IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-1644
Polk County No. EQCE084330

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation,

Plaintiffs/Appellees,

v.

STATE OF IOWA; DEPARTMENT OF NATURAL RESOURCES; BRUCE TRAUTMAN, in his official capacity as Acting Director of the Department of Natural Resources; ENVIRONMENTAL PROTECTION COMMISSION; MARY BOOTE, NANCY COUSER, LISA GOCHENOUR, REBECCA GUINN, HOWARD HILL, HAROLD HOMMES, RALPH LENTS, BOB SINCLAIR, JOE RIDING, in their official capacities as Commissioners of the Environmental Protection Commission; NATURAL RESOURCE COMMISSION; MARCUS BRANSTAD, RICHARD FRANCISO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD, in their official capacities and Commissioners of the Natural Resource Commission; DEPARTMENT OF AGRICULTURAL AND LAND STEWARDSHIP; AND MICHAEL NAIG, in his official capacity as Secretary of Agriculture,

Defendants/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT

IN AND FOR POLK COUNTY

THE HONORABLE ROBERT B. HANSON

PLAINTIFFS-APPELLEES' PROOF BRIEF

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I. PROOF OF SERVICE

I, Brent Newell, hereby certify that on the 13th day of January, 2020, I, or a person acting on my behalf, did serve Plaintiffs-Appellees' PROOF BRIEF on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Brent Newell, hereby certify that on the 13th day of January, 2020, I, or a person acting on my behalf, filed Plaintiffs-Appellees' PROOF BRIEF with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Brent Newell
Brent Newell

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V. ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction because this appeal presents a substantial constitutional questions regarding Iowans' constitutionally protected use rights in navigable waters in a challenge to the constitutionality of Section 20 of Senate File 512 (2018), codified at Iowa Code § 455B.177(3) (2019). IOWA R. APP. P. 6.1101(2)(a). This case also presents an issue of first impression with respect to whether Plaintiffs-Appellees Iowa Citizens for Community Improvement and Food & Water Watch (collectively "Iowa Citizens") must meet the standing requirements imposed by Article III of the U.S. Constitution. *Id*. § 6.1101(2)(c).

This case also presents a fundamental and urgent issue of broad public importance requiring prompt and ultimate determination by the Supreme Court. Iowans have a right to use navigable waters and this action seeks to protect that use in the Raccoon River, including use as a source of drinking water for half a million Iowans. *Id*. § 6.1101(2)(d).

The Iowa Supreme Court granted interlocutory review of this matter. (11/4/19 Supreme Court Order, App. __).

VI. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Iowa Citizens filed this action to protect their right to clean water in the Raccoon River. This use right under the public trust doctrine predates the Iowa Constitution. As such, the right is both an unenumerated right and a property interest, the deprivation of which violates the due process clause of the Iowa Constitution. The legislature, as the sovereign trustee under the doctrine, holds the Raccoon River in trust for the use of the public, and has the duty to protect public use. The legislature has violated its duty by abdicating control, and allowing substantial impairment, of the Raccoon River, which harms Iowa Citizens' use of the River for recreation and as a source of drinking water.

On March 27, 2019, Iowa Citizens filed the Petition, which pleads two counts alleging Defendants-Appellants State of Iowa, *et al*. (collectively "State") have violated the State's duty under the public trust doctrine. Count I alleges violations of the due process clause of the Iowa Constitution, and Count II alleges common law violations in equity. (Petition at ¶¶ 76-99, App. __). The Petition prays for injunctive relief, declaratory relief, attorney's fees and costs, and other appropriate relief the District Court finds may be just and equitable. (*Id*., Prayer at ¶¶ (a)-(h), App. __).

B. DISPOSITION OF THE CASE IN THE DISTRICT COURT

On April 29, 2019, the State filed a Motion to Dismiss. (Motion to Dismiss, App. __). The State sought dismissal on four grounds: (1) Iowa Citizens did not demonstrate causation and redressability and thus lacked standing; (2) the political question doctrine renders the injunctive relief claims nonjusticiable; (3) the declaratory relief claims are nonjusticiable; and (4) Iowa Citizens may only proceed under the Iowa Administrative Procedure Act (IAPA), must exhaust administrative remedies, and programmatic claims are not cognizable under the IAPA. (Memorandum of Law in Support of Motion to Dismiss, App. __).

On September 11, 2019, the District Court denied the Motion to Dismiss. The District Court held that Iowa Citizens have standing because they "will suffer injury as a result [sic] the untreated water of the Raccoon River being too polluted to enjoy either recreationally or aesthetically" and they "are likely to be unable to use the Raccoon River in any reasonable, functional manner, without heavy water treatment." (Ruling at 5, App. __). The District Court held that Iowa Citizens need not demonstrate causation and redressability, which are elements of Article III standing required in federal court, but also ruled that the "case currently before the court does involve causation and redressability." (*Id*. at 5-6, App. __).

The District Court held that the political question doctrine did not apply in Iowa when the U.S. Supreme Court has "already determined that the political question doctrine does not apply to state courts." (Ruling at 7, App. __). Even if the doctrine applied in state court, the Court declined to find that the "claims represent a political question" and that the doctrine does not apply because courts "still maintain the power to interpret the Iowa Constitution." (*Id*. at 8, App. __). The District Court further held that "none of the proposed remedies encroach on the separation of powers." (*Id*.).

Finally, the District Court held that Iowa Citizens were not required to pursue claims under the IAPA, that "pursuing relief via administrative remedies would be fruitless," and thus "there is no need to exhaust administrative remedies." (*Id*. at 10, App. __).

On November 4, 2019, the Court granted the Application for Interlocutory Appeal. (11/4/19 Supreme Court Order).

On December 2, 2019, the Court granted Iowa Citizens' Motion for Expedited Briefing and Submission in part. (12/2/19 Supreme Court Order).

VII. STATEMENT OF FACTS

The Raccoon River, from the Des Moines River confluence upstream to the Polk/Dallas county line, is a meandered river and a navigable water. (Petition at ¶ 28, App. __). This intrastate watershed drains 3,625 square miles,

or 2.3 million acres, approximately seventy-three percent of which grows corn and soybeans with 1.15 million acres farmed with tile drains. (*Id*. at ¶ 29, App. __). The Iowa Department of Natural Resources (DNR) has designated the River as non-compliant with the state drinking water standard for nitrate because of pollution from agricultural sources. (*Id*. at ¶¶ 30, 33, App. __). The Des Moines Water Works sources drinking water for half a million Iowans from the River and treats the water, passing the costs on to its ratepayers, because the water frequently does not meet the drinking water standard. (*Id*. at ¶¶ 20, 35, App. __).

Iowa farmers apply vast amounts of fertilizer to grow corn and soybeans. (Petition at ¶ 17, App. __). The applied fertilizer provides nitrogen and phosphorus to promote plant growth and increase yields. (*Id*.). Animal Feeding Operations (AFOs) confine animals in buildings or corrals, bringing the feed to the animals and collecting their manure, in liquid or solid form, rather than stocking the animals on pasture. (*Id*. at ¶ 40, App. __). AFOs then apply the manure containing nitrogen and phosphorus to crops. (*Id*. at ¶ 17, App. __). The DNR operates a database tracking over 9,000 AFOs. (*Id*. at ¶ 41, App. __).

Nitrate enters surface water from farming operations through precipitation events, which create storm water runoff into surface water

systems, and through tile drains, which directly transport the water-soluble nitrate from soil below the surface and discharge that nitrate-infused runoff into surface waters. (Petition at ¶ 19, App. __).

Farmers' application of phosphorus as fertilizer binds phosphorus to soil particles, which then enters surface water systems through agricultural storm water runoff and soil erosion. (Petition at ¶ 23, App. __). Phosphorus can also dissolve in water, and tile drains contribute dissolved phosphorus loads to streams and lakes. (*Id*.). Climate change increases the frequency of heavier than normal precipitation events, which will increase nitrate and phosphorus discharges from agricultural sources. (*Id*. at ¶¶ 26-27, App. __).

The nutrients phosphorus and nitrogen serve as a driver for cyanobacteria growth and resulting harms. (Petition at ¶ 24, App. __). Cyanobacteria are aquatic photosynthetic bacteria also known as "blue-green algae," which thrive in lake water and slow-moving, nutrient rich water during the warmer months of the year. (*Id*. at ¶ 25, App. __). Cyanobacteria excrete cyanotoxins, including microcystins and cylindrospermopsin, which are toxic to humans and animals. (*Id*.) Climate change increases air and water temperatures, and thus increases cyanobacteria proliferation and impacts to water quality. (*Id*. at ¶¶ 25-27, App. __). Exposure to microcystins as a result

of drinking contaminated water or through water contact recreation also results in adverse health risks to Iowans. (*Id*. at ¶ 39, App. __).

The U.S. Environmental Protection Agency has established a primary drinking water standard for nitrate of 10 mg/l. (Petition at ¶ 20, App. __). This standard is also the Iowa Class C water quality standard for drinking water. (*Id*.). The DNR has classified the meandered section of the Raccoon River as impaired for nitrate. (*Id*. at ¶ 28, App. __). Exposure to nitrate levels both above and below the drinking water standards results in adverse health risks to Iowans. (*Id*. at ¶ 39, App. __).

The Des Moines Water Works monitors water at its intake point on the meandered section of the Raccoon River for nitrates and cyanotoxins. (Petition at ¶ 36, App. __). The Des Moines Water Works' nitrate monitoring shows historical and ongoing nitrate levels greater than the Class C nitrate water quality standard, and which have increased over time as depicted in Figure 1. (*Id*.).

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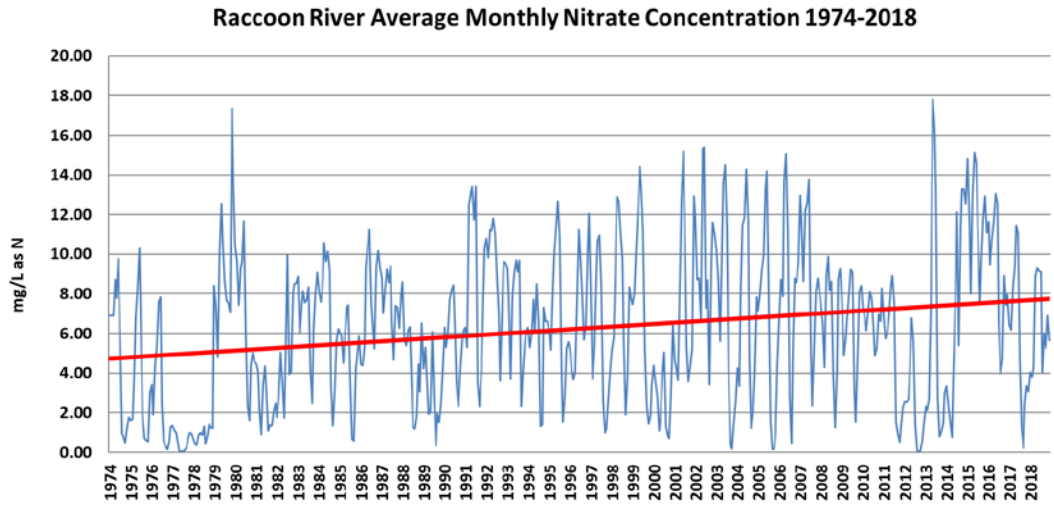
Figure 1



(Petition at 10, Figure 1, App. __).

The Des Moines Water Works' cyanotoxin monitoring since 2016 indicates the ongoing presence of cyanobacteria, microcystins, and cylindrospermopsin in the meandered section of the Raccoon River. (Petition at ¶ 37, App. __). The Des Moines Water Works sampling since 2016 demonstrates several days when levels of microcystins presented human health risks and impaired water contact recreation, including swimming and kayaking. (*Id*. at ¶ 38, App. __).

In 2008, the DNR adopted a Raccoon River pollution budget called a Total Maximum Daily Load ("TMDL"). (Petition at ¶ 31, App. __). The TMDL determines the origin of nitrate pollution and the pollution reductions necessary to meet the Class C drinking water standard for nitrate in the

meandered section of the Raccoon River. (*Id*. at ¶ 32, App. __). Point sources[1] "do not contribute substantially to the nitrate impairment at the [Des Moines Water Works] in the City of Des Moines," and agricultural nonpoint sources contribute 85.3 percent of the nitrate load at Van Meter, the monitoring station upstream from the meandered section of the Raccoon River. (*Id*. at ¶ 33, App. __). The TMDL establishes that nonpoint sources must reduce nitrates by 48.1 percent to meet the Class C drinking water standard. (*Id*. at ¶ 34, App. __). But TMDLs do not themselves require pollution reductions or best management practices, (*id*.), and the River remains impaired more than eleven years after the adoption of the TMDL. (*Id*. at ¶¶ 30, 31, App. __).

Nitrogen and phosphorus entering the Gulf of Mexico from the Mississippi/Atchafalaya River Basin has created a hypoxic zone spanning thousands of square miles. (Petition at ¶ 57, App. __). The 2008 Gulf Hypoxia Action Plan calls for states, including Iowa, to develop strategies to reduce nitrogen and phosphorus loadings to the Gulf of Mexico. (*Id*. at ¶ 58, App. __). The Plan establishes a goal of at least a forty-five percent reduction

[1] A "point source" is any discernible, confined and discrete conveyance, but does not include agricultural storm water discharges and return flows from irrigated agriculture. Iowa Code § 455B.171(19) (2019); Iowa Admin. Code 567-60.2 (2019).

in total nitrogen and total phosphorus loads. (*Id*.). In 2013, the DNR, the Department of Agriculture and Land Stewardship, and Iowa State University adopted the Iowa Nutrient Reduction Strategy ("the Strategy"). (*Id.* at ¶ 59, App. __). The Strategy identifies best management practices that reduce nitrogen and phosphorus discharges, including but not limited to cover crops, no till, conversion to perennial grasses, conversion to grazed pasture, and land retirement. (*Id*. at ¶ 61, App. __). The Strategy does not require adoption or implementation of any limitations on nitrogen and phosphorus from agricultural nonpoint sources. (*Id*.).

Effective July 1, 2018, the Iowa legislature enacted section 20 of Senate File 512 (2018), which declared the Strategy the state policy for nitrogen and phosphorus. (Petition at ¶ 63, App. __); *see also* Iowa Code § 455B.177(3).

The most recent Strategy progress report acknowledges that adoption of the Strategy's agricultural best management practices was not making sufficient progress towards its nonpoint source nutrient reduction goal. (Petition at ¶ 62, App. __ ("early NRS efforts only scratch the surface of what is needed across the state to meet the nonpoint source nutrient reduction.")).

VIII. THE PUBLIC TRUST DOCTRINE

The public trust doctrine provides all Iowans with an inviolable use right which the Iowa Constitution protects as a property interest and unenumerated

right. Justice Larson, writing for a unanimous court, described the doctrine as providing the public with "inviolable rights to certain natural resources" and placing a "burden" on the State of Iowa, with its role being "only that of a steward" of public trust land. *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). In *Sorensen*, the Court held that land adjacent to the Missouri River, and the river itself, were public trust property. *Id*. at 363. The defendants opposing the state's claim to the property argued that even if the land adjacent to the river was public trust property, protected public uses did not extend past navigation or commerce. *Id*. The Court resoundingly rejected this argument. *Id*. "The public trust doctrine, however, is not limited to navigation or commerce; it applies broadly to the public's *use* of property, such as waterways, without ironclad parameters on the types of uses to be protected." *Id*. (emphasis in original).

This Court has underscored the paramount use right and the duty imposed on the State as the trustee. In *Board of Park Commissioners of City of Des Moines v. Diamond Ice Co.*, 105 N.W. 203 (Iowa 1905), the Court considered whether an act of the legislature authorizing the Board to limit the taking of ice from the Des Moines River violated riparian landowners' rights. The Court held that riparian landowners had no vested rights to take ice and "have no rights which may be exercised to the exclusion of all others, and, the ownership of the stream being in the state in trust for all of the people, it is the duty of the

Legislature to enact such laws as will best preserve its use for all persons, and for all purposes." *Id.* at 205.

As the trustee, the State cannot abdicate control, or allow substantial impairment, of the Raccoon River. The U.S. Supreme Court and other courts have articulated these central duties under the doctrine. In *Illinois Central Railroad v. State of Illinois*, the U.S. Supreme Court held that the Illinois legislature's act to convey submerged lands in the harbor of Chicago to a railroad company was either void or always revocable. 146 U.S. 387, 453, 455 (1892). "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them…than it can abdicate its police powers in the administration of the government and the preservation of the peace." *Id*. The Court held that alienation of public trust property could not occur "except as to such parcels as are used in promoting the interests of the public therein, or can be disposed without any substantial impairment of the public interest in the lands and waters remaining." *Id*. State Courts have followed *Illinois Central*. *See, e.g.*, *Nat. Audubon Soc'y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983) ("the public trust…is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right

is consistent with the purposes of the trust."); *see also Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987); *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 74 (Wisc. 1957).

The public use of navigable water as a source of drinking water is also well established. In *Minneapolis Mill Co. v. Bd. of Water Comm'rs of St. Paul*, the Minnesota Supreme Court considered whether a Board of Water Commissioners, created by state statute, could draw water for domestic use even if such use interfered with riparian landowners. 58 N.W. 33, 34 (Minn. 1894). The court held that the rights of the riparian landowners were subordinate to the right of the public to draw from navigable public streams and that the "right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized." *Id*.; *see also In re Water Use Permit Applications*, 9 P.3d 409, 449 (Hawaii 2000) ("[W]e recognize domestic water use as a purpose of the state water resources trust"); *Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Super. 1987) (The public trust doctrine "applies with equal impact upon the control of drinking water reserves").

IX. ARGUMENT

A. IOWA CITIZENS HAVE STANDING

1. Preservation of Error

Iowa Citizens agree the State preserved error with respect to the standing issue.

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review constitutional claims within a motion to dismiss, our review is de novo." *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017).

3. Argument

Although the State admits that Iowa Citizens' members have suffered cognizable injuries, the State challenges Iowa Citizens' standing. (State Br. at 33).[2] The State relies on elements of federal Article III standing – causation and redressability – that are not required under Iowa law. Regardless, Iowa Citizens have standing under both Iowa law and the federal Article III standard.

[2] "Defendants concede that the Petition alleges harm to a specific personal interest." (Memorandum of Law in Support of Defendants' Motion to Dismiss at 13, App. __).

a. Iowa Citizens have Standing under Iowa Law

In the context of environmental and public trust doctrine claims, Iowa Citizens can demonstrate standing by showing that their members use the affected area and suffer injuries to aesthetic and recreational interests. *See Bushby v. Wash. County Conservation Bd.*, 654 N.W.2d 494, 496-497 (Iowa 2002); *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 837 (Iowa 2019). Iowa Citizens have standing because the Petition alleges Iowa Citizens' members use the Raccoon River and suffer aesthetic, recreational, and drinking water injuries from agricultural sources' nitrogen and phosphorus pollution. (Petition at ¶¶ 6, 39, 85, 97, App. __). Because Iowa Citizens challenge State actions and inactions that have abdicated control, and allowed substantial impairment, of the River by agricultural sources, Iowa Citizens have pleaded a legally cognizable interest and injuries. (Petition at ¶¶ 82-83, 85-86, 94-95, 97-98, App. __).

In *Bushby*, this Court analyzed standing under Iowa law in the context of public trust doctrine and environmental claims, and required the plaintiffs "to show (1) a specific, personal, and legal interest in the litigation, and (2) injury." 654 N.W.2d at 496 (quoting *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001)). To evaluate the interest and injury elements, the Court adopted the federal environmental injury test. *Id*. at 496-497. The *Bushby* Court held

that the plaintiffs had demonstrated standing because "they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Bushby*, 654 N.W.2d at 497 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (internal citations omitted)).

In *Puntenney*, this Court held that a non-profit environmental organization met "the *Bushby* standard" in a challenge to the approval of an oil pipeline and the use of eminent domain. *Puntenney*, 928 N.W.2d at 837. Although none of the environmental organization's members owned land on the pipeline route, this Court held the organization had standing under the *Bushby* standard because it had demonstrated its members use and enjoy rivers, streams, soil, and other natural areas and were concerned that the construction and operation of the pipeline would impact those areas. *Id*.

Here, the District Court correctly applied the *Bushby* standard when it held that Iowa Citizens have standing and rejected application of additional federal standing requirements.[3] (Ruling at 5-6, App. __). The State continues

[3] Federal Article III standing requires a plaintiff to establish that: "(1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180.

to assert that Iowa Citizens must establish standing by demonstrating a "causal connection" and "redressability" required by federal law. (State Br. at 34). But nothing in either *Bushby* or *Puntenney* hold that an environmental plaintiff must meet those additional requirements.

The State argues the higher standing bar applies because the Court has "cited with approval" the federal constitutional framework for standing. (State Br. at 34 (citing *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 867-868 (Iowa 2005) and *Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005)). But this Court has only adopted the federal analysis for *injury*, and has not adopted the causation and redressability elements of Article III standing. *Alons*, 698 N.W.2d at 872 (holding that the plaintiffs failed meet the requisite interest and injury elements); *Sanchez*, 692 N.W.2d at 821 (declining to reach the standing issue presented). The State confuses the Court's reference to the federal analysis as a wholesale adoption of the entire federal standing framework. The District Court thus correctly ruled that the federal causation and redressability elements do not apply. (Ruling at 6, App. __).

The State also describes *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008), as "binding precedent recognizing the applicability of prudential requirements for standing." (State Br. at 36-38). But the Court's reference to causation and redressability is *dicta*. *Godfrey*, 752 N.W.2d at 421. *Godfrey* held that the

plaintiff had not demonstrated a cognizable injury under several injury theories, including a public interest injury exception that further demonstrates that the Court has not bound itself to the federal Article III standing requirements. *Godfrey v. State*, 752 N.W.2d at 423-428.

Nor does *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470 (Iowa 2004), stand for the State's proposition. In *Citizens*, the plaintiffs claimed their injuries resulted from a proposed development project. *Citizens*, 686 N.W.2d at 475. In a challenge to the bond financing for the project, the Court confirmed the standing inquiry requires that "a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Id*. (internal citations omitted). It then held the plaintiffs did have standing because the "bonds would produce no adverse effect on Citizens' members." *Id*. At no point did the Court cite any federal causation or redressability requirements, cite any federal cases applying such requirements, or adopt federal standing requirements. The absence of these considerations in *Citizens* further demonstrates why this Court should not rely on the *dicta* in *Godfrey*.

b. Iowa Citizens Establish Causation and Redressability

Even though the *Bushby* standard should control the standing analysis, Iowa Citizens establish causation and redressability, which the District Court

correctly held. (Ruling at 6, App. __). To establish causation in federal court, an injury must be "fairly traceable to the challenged action of the defendant." *Laidlaw*, 528 U.S. at 180. In this case, Iowa Citizens' recreational, aesthetic, and drinking water injuries are fairly traceable to the State's voluntary nutrient control policies – exemptions for agricultural sources – and *de facto* under-regulation of AFOs. (Petition at ¶¶ 82, 94, App. __). The State argues that Iowa Citizens do "not allege the State is directly responsible for discharging nitrogen and phosphorus [sic] the Raccoon River watershed." (State Br. at 39). But this is not the relevant test. The Petition alleges the causal connection between the state's failure to regulate agricultural pollution with injuries resulting from agricultural nitrogen and phosphorus entering the Raccoon River watershed and substantially impairing the River.[4]

[4] Petition at ¶ 6, App. __ (injuries from nitrogen and phosphorus pollution from agricultural sources); ¶¶ 17-25, App.__ (application of fertilizer and manure on crop fields releases nitrogen and phosphorus into surface waters through storm water runoff and storm water tile drain discharges); ¶¶ 29-39, App.__ (nitrogen and phosphorus-related pollution in the Raccoon River, including nitrates and cyanotoxins); ¶¶ 40-48, App.__ (failure to regulate AFOs); ¶¶ 59-63, App.__ (voluntary Iowa Nutrient Reduction Strategy and admitted efforts "only scratch the surface of what is needed"); ¶¶ 82-88, 94-98, App.__ (allegations that voluntary nutrient policies and *de-facto* under regulation of AFOs abdicate control and substantially impair the Raccoon River and harm Iowa Citizens' members).

Federal courts routinely find standing for private plaintiffs suing government actors for exempting or failing to regulate polluting industries on the basis that the resulting pollution causes the injury. *See, e.g., Association of Irritated Residents v. EPA*, 790 F.3d 934, 940 n.4 (9th Cir. 2015) (regulatory exemption for agricultural sources' air pollution was fairly traceable to the petitioners' injuries from air pollution); *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1072 (9th Cir. 2014) (causation where Nevada plan allowed pollution from a coal fired power plant); *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (affirmative defense allowing more pollution establishes causation for air pollution injuries). In an effort to stretch out the causal chain between the State's actions and Iowa Citizens' injuries, the State mischaracterizes Iowa Citizens' claims as "alleg[ing] the ongoing efforts by the State to reduce such pollution have proved inadequate." (State Br. at 39). But Iowa Citizens do not allege harm from the indirect effects of inadequate, but valiant, "efforts…to reduce nutrient pollution in its waterways[.]" *Id*. Iowa Citizens allege the causal connection between the state's failure to regulate agricultural pollution *at all* with injuries resulting from agricultural nitrogen and phosphorus entering the Raccoon River watershed and substantially impairing the River. *Irritated Residents*, *WildEarth Guardians*, and *NRDC* all found causation to establish standing for persons injured by

pollution to sue the government for allowing the pollution to occur. The causation analysis here is no different, despite the State's protests. Thus, the injuries alleged here are fairly traceable to the State's violations of the public trust doctrine.

To satisfy the redressability element of federal Article III standing, a plaintiff must demonstrate "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. Plaintiffs do not need to demonstrate that the requested relief will redress one hundred percent of their injuries. *See, e.g.*, *P.I.R.G. v. Powell Duffryn Terminals*, 913 F.2d 64, 73 (3d Cir. 1990) ("Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III."). Moreover, repeal of an unlawful exemption redresses injury caused by that exemption. *See Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (repeal of "grace period" exemption redresses injury); *NRDC*, 749 F.3d at 1062 (repeal of an exemption for certain emissions "would prevent those emissions and help alleviate that harm"); *Irritated Residents*, 790 F.3d at 940 n.4 (repeal of exemption for agricultural sources' air pollution would redress petitioners' injuries from air pollution).

Iowa Citizens request several forms of relief, including declaratory relief, an order directing the State to adopt a mandatory remedial plan, and an

order enjoining new and expanding medium and large AFOs in the Raccoon River watershed. (Petition, Prayer at ¶¶ (a)-(f), App. __). The injunctive relief sought will limit and reduce the agricultural nitrogen and phosphorus pollution that the State concedes is injuring Iowa Citizens' recreational, aesthetic, and drinking water uses of the Raccoon River. Thus even if the requested order to the State to adopt a mandatory remedial plan would not result in immediate or complete elimination of nutrient pollution, it is "likely, as opposed to merely speculative," it will reduce pollution and thereby reduce Iowa Citizens' injuries. *Laidlaw*, 528 U.S. at 181. Moreover, the Court should presume that the State will act pursuant to any declaratory relief, making such relief redressable. *See Cherniak v. Kitzhaber*, 328 P.3d 799, 807 (Oregon Ct. App. 2014) (holding declaratory relief justiciable because "it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine").

The State's argument relies entirely on a mischaracterization of the U.S. Supreme Court's analysis in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, the Court held that plaintiffs lacked standing in a challenge to an agency regulation applicable to other federal government agencies. *Id*. at 558-89. The plaintiffs failed to show redressability, because it was not clear

that the regulation at issue imposed binding requirements on the non-party agencies whose actions caused plaintiffs' injuries. *Id*. at 568 ("Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation…But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question.").

No such considerations are present here. The Iowa agencies responsible for implementing water pollution programs and the Iowa Nutrient Reduction Strategy are parties in this action, so their compliance with a court order is not speculative. Moreover, because Iowa Citizens seek remedies that would impose unambiguously mandatory pollution reduction requirements on agricultural sources, the fact that private third parties are not before the court has no relevance. The State misleadingly implies that *Lujan* addressed a challenge to a regulation over *polluters*, and stands for the proposition that the redressability of mandatory regulations over polluters is dependent on "show[ing] such revisions would actually change the conduct of third parties," rendering it difficult or impossible to establish redressability. (State Br. at 40 (citing *Lujan*, 504 U.S. at 563, 568-69)). *Lujan* does not stand for that proposition.

The State admits that Iowa Citizens have met Iowa's threshold standing requirements of a legal interest and an injury. And though the State significantly overstates the extent to which Iowa courts have adopted and relied on the federal Article III standing framework, Iowa Citizens satisfy those causation and redressability requirements.

B. THE POLITICAL QUESTION DOCTRINE SHOULD NOT APPLY IN IOWA COURTS OR, ALTERNATIVELY, THE COURT SHOULD LIMIT THE DOCTRINE TO THE CLASSICAL MODEL

1. Preservation of Error

Iowa Citizens agree the State preserved error with respect to the political question doctrine issue.

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review constitutional claims within a motion to dismiss, our review is de novo." *Godfrey*, 898 N.W.2d at 847.

3. Argument

This Court recently observed that the political question doctrine does not apply in state courts. *See Freeman v. Grain Processing Corp.*, 848

N.W.2d 58, 91 (Iowa 2014).[5] But, because no party argued for a different standard, the Court applied the federal standard for the purposes of the case and then held the doctrine did not bar a state common law nuisance claim. *Id*. at 92-93. The District Court correctly applied the rationale in *Freeman* and held that the doctrine does not apply to state courts. (Ruling at 7, App. __). This Court should affirm the District Court and hold that the doctrine does not apply to Iowa courts for two reasons.

First, the political question doctrine should remain a creature of federal law. The doctrine exists because of the limited constitutional authority of federal courts within the U.S. Constitution's separation of powers. "Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.'" *Rucho v. Common Cause*, 139 S.Ct. 2484, 2493, __ U.S. __ (2019). In *Common Cause*, the U.S. Supreme Court described political questions as "outside the courts' competence and therefore beyond the courts' jurisdiction." *Id*. at 2494.

[5] The *Baker* factors summarize the political question doctrine analysis. To determine "whether a political question is present," *Baker* factors one, two, and three ask whether there exists "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]" *Freeman*, 848 N.W.2d at 90 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

But the Iowa Constitution imposes no such Article III limit on courts' jurisdiction. *See* Iowa Const. art. V, § 1. The "courts, as the interpreters of [the] law[], will stand as the arbiters of all litigated matters…between the individual and any department of the government which transgresses any of his inalienable rights." *Pierce v. Green*, 294 N.W. 237, 248 (Iowa 1940). In discussing the separation of powers and the constitutional role of the courts in Iowa, this Court acknowledged that "[i]t is also well established that courts must, *under all circumstances*, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009) (emphasis added). In *Varnum*, the Court rooted "this mandate under the Iowa Constitution" by referring to the enduring principle, which "was recognized at the time...the Iowa Constitution was formed," "that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights." *Id*. at 876 (citing *Koehler v. Hill*, 15 N.W. 609, 640-641 (Iowa 1883) and 1 *The Debates of the Constitutional Convention of the State of Iowa* 453 (W. Blair Lord rep.) (Davenport, Luse, Lane & Co. 1857)).

Second, this *federal* doctrine does not even apply to state courts, a point of law the District Court correctly applied. (Ruling at 7, App. __). In *Freeman*, this Court noted that "the United States Supreme Court has made

clear that the federal political question doctrine does not apply to state courts." 848 N.W.2d at 91 (citing *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J. concurring)). And Iowa is not alone in rejecting the doctrine. *See, e.g.*, *Backman v. Secretary of the Commonwealth*, 441 N.E.2d 523, 527 (Mass. 1982); *State v. Campbell County School District*, 32 P.3d 325, 334 (Wyo. 2001); *Bryan v. Fawkes*, 61 V.I. 201, 218 n.6 (Virgin Islands 2014).

In the alternative, this Court should limit the doctrine to the Classical Model. This Court has on only two occasions held claims nonjusticiable, and in both instances under circumstances where the Iowa Constitution contained a textually demonstrable constitutional commitment of the issue. *See Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996) (textual commitment to the Senate to make its own rules under article III, section 9 made claim nonjusticiable); *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 831 (Iowa 1987) (textual commitment to each house of the legislature to judge the qualifications of its members under article III, section 7 made claim nonjusticiable). This Court described *Dwyer* and *Scott* as applying the "narrower classical model of the political question doctrine." *Freeman*, 848 N.W.2d at 92.

Rejecting the federal political question doctrine, or in the alternative limiting the doctrine to the Classical Model, would allow Iowa courts to

exercise their role within the Iowa Constitution's separation of powers without importing Article III limits.

C. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR CONSTITUTIONAL CLAIMS

1. Preservation of Error

Iowa Citizens agree the State preserved error with respect to the political question doctrine issue.

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review constitutional claims within a motion to dismiss, our review is de novo." *Godfrey*, 898 N.W.2d at 847.

3. Argument

a. Constitutional Claims are Always Justiciable

Regardless of whether the Court applies the Classical Model or the federal political question doctrine, the constitutional claims pleaded in Count I are justiciable. The District Court correctly rejected application of the doctrine on that basis. "State courts still maintain the power to interpret the Iowa constitution. The heart of Plaintiffs' claim is a challenge to the constitutionality of Section 20 of Senate File 512." (Ruling at 8, App. __ (citing *King v. State*, 818 N.W.2d at 1, 16 (Iowa 2012)). The State fails to

acknowledge this aspect of the District Court's ruling, instead arguing only that the District Court erred in holding that the doctrine does not apply at all based on *Freeman*. (State Br. at 44-46). The State's remaining arguments with respect to the doctrine do not respond to or dispute the constitutional basis of Iowa Citizens' claims, but rather argue that the injunctive relief sought "demonstrates they present nonjusticiable political questions under the first, second, and third *Baker* factors." (State Br. at 48; 48-68).

This Court first recognized the primacy of constitutional claims in any assertion of the political question doctrine in *Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977). In *Luse*, the Court addressed the issue of whether claims challenging the constitutionality of former Iowa Code section 53.17 regarding absentee ballots and the constitutionality of actions by the Iowa House of Representatives in an election contest were justiciable given section 7 of Article III of the Iowa Constitution. *Luse*, 254 N.W.2d at 326-28. The Court analogized the question presented to the exact *Baker* factor one argument the State advances in this appeal:

> By analogy, the Iowa General Assembly also possesses exclusive constitutional power to legislate, by virtue of [Section] 1 of Article III (Legislative Department), but that does not mean the courts are powerless to declare legislation invalid if it violates another constitutional clause. This latter power of courts goes back to *Marbury v. Madison*.

Id. at 327 (citations omitted).[6] The Court first recognized that the "judicial power" conferred to the courts "include[s] the gamut of the determination of constitutional questions." *Id*. The Court then cited three federal political question doctrine cases rejecting application of the doctrine to reach the underlying claims of unconstitutionality. *Id*. (citing *Baker*, 369 U.S. 186 (1962); *Bond v. Floyd*, 385 U.S. 116, 131 (1966); *Powell v. McCormack*, 395 U.S. 486, 549 (1969)). In rejecting the assertion of nonjusticiability, the Court held "that Iowa courts have power to adjudicate substantial claims of deprivation of federal or Iowa constitutional rights by the houses of the Iowa General Assembly in the exercise of the houses' election contest powers under [section] 7 of Article III of the Iowa Constitution." *Id*. at 328.

This Court followed *Luse* in the handful of cases considering the political question doctrine prior to *Freeman*. *See*, *e.g.*, *Scott*, 269 N.W.2d at 832 (considering the same constitutional provision as *Luse* but holding claim nonjusticiable because the Attorney General had not raised a constitutional claim); *Dwyer*, 542 N.W.2d 493-496, 501 (no constitutional claims were alleged and the Court found claims nonjusticiable under the doctrine); *King v.*

[6] The only textually demonstrated commitments of authority on which the State's political question argument relies are the legislature's and executive's general power in Iowa Const. art. III, § 1 (general legislative power) and art. IV, § 1 (general executive authority in the Governor). (State Br. at 49).

State, 818 N.W.2d 1, 21-22 (Iowa 2012) (the Court declined to apply the doctrine because the plaintiffs had alleged constitutional equal protection claims).[7]

The principles underlying *Luse* and the inapplicability of the political question doctrine rest upon this Court's "responsibility to protect the state constitutional rights of its citizens." *Godfrey*, 898 N.W.2d at 865 (citing *Corum v. University of North Carolina*, 413 S.E.2d 276, 290 (N.C. 1992)); *see also Varnum*, 763 N.W.2d at 876 ("When individuals invoke the Iowa Constitution's guarantees of freedom and equality, courts are bound to interpret those guarantees."). The Iowa Constitution reigns supreme over all of the branches of state government, including the legislative branch. *C.C. Taft Co. v. Alber*, 171 N.W. 719, 720 (1919); Iowa Const. art. XII, § 1 ("[The] Constitution shall be the supreme law of the State."). The Constitution reigns supreme because the people of Iowa hold the state's sovereignty – not the legislative, executive, nor judicial branch. *C.C. Taft Co.*, 171 N.W. at 720. The Constitution is, in essence, the people's voice. *Id.*; Iowa Const. art. I, § 2 ("All political power is inherent in the people"). Accordingly, this Court

[7] The State incorrectly argues that this Court held that "the doctrine warranted dismissal" in *King*. (State Br. at 45 (citing *King*, 818 N.W.2d at 16)).

should affirm the District Court and hold that the doctrine does not apply to the constitutional claims pleaded in Count I.

b. Iowa Citizens Pleaded Substantive Due Process Claims Concerning their Protected Property Interest and Unenumerated Right to Use the Raccoon River

Count I of the Petition alleges violations of the substantive due process clause, Iowa Const. art. I, § 9. The State neither contested these allegations in the District Court nor in its Proof Brief.

The due process clause of the Iowa Constitution provides a right of action against the state for a violation of a constitutionally protected right. *See Godfrey*, 898 N.W.2d at 871 (holding that a claim for damages under the due process clause was self-executing when the legislature did not provide a remedy). In so holding, this Court followed its own decisions allowing self-executing claims for injunctive relief. *Id*. (citing *Hensler v. City of Davenport*, 790 N.W.2d 569, 588–90 (Iowa 2010)). In *Varnum*, for instance, the Court granted injunctive relief in an action under the Iowa equal protection and substantive due process clauses to remedy an act of the legislature banning same-sex marriage. 763 N.W.2d at 906-07. Under *Godfrey*, *Hensler*, and *Varnum*, Iowa Citizens may seek injunctive relief here for their constitutional claim.

The public trust doctrine right of use receives protection as a property

interest under the due process clause. In *Witke v. State Conservation Commission*, the Court considered whether the state, as the trustee of navigable waters, may charge Iowans for their use. 56 N.W.2d 582, 585 (Iowa 1953). The Court held that "all persons have a right to use the navigable waters of the state, so long as they do not interfere with their use by other citizens, subject to regulation by the state under its police powers," and the State – except to provide improvements for public use – "may not restrict or charge for the use of the waters of navigable streams or lakes, and an attempt on its part to do so is a deprivation of the citizen of his property without due process of law[.]" *Id.* at 588-89. The Court has more recently described the public trust doctrine as "the 'paramount' right of Iowans to use state waterways" when the Court held that the threatened loss of the right weighed against concluding that a warrantless search was voluntary. *State v. Pettijohn*, 899 N.W.2d 1, 35 (Iowa 2017) (quoting *Witke*, 56 N.W.2d at 586).

The public right of use also receives constitutional protection as an unenumerated right pursuant to the unenumerated rights clause, Iowa Const. art. I, § 25, which "secure[s] to the people of Iowa common law rights that pre-existed Iowa's Constitution."[8] *Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa

[8] The Clause states that "[t]his enumeration of rights shall not be construed to impair or deny others, retained by the people." Iowa Const. art. I, § 25.

2006). The Clause "bring[s]…unenumerated rights retained by the people, founded equally…upon natural justice and common reason…within the censorship of courts of justice…when… [the rights are] assailed." *State ex rel. Burlington & Mo. River R.R. v. County of Wapello*, 13 Iowa 388, 412 (Iowa 1862). The public trust doctrine predates the Iowa Constitution, as well as the original thirteen states, and is thus an unenumerated right. *See Sorensen*, 436 N.W.2d at 361 (noting that the 1845 Act admitting Iowa into the Union required "forever free" public use of navigable waters and noting the pre-constitutional history of the doctrine); *Arnold v. Mundy*, 6 N.J.L. 1, 76-78 (1821) (discussing the pre-colonial history of the public trust doctrine, and holding that a riparian owner did not hold title to oyster beds in the Raritan River).

Count I alleges that the State, as the sovereign trustee, has violated Iowa Citizens' property interest and unenumerated right of use by abdicating control of the Raccoon River. (Petition at ¶ 82, App. __). Count I also alleges that the State, as the sovereign trustee, has violated Iowa Citizens' property interest and unenumerated right of use by allowing substantial impairment of the Raccoon River. (Petition at ¶ 83, App. __). Count I also alleges that the abdication of control and substantial impairment harms Iowa Citizens' members. (Petition at ¶ 85, App. __). The abdication of control and substantial impairment standards ascertain whether the State has violated the public trust doctrine and thus Iowa

Citizens' constitutional rights. *See Illinois Central*, 146 U.S. at 453; *National Audubon*, 658 P.2d at 724; *Caminiti*, 732 P.2d at 994; *Public Serv. Comm'n*, 81 N.W.2d at 74. Iowa Citizens thus pleaded constitutional claims in Count I, which preclude application of the political question doctrine.

D. EVEN IF APPLIED, THE POLITICAL QUESTION DOCTRINE DOES NOT RENDER IOWA CITIZENS' CLAIMS NONJUSTICIABLE

1. Preservation of Error

Iowa Citizens agree the State preserved error with respect to the political question doctrine issue.

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review constitutional claims within a motion to dismiss, our review is de novo." *Godfrey*, 898 N.W.2d at 847.

3. Argument

a. The District Court Correctly Held that the Remedies Sought did not Violate the Separation of Powers

After correctly holding that the constitutional claims precluded application of the political question doctrine, the District Court rejected the State's attack on the remedies sought by applying a separation of powers analysis, and concluded that "none of the proposed remedies encroach upon

the powers of the other branches of government." (Ruling at 8, App. __). The Petition asks the District Court to order the State to adopt a mandatory remedial plan, enjoin construction and expansion of certain AFOs, enjoin the State from violating Iowa Citizens' rights with respect to the Raccoon River, to provide declaratory relief, award attorney's fees and costs, and to order such other appropriate relief as the Court finds is just and proper. (Petition, Prayer at ¶¶ (a) through (h), App. __). But the state argues nevertheless that the Court apply the doctrine to the remedies sought.

By arguing that the injunctive relief sought in the Petition warrants dismissal as a political question under the *Baker* factors, the State misconstrues the political question doctrine. (State Br. at 47). In the rare cases where this Court applied the doctrine, the Court applied it to the underlying claim, not the remedies sought. *See Dwyer*, 542 N.W.2d at 501 (nonjusticiable "rule of proceeding" within Iowa Const. art. III, § 9); *Scott*, 269 N.W.2d at 832 (nonjusticiable determination of the qualifications of the Senate's members pursuant to Iowa Const. art. III, § 7); *Freeman*, 848 N.W.2d at 93-94 (justiciable state common law nuisance claim for damages).

In *Baker*, which articulates the modern analysis for the federal political question doctrine, the U.S. Supreme Court was careful to explain that it analyzed the *cause of action* for justiciability, not the remedies sought. 369

U.S. at 197-198 (holding equal protection claim justiciable at the motion to dismiss stage).

> Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

Id. at 198. *Baker* is especially instructive here because the U.S. Supreme Court performed its analysis of the equal protection claim at the motion to dismiss stage before the lower court had adjudicated any claims or ordered any remedies. This case presents the same posture.

As the Petition demonstrates, none of the requested remedies asks the District Court to perform an act outside of its equitable authority. The relief requested neither asks the District Court to perform a legislative nor an executive function. The State offers several arguments misconstruing the relief sought as asking the Court to order the legislature to enact or repeal laws. (State Br. at 51-55, 62). As the District Court held, the relief requested did not make such requests. (Ruling at 8, App. __). But pursuant to *Baker*, the issue of whether the District Court crafts any injunctive relief beyond its equitable powers or that might conflict with the separation of powers concerns is wholly premature.

b. The *Baker* Factors

The State argues incorrectly that *Baker* factors one, two, and three warrant dismissal. (State Br. at 48-67). Under these factors, dismissal is only warranted when there exists:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]

Freeman, 848 N.W.2d at 90 (citing *Baker*, 369 U.S. at 217).

Importantly, the *Baker* factors do not recognize controversial issues as political questions simply because the stakes are high. *Baker*, 369 U.S. at 217 ("The doctrine…is one of 'political questions,' not one of 'political cases.'"); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (a case does not present a political question "merely because [the] decision may have significant political overtones."). The fact that water quality in Iowa has been the subject of significant controversy and involves the resolution of complex issues does not make violations of the public trust doctrine nonjusticiable political questions.

c. The Iowa Constitution does not Textually Commit the Public Trust Doctrine Issue to a Specific Branch of Government

If the Court proceeds to the political question inquiry notwithstanding the constitutional claims here, it should hold that the Iowa Constitution does

not textually commit the public trust doctrine issue to a specific branch and end the analysis there, in accordance with the Classical Model. The State's misplaced argument challenging Iowa Citizens' requested injunctive relief relies on general legislative and executive power as the "textually demonstrable constitutional commitment of the issue to a coordinate political department." (State Br. at 49, 62). Citing broad grants of legislative and executive authority in Iowa Const. art. III, § 1 and Iowa Const. art. IV, § 1, the State advances an unprecedented expansion of the doctrine that would insulate *any* legislative and executive acts from judicial review. The State claims that because the "legislative and executive branches have addressed water quality issues through a variety of legislative and regulatory efforts, including the [Iowa Nutrient Reduction Strategy]," Iowa Citizens claims here are nonjusticiable. (State Br. at 49). This argument plainly offends the role of the judiciary and separation of powers in the Iowa Constitution. This Court has analogized to this *identical* argument to explain the manner in which a textual commitment *fails* to render a claim nonjusticiable. *See Luse*, 254 N.W.2d at 327 (noting that the power in Iowa Const. art. III, § 1 "does not mean the courts are powerless to declare legislation invalid if it violates another constitutional clause.").

Nor does the State advance any apt authority to support its argument that, if accepted, would broadly eviscerate judicial review of legislative and executive acts. The State cites *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) and *Rousso v. State*, 239 P.3d 1084, 1086-87 (Wash. 2010) but neither of these cases lend any support. (State Br. at 49-50). *Ferguson* stands for the principle that federal courts do not second-guess the legislative reasons for state policy so long as the legislation does not run afoul of federal law. *Ferguson*, 372 U.S. at 730-731. *Ferguson* does not address the issue of whether a sovereign trustee has violated the public trust doctrine, or even apply the political question doctrine. *Rousso* similarly does not involve either the political question or the public trust doctrines and, like *Ferguson*, expresses judicial restraint in the application of federal law to Washington law banning internet gambling. *Rousso*, 239 P.2d at 1086.

The Iowa Constitution lacks a "textual constitutional commitment of the issues raised in this case" because the public trust doctrine issue is not textually committed to any branch of government. *Freeman*, 848 N.W.2d at 93. The State cannot make a showing to the contrary. The "first and most important factor of the *Baker* formula is thus plainly not present and cuts markedly against any application of the political question doctrine[.]" *Freeman*, 848 N.W. 2d at 93 (citing *Klinghoffer v. S.N.C. Achille Lauro Ed*

Altri—Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 49 (2d. Cir. 1991)).

Lacking a textual commitment and supporting authority, the State resorts to rhetorical exaggerations by reframing the remedies sought as asking the District Court to order the State to engage in specific legislative actions. (State Br. at 51-55, 62). The Petition asks the Court to order the State to adopt a mandatory remedial plan and to enjoin construction and expansion of certain AFOs. (Petition, Prayer at ¶¶ (d) and (e), App. __). The Petition does not ask the Court to require or proscribe any legislative action as part of that mandatory remedial plan.[9]

Moreover, the requested remedies do not make this lawsuit nonjusticiable. *See Baker*, 369 U.S. at 198 (premature to consider remedies at the motion to dismiss stage). The District Court has the equitable power to order the remedies that it deems appropriate, including "such other appropriate relief as the Court finds may be just and equitable." (Petition, Prayer at ¶ (h), App. __). The State's characterization of the Petition as asking

[9] One of the State's most egregious exaggerations warrants a response. The State seizes upon a statement Iowa Citizens made in their Resistance to the Application for Interlocutory Appeal, in which Iowa Citizens expressed support for farmers and that the State, when adopting the mandatory remedial plan, can and should support farmers. (State Br. at 54-55). Iowa Citizens have not asked the Court to order such relief nor to become an "agricultural production czar." (State Br. at 55).

the District Court to trample the separation of powers is both factually incorrect and premature; any such argument of remedies violating the separation of powers should be raised in the remedies phase of the litigation.

d. The Public Trust Doctrine and Substantive Due Process Provide Judicially Manageable Standards

A vast body of substantive due process and public trust doctrine law from Iowa and other states provide judicially manageable standards, making *Baker* factor two a non-issue. *See, e.g., Hensler*, 790 N.W.2d at 580 (substantive due process standard); *Witke*, 56 N.W.2d at 586-87 (substantive due process and public trust doctrine); *Sorensen*, 436 N.W.2d at 361-362 (public trust doctrine); *Illinois Central*, 146 U.S. at 453 (public trust doctrine); *National Audubon*, 658 P.2d at 724 (public trust doctrine). The Petition does not demand that this Court resolve technical remedial questions that lack judicially manageable standards. Instead, it asks the Court to use standards developed in decades of case law to determine whether the State has violated Iowa Citizens' due process rights and the public trust doctrine, and order the State to adopt the mandatory remedial plan. (Petition, Prayer at ¶ (d), App __). The complexity of the issues does not implicate the political question doctrine because "the mere fact that a case is complex does not satisfy this factor." *Freeman*, 848 N.W.2d at 94 (rejecting scientific complexity as a basis for nonjusticiability).

The State incorrectly argues that an absence of "a standard under the public trust doctrine to assist courts in evaluating a state's efforts to develop, implement and measure progress for numeric water quality limits for specific pollutants" means the entire case should be dismissed. (State Br. at 56-57). Setting aside the State's misplaced focus on the remedies, such a standard does exist: the substantial impairment standard. *See Illinois Central*, 146 U.S. at 453. Multiple courts have applied this standard. *See, e.g., Environmental Law Foundation v. State Water Resources Control Board*, 26 Cal. App. 5th 844, 859 (Cal. Ct. App. 2018) ("The analysis begins and ends with whether the challenged activity harms a navigable waterway and thereby violates the public trust."); *Public Serv. Comm'n*, 81 N.W.2d at 74; *In re Water Use Permit Applications*, 9 P.3d at 451-53; *San Francisco Baykeeper, Inc. v. State Lands Comm'n*, 242 Cal. App. 4th 202, 239 (Cal. Ct. App. 2015). The District Court's evaluation of impairment given numeric water quality standards provides a judicially manageable standard, especially given the facts that DNR found the Raccoon River impaired for nitrate based on its numeric nitrate drinking water standard, the DNR adopted the TMDL, the Des Moines Water Works' monitoring and water quality expertise is readily available, and the U.S. Environmental Protection Agency's recommended numeric recreational warning criteria for certain cyanotoxins. (Petition, at ¶¶ 30-38,

App. __); 84 Fed. Reg. 26413 (June 19, 2019). The District Court, given the facts and the law, is more than capable of evaluating impairment of the Raccoon River.

e. The Court can Reach a Decision Because the State has Made the Initial Policy Determination

Regarding *Baker* factor three, the State concedes that it has made an initial policy determination: The "legislative and executive branches have addressed water quality issues through a variety of legislative and regulatory efforts, including the [Iowa Nutrient Reduction Strategy]." (State Br. at 49). The State has implemented years of voluntary agricultural nutrient controls, and officially declared that the voluntary Strategy is the State's policy for nutrient control when the legislature passed section 20 of Senate File 512 (2018). (Petition at ¶¶ 31-34, 58-63, App. __). That voluntary policy remains a central factor in the State's abdication of control and allowing substantial impairment of the Raccoon River. (Petition at ¶¶ 82, 83, 86, 94, 95, 98, App. __).

Nor must the legislature or executive branches first make nonjudicial policy determinations with respect to the Raccoon River. The public trust doctrine applies in Iowa and protects the public's use of navigable waters such as the meandered section of the River. *Witke*, 56 N.W.2d at 586; *Sorensen*, 436 N.W.2d at 361. Moreover, the State has already declared the River

impaired for nitrate, performed an accounting of nitrogen and phosphorus, determined sources, and identified effective best management practices in the TMDL and the voluntary Strategy. (Petition at ¶¶ 30-34, 59, 61, App. __).

The prospect of other Iowans seeking to protect their right to use other navigable waters should not render the claims in this Petition nonjusticiable. (State Br. at 61). The State concedes that there is a "realistic probability" that its actions and inactions may have rendered other navigable waters subject to public trust doctrine claims, and that those watersheds may have more or less pollution with reductions more or less urgent than the Raccoon River. (*Id*.). But this problem exists not because of the Petition, but rather because of the State's policy to pursue only voluntary nutrient controls. The State's contention that the courts are incapable of crafting effective, non-conflicting remedies to respond to agricultural water pollution underestimates the capacity of Iowa judges to develop equitable remedies.

f. The Climate Change Cases are Inapposite

The State cites five cases dismissing claims that the public trust doctrine applies to the atmosphere and that states are violating the doctrine by not reducing greenhouse gas emissions. All of these cases are inapposite.

The State first relies on *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, in which the Alaska Supreme Court applied *Baker* factor three

(initial policy determination) to hold three requests for declaratory and injunctive relief nonjusticiable political questions. 335 P.3d 1088, 1097-99 (Alaska 2014). *Kanuk* is inapposite because the State of Alaska had not developed *any* climate policy, and the Alaska Supreme Court noted that, in the context of *Baker* factor three, the "underlying policy choices are not ours to make *in the first instance*." *Id*. at 1098 (emphasis added). As discussed above, the State of Iowa here has made the initial policy determination, including adopting legislation, to codify the voluntary Iowa Nutrient Reduction Strategy as that policy, as well as declaring the Raccoon River watershed impaired for nitrate and adopting the TMDL. *Kanuk*'s holding regarding *Baker* factor three is also inapposite because the Alaska Supreme Court inappropriately focused its inquiry on the relief requested rather than the underlying constitutional claims, which are always justiciable in Iowa.

The second case cited by the State is an unpublished trial court decision from the Superior Court of Alaska, which cited *Kanuk* and applied *Baker* factor three to hold that constitutional claims for injunctive relief were nonjusticiable because a "court order granting Plaintiffs' injunctive relief claims would in essence create a policy where none now exists." *Sinnok v. Alaska*, 2018 WL 7501030 at *4 (Alaska Super. Oct. 30, 2018). *Sinnok* is thus

inapposite for the same reasons as *Kanuk* and does not support dismissal on political question grounds here.

The third case cited by the State – *Sanders-Reed v. Martinez* – stands in stark contrast to the posture of this case. *Sanders-Reed* involved an explicit constitutional duty to protect the environment and a delegation to the legislature to implement that specific duty, which abrogated the common law public trust doctrine. 350 P.3d 1221, 1225-26 (N.M. Ct. App. 2015). There, the court held that claims to reduce greenhouse gases and protect the atmosphere should be raised within the constitutional and statutory framework, not a common law public trust claim. *Id*. at 1225-1227. The present case is inapposite because the Iowa Constitution contains no environmental protection clause and the statutory scheme does not give Iowa agencies authority to require nitrogen and phosphorus limitations from agricultural nonpoint sources. (Application for Interlocutory Appeal at 6). Moreover, the Iowa Constitution preserves the common law right as an unenumerated right under the unenumerated rights clause.

The State also cites *Svitak v. State*, 2013 WL 6632124 (Wash. Ct. App. 2013), an unpublished decision from the Washington Court of Appeals. *Svitak* is inapposite in that it dismissed claims on political question grounds when the plaintiffs did *not* challenge an affirmative state action or the state's

failure to undertake a duty to act as unconstitutional. *Svitak*, 2013 WL 6632124 at *2. The claims here, by contrast, challenge the constitutionality of the State's conduct and allege violations of constitutionally protected rights. Specifically, the Petition challenges the legislature's pursuit of a voluntary agricultural nonpoint source policy explicitly in section 20 of Senate File 512 (2018), and its prior inactions to regulate agricultural pollution. Iowa Citizens allege that these actions and inactions amounted to an unconstitutional deprivation of an unenumerated right, a deprivation of property without due process of law, and a violation of the public trust doctrine. (Petition at ¶¶ 78-88, 91-99, App. __). *Svitak* therefore has no relevance to the political question issue presented here.

The final inapt climate decision relied on by the State, *Aji P. v. State of Washington*, 2018 WL 3978310 (Wash. Super. Aug. 14, 2018), is another unpublished trial court decision. *Aji P.* generally relies on *Baker* to hold that the constitutional and public trust claims in that case raise political questions, but does not apply any of the *Baker* factors in its analysis. *See generally id*. Thus, *Aji P.* does not warrant dismissal here.

This Court can and should hold the State accountable to the public and should not dismiss this petition. As demonstrated above, the political question doctrine should not apply in Iowa, and if it did, the Court should limit the

doctrine to only the Classical Model. Regardless, the doctrine should not apply to the constitutional claims in Count I. But even if the Court applies the doctrine broadly, the Court should reject all of the State's arguments because the Iowa Constitution lacks a textual commitment of the public trust issue to another branch of government, the public trust doctrine and due process clause provide judicially manageable standards, and the State has already made several policy determinations, including codification of the state's voluntary nutrient policy.

E. THE DECLARATORY RELIEF CLAIMS ARE JUSTICIABLE

1. Preservation of Error

The State failed to preserve error. The District Court did not address the issue of whether the declaratory relief requested was justiciable. (Ruling at 8-10, App. __). Because the State failed to file a motion requesting a ruling on this issue, the State has failed to preserve error. *UE Local 893/IUP v. State*, 928 N.W.2d 51, 60 (Iowa 2019).

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review constitutional claims within a motion to dismiss, our review is de novo." *Godfrey*, 898 N.W.2d at 847.

3. Argument

The Petition prays for justiciable declaratory relief by pleading sufficient facts to establish a live controversy concerning the rights and duties of the State under the Iowa Constitution and the public trust doctrine, and asks the Court to declare Section 20 of Senate File 512 (2018) null and void. While Iowa Rule of Civil Procedure 1.1101 permits Iowa courts to adjudicate declaratory actions, "a justiciable controversy must exist" and Iowa courts "will not decide an abstract question simply because litigants desire a decision on a point of law or fact." *Bechtel v. City of Des Moines*, 225, N.W.2d 326, 330 (Iowa 1975). For a controversy to be justiciable, the parties must have "adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." *Id*. (quoting *Katz Investment Co. v. Lynch*, 47 N.W.2d 800, 805 (1951)). Additionally, plaintiffs must plead sufficient facts "to show that the issue is concrete and that particular legal rights and powers will be or are affected." *Id.* at 331.

A live controversy exists here between the parties with respect to whether the State's actions and inactions, including the voluntary nutrient strategy, comport with the State's duty to protect the Raccoon River for public use. The Petition pleads abundant facts concerning agricultural water pollution, the State's voluntary control strategy, the abdication of control and

substantial impairment of the Raccoon River, and the harm to public trust uses suffered by Iowa Citizens' members. (Petition at ¶¶ 4-6, 16-39, 40-48, 59-62, App. __). Not only do Iowa Citizens seek a declaration of rights and duties, but their Petition also prays for an order declaring Section 20 of Senate File 512 (2018), codified at Iowa Code § 455B.177(3), null and void so as to provide specific relief by declaring the voluntary Iowa Nutrient Reduction Strategy unconstitutional and inconsistent with the public trust doctrine. Declaratory relief will inform Iowans of the rights of the public, the duties the State has violated, and the harm inflicted on the public interest resulting from the State's improper and imbalanced voluntary agricultural pollution control policy. This Petition is thus justiciable because the parties have adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment.

The State argues declaratory relief here would be "abstract" and "academic" because it would have "no immediate impact on the water quality of the Raccoon River watershed, does not compel the State to take any particular action, and will not protect Iowa Citizens from their claimed injury." (State Br. at 69). The State's argument rests on its apparent disregard for the law. Regardless of any declaratory relief, the State now tells this Court that it will take no action in the face of a judicial decree stating the respective rights and duties. But the State's hubris should not render Iowa Citizens claims

nonjusticiable. Rather, this Court should presume that the State will act in accordance with such declaratory relief. *See Cherniak*, 328 P.3d at 807 (holding declaratory relief claims justiciable because "it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine"). The paramount right of Iowans to use and enjoy the State's navigable waters – the right to clean water – is far too important to be declared nonjusticiable.

F. THE IOWA ADMINISTRATIVE PROCEDURE ACT DOES NOT PROVIDE A REMEDY AND EXHAUSTION OF ADMINISTRATIVE REMEDIES IS FRUITLESS

1. Preservation of Error

Iowa Citizens agree the State preserved error with respect to the IAPA, except the State failed to preserve error with respect to its argument that Iowa Citizens must challenge discrete agency action and may not raise programmatic claims under the IAPA. (State Br. at 77-80). The District Court did not rule on this argument. (Ruling at 10, App. __). Because the State failed to file a motion requesting a ruling on this issue, the State has failed to preserve error. *UE Local 893/IUP*, 928 N.W.2d at 60.

2. Scope of Review

Iowa Citizens agree with the State's scope of review, except the Court reviews constitutional issues de novo. "To the extent that we review

constitutional claims within a motion to dismiss, our review is de novo." *Godfrey*, 898 N.W.2d at 847.

3. Argument

The legislature has the duty to protect the Raccoon River and Iowans' right to use the River, and should not escape accountability here. The State incorrectly argues that Iowa Citizens' claims challenging the legislature's voluntary agricultural nutrient policy must be pleaded within the confines of the Iowa Administrative Procedure Act ("IAPA"), that Iowa Citizens failed to exhaust administrative remedies before state agencies that, as the State admits,[10] lack the authority to limit agricultural nonpoint source nutrient pollution, and that Iowa Citizens' claims are programmatic challenges disallowed by the IAPA. (State Br. at 71-80).

In sum, the State would have this Court hold that Iowa Citizens must seek piecemeal remedies from agencies without authority to limit the pollution in the first instance. Instead, this Court should affirm the District Court, which correctly held that the legislature's actions and inactions pursuing a voluntary control strategy were subject to judicial review because the legislature holds the duty to enact laws to protect the public trust and Iowans' use of navigable waters. (Ruling at 10, App. __). The District Court

[10] (Application for Interlocutory Appeal at 6).

also correctly held that exhausting administrative remedies "would be fruitless." (*Id*.) Finally, the programmatic claims alleged here are appropriately pleaded as violations of the substantive due process clause.

a. Iowa Citizens' Claims are not Governed by the Iowa Administrative Procedure Act

Iowa Citizens challenge the State's voluntary agricultural water pollution controls for nutrients – nitrogen and phosphorus – from agricultural sources. (Petition at ¶¶ 82, 94, App. __). These voluntary control policies exist because of the actions and inactions of the legislature. In 2018, after years of voluntary nutrient controls, the legislature made the voluntary Iowa Nutrient Reduction Strategy the State's official policy for nutrients. (*Id*.); Iowa Code § 455B.177(3); Acts 2018 (87 G.A.) ch. 1001, S.F. 512, § 20. And as alleged, the *de minimis* progress from the Strategy to date "only scratches the surface of what it needed" and "improvements affected by conservation practices will require a much greater degree of implementation than has occurred so far." (Petition at ¶ 62, App. __). Thus, instead of protecting the public use of the Raccoon River, the State has abdicated control to private parties and allowed substantial impairment of the River. (Petition at ¶¶ 82, 86, 94, 98, App. __).

The District Court correctly allowed this action to proceed because the IAPA does not provide for judicial review of the actions and inactions of the

legislature. (Ruling at 10, App. __). "Any person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final *agency* action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1) (2019) (emphasis added). The IAPA defines "agency" specifically to exclude the legislature. *Id*. § 17A.2(1) (2019). The IAPA thus does not govern judicial review of the Iowa legislature's voluntary agricultural pollution policy.

This Court has held that the legislature has the duty to protect the public's use of navigable waters. *Board of Park Commissioners*, 105 N.W. at 205 ("[I]t is the duty of the Legislature to enact such laws as will best preserve its use for all persons, and for all purposes"). The U.S. Supreme Court also observed the same duty in *Geer v. Connecticut*, confirming that "it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state." 161 U.S. 519, 534 (1896) *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979); *see also Arnold*, 6 N.J.L. at 78 (explaining that the legislature is the "rightful representative" of the trust resources). Other courts invalidating legislative actions violating the public trust doctrine have emphasized the importance of the judiciary in enforcing the doctrine.

> Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and

> executive branches are judicially accountable for their dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 158, 167 (Ariz. 1991) (citations omitted). The State of Iowa has embraced the public trust doctrine and should be held to account for its actions and inactions as the trustee.[11]

b. Iowa Citizens Need Not Exhaust Administrative Remedies when Defendant Agencies have no Authority to Limit Nitrogen and Phosphorus from Agricultural Nonpoint Sources

The State's argument that review should proceed only under the IAPA and that Iowa Citizens have failed to exhaust administrative remedies overlooks agency Defendants' lack of authority.[12] The State admits that the State does not limit nitrogen and phosphorus runoff from crop fields, which the State classifies as agricultural nonpoint sources. (Application for

[11] The State of Iowa has relied on the public trust doctrine to, *inter alia*, prevent a private party from draining a meandered lake, *State v. Jones*, 122 N.W. 241, 244 (Iowa 1909), and claim title to lands adjacent to the Missouri River. *Sorensen*, 436 N.W.2d at 360.

[12] The State concedes Iowa Citizens have no duty to exhaust administrative remedies in a challenge to the constitutionality of Section 20 of Senate File 512 (2018). (State Br. at 72 n.9).

Interlocutory Appeal at 6 ("Iowa farms are nonpoint sources of nitrogen and phosphorus that are not subject to regulation.")).[13] Similarly, federal and state law classifies stormwater runoff from Concentrated Animal Feeding Operations' (CAFOs) land-applied manure as nonpoint source agricultural stormwater when applied pursuant to a manure management plan.[14]

[13] While the legislature has directed the DNR to implement the federal Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program for point sources, Iowa Code § 455B.197 (2019), the legislature specifically exempted "agricultural storm water discharge and return flows from irrigated agriculture[]" from the term "point source" and thus exempted agricultural nonpoint sources from any obligation to limit pollution under the NPDES permitting program. Iowa Code § 455B.171(21) (2019). This is consistent with the federal Clean Water Act, which prohibits discharges of pollutants from point sources without a permit, and also exempts agricultural storm water discharges and irrigation return flows from the definition of point source. *See* 33 U.S.C. §§ 1311(a), 1342, 1362(12), (14) (discharge of a pollutant from a point source without a permit unlawful). Also tracking federal regulations, Iowa's NPDES implementing regulations exempt "any introduction of pollutants from non-point source agricultural and silvicultural activities" from the obligation to obtain an NPDES permit. Iowa Admin. Code 567-64.4(1)(e) (2019). Thus, agricultural nonpoint source runoff and discharges are not subject to regulation or limitation under the NPDES permitting program administered by the Iowa DNR.

[14] CAFOs are large confinement operations that house significant numbers of animals such that, in 1972, the federal Clean Water Act classified such facilities as point sources. *See* 33 U.S.C. § 1362(14) (definition of "point source" includes CAFOs and exempts "agricultural stormwater discharges and return flows from irrigated agriculture"); 40 C.F.R. § 122.23(e), (e)(1) (federal stormwater exemption for land-applied manure); Iowa Code § 459.311(2) (prohibition on regulations more stringent than federal law).

The IAPA does not provide an adequate remedy because the agencies themselves do not have authority to limit nitrogen and phosphorus from agricultural nonpoint sources. A reviewing court under the IAPA could not order an agency to perform an *ultra vires* action – adopt mandatory nitrogen and phosphorus limits at agricultural nonpoint sources – if the agency lacks authority.

Because the agency Defendants lack authority to require nutrