregard Carter's property rights and hunt there themselves. Unlike the statute at issue in *Gacke*, the deer tag framework imposes no transfer of property benefits from the landowner to someone else. Thus, this case is more like *Gravert* than *Gacke*. *See Gravert*, 539 N.W.2d at 188 (concluding a statute imposing some of the costs of a partition fence on a party was not unduly oppressive under article I, section 1 because the party received a benefit from the fence—protection of "their crops from denigration by the defendants' miniature horses"). *Gacke* involved an exceedingly unique and severe circumstance; the burden on

Carter here is significantly less. The nonresident deer tag framework does not violate the inalienable rights clause of the Iowa Constitution.

Similarly, nothing in *State v. Ward*, 152 N.W. 501 (Iowa 1915), is inconsistent with the Department's position here. *See Democko*, 840 N.W.2d at 294. *Ward* does not stand for or "establish the general right of a property owner to hunt wildlife on his or her own land in light of the comprehensive statutory scheme regulating hunting" in Iowa. *Id.* Instead, it merely "establishes the principle that, in a criminal prosecution, property damage may serve as a justification for the killing of deer on one's own land." *Id.* The district court's opinion does not disturb this proposition, and neither would affirmance on appeal. *See Cook v. State*, 74 P.2d 199, 203 (Wash. 1937) (affirming a hunting restriction while expressly noting that doing so did not disturb a citizen's "constitutional right to defend and protect his property, against imminent and threatened injury by a protected animal, even to the extent of killing the animal").

In sum, the Department's statutory mission of protecting, conserving, and maintaining the State's wildlife populations (especially as to trophy bucks in particular) is both a legitimate exercise of the police power and a reasonable ground for limiting the number of nonresident any-sex deer tags

issued each year. *See* Iowa Code §§ 455A.2, 456A.23, 481A.39; *DeMasters*, 656 F. Supp. at 24 ("The purpose to be served by Montana's hunting license system is the conservation of wildlife.").[7] The Iowa licensure framework does not violate article I, section 1 of the Iowa Constitution.

III. IOWA'S DEER TAG FRAMEWORK DOES NOT VIOLATE ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION.

"[T]he contentions that an act is arbitrary and unreasonable and that it is discriminatory are often not greatly different." *Diamond Auto*, 251 Iowa at 1339, 105 N.W.2d at 654. Just as *Diamond Auto* portends, the result in

[7] The testimony in the district court, and the two witnesses' competing methodologies, lend further support to the Department's position here. For example, Harms's data-driven testimony left room for uncertainty about possible effects on the deer population that could result from various management strategies. (Dist. Ct. Transcript at 131, App. 466.) Harms's recognition of the various factors at play reflects an acknowledgement that statistical projection features inherent uncertainty and complexity. *See* Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail, But Some Don't* 56 (Nook e-book ed. 2012) ("In many walks of life, expressions of uncertainty are mistaken for admissions of weakness."). Likewise, Harms focused on the type of deer harvested with any-sex tags, whereas Thien dismisses that subset of data as wholly unimportant. *Compare id.* at 366 (stressing the importance of isolating data points that are "an indication of the underlying truth behind a statistical or predictive problem"), *with id.* at 173 ("Ignoring data is often a tip-off that the forecaster is overconfident, or is . . . interested in showing off rather than trying to be accurate."). The district court rejected Carter's attack on Harms's methodology, and this Court should do the same.

this case under article I, section 6 is not greatly different from the result under article I, section 1. Carter is not similarly situated to resident landowners, and even if he is, a rational basis supports the distinction between resident and nonresident landowners.

A. Nonresident landowners like Carter are not similarly situated to resident landowners.

"The first step" in evaluating a statute under article I, section 6 of the Iowa Constitution "is to identify the classes of similarly situated plaintiffs singled out for differential treatment." *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002). Carter has not identified any similarly situated person treated differently. While residents and nonresidents are treated differently, they are not similarly situated to each other. (Dist. Ct. Ruling at 19, App. 39.) Because Carter does not identify any person similarly situated to him who is treated differently, his claim fails and the Court need not proceed any further. *See, e.g.*, *Timberland Partners XXI, LLP v. Iowa Dep't of Revenue*, 757 N.W.2d 172, 176–77 (Iowa 2008); *Grovijohn*, 643 N.W.2d at 204; *New Midwest Rentals, LLC v. Iowa Dep't of Commerce*, 910 N.W.2d 643, 653 (Iowa Ct. App. 2018) ("Because Valero has failed to demonstrate dissimilar treatment with those similarly situated, its equal protection claim fails.").

Nonetheless, the Department understands that the Court has "cautioned against making intricate distinctions between purported classes of similarly situated individuals," because doing so could resolve almost every equal protection claim "against the plaintiffs on the 'similarly situated' requirement." *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015). But even if the Court assumes (without deciding) that Carter has identified a class of similarly situated people subjected to allegedly different treatment, the distinction is rational. *See id.* at 860–62 (assuming without deciding that the plaintiff satisfied the "similarly situated" requirement, but nonetheless rejecting the claim under article I, section 6 on the merits).

B. The legislature could have believed there was a rational basis for distinguishing between nonresident landowners and resident landowners.

Carter accepts that preservation, conservation, and responsible wildlife management are legitimate ends "and questions only whether the [framework] further[s] them in a rational way." *Schutz v. Thorne*, 415 F.3d 1128, 1135 (10th Cir. 2005); *see also LSCP*, 861 N.W.2d at 861 ("LSCP does not contest the legitimacy of the interests expressly proffered by the Department . . . . Rather, LSCP contends the means and ends bear no rational relation to one another."). (Carter Trial Br. at 9.) In other words,

Carter acknowledges that the proper level of scrutiny in this case is rational basis review. *See NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012) ("Although the parties disagree as to whether MidAmerican and NextEra are similarly situated, they . . . agree that the legislative classification at issue is not one requiring any more than rational basis scrutiny."). Applying that standard, the nonresident any-sex deer tag quota at minimum "help[s] preserve the gender balance needed to maintain herd sizes," *Schutz*, 415 F.3d at 1135, so the statutory framework limiting nonresident any-sex licenses is rational.

Carter's primary misstep is his assertion that because the Department could do other things to manage the overall deer population, it is constitutionally required to do them so that he can hunt a trophy buck every year. Specifically, he proposes imposing antlerless quotas, or reducing the number of any-sex tags available to nonresidents who don't own land as a pro tanto offset against any-sex tags issued automatically to nonresident landowners. (Carter Br. at 45–46.) *Cf. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 124 (Iowa 2015) (concluding an attorney's voluntary cessation from practice should not "justify a pro tanto credit against a suspension imposed" for violations of the ethical rules). And

because those things haven't occurred, he continues, the existing framework must be irrational.

But that's not the standard. The legislature's decision not to enact alternative measures does not mean the nonresident any-sex license quota is irrational. "The fit between the means chosen by the legislature and its objective need only be rational, not perfect." *LSCP*, 861 N.W.2d at 859. Instead of seeking perfection, the Court asks only whether "the legislature *could have* rationally believed" that the quota would further the goals of preservation and population management. *Id.* at 862 (emphasis added); *see also Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 563 (Iowa 2013) (upholding a legislative classification based on what "the legislature *might* logically conclude" (emphasis added)); *King v. State*, 818 N.W.2d 1, 30 (Iowa 2012) (citing cases that upheld "legislative classifications based on judgments the legislature *could have* made" (emphasis added)).

For that reason, Carter's reliance on the treatment of legislative history in *Racing Association of Central Iowa v. Fitzgerald* is misplaced. There, the legislative history affirmatively refuted the stated public interest. *See Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 15. Here, the lack of

legislative history—which is common in Iowa—simply leaves no indication one way or the other. *See Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 188 (Iowa 2011) (commenting that "with most Iowa statutes, there are no committee hearings or floor debates to review"). The Court's 2004 holding about available legislative history belying the proffered interest should not be extended to mean the same thing for an *absence* of legislative history. *Cf. Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 95 (Iowa 2002) (refusing "to rely on legislative inaction as indicating a legislative intent that is at odds" with a statutory objective).

Similarly, while the Court has suggested that sometimes "the passage of time may call for a less deferential standard of review," *Bierkamp v. Rogers*, 293 N.W.2d 577, 581 (Iowa 1980), that "reevaluation standard," *LSCP*, 861 N.W.2d at 862 n.8, "contemplates evolving *legal* trends," *Qwest Corp.*, 829 N.W.2d at 562 n.7. It is "not . . . a look back in time to verify whether the legislature actually accomplished its goals." *LSCP*, 861 N.W.2d at 862 n.8. Carter does not identify any changing legal trends with respect to the constitutionality of nonresident hunting regulations. Accordingly, the Court should "decline to apply the *Bierkamp* reevaluation standard in this case." *Id.*

In any event, the legislature could have believed the nonresident any-sex license quota would advance the objective of protecting, preserving, and responsibly managing Iowa's deer population—and the district court so found. (Dist. Ct. Ruling at 19, App. 39.) Thirteen years ago, the United States Court of Appeals for the Tenth Circuit directly addressed a similar challenge by a nonresident to some of Wyoming's hunting restrictions under the Fourteenth Amendment, and reached a similar conclusion:

> [W]e cannot conclude that there exists *no* reasonable justification for the in-state preferences. Many reasons exist, in fact, for states to adopt a preference scheme. Residential preferences are commonly considered a benefit of state citizenship for finite resources such as wildlife resources, higher education, or access to state run facilities. While the reasons for preferences are varied—and context specific—it is not irrational to provide them. In-state residents, for example—especially those who hunt or fish—have a vested long-term interest in the sustainability of Wyoming's wildlife management system. This includes not just political support for such programs, but direct financial support through fees and taxes. In-state residents may be counted on more reliably to hunt in Wyoming year after year, thus supporting long-term game and fish habitat preservation, herd management programs, new species programs . . . , or, finally, the more mundane aspects of wildlife programs such as adequate highways, off-road and hiking trails, fire protection, and search and rescue programs. While out-of-state hunters also contribute directly and indirectly to these programs through hunting and fishing license fees and sales taxes, their financial support does not replace that made by Wyoming residents. The in-state preference is a logical and reasonable way to reward this

> support and foster the long-term success of wildlife management programs.

Schutz, 415 F.3d at 1136. Justifications like those the *Schutz* court identified and those Harms discussed in his testimony are sufficient rational bases under article I, section 6 of the Iowa Constitution for the nonresident any-sex deer tag quota. *See DeMasters*, 656 F. Supp. at 25 ("There is no irrationality in Montana's legislative decision to utilize limitation of the number of nonresident big-game hunters as an effective game management tool.").

CONCLUSION

Hunting is undoubtedly a longstanding Iowa pastime. *See, e.g.*, *Weatherill v. Weatherill*, 238 Iowa 169, 180–81, 25 N.W.2d 336, 343 (1946) (recounting a father's testimony that he did not enjoy a strong relationship with his son because they did not go hunting or fishing together); *Van Norman v. Modern Bhd. of Am.*, 121 N.W. 1080, 1082 (Iowa 1909) ("David Van Norman had been in the habit of hunting a great deal for a great many years, and enjoyed the sport very much."); *Gross v. Miller*, 61 N.W. 385, 388 (Iowa 1894) (adjudicating a tort lawsuit arising out of a hunting accident). But there exists no fundamental or inalienable right to hunt in Iowa, even on one's own land. Even if such a right does exist, the statutory framework limiting the number of any-sex deer tags available to

nonresidents is a reasonable regulation under article I, section 1 of the Iowa Constitution. The framework also serves the purpose of responsibly managing the deer population in Iowa, so it is rational under article I, section 6 of the Iowa Constitution. The Court should affirm.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Because this case is so similar to *Democko*, DNR believes oral argument is not an urgent requirement. However, if the Court holds oral argument to probe the contours of article I, section 1, DNR asks to be heard.

CERTIFICATE OF COMPLIANCE

This 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 Times New Roman in 14-point font and contains 9,767 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE

I, David M. Ranscht hereby certify that on the 22nd day of June, 2018, I or a person acting on my behalf did serve Appellee's Final Brief and Conditional Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, David M. Ranscht, hereby certify that on the 22nd day of June, 2018, I or a person acting on my behalf filed Appellee's Final Brief and Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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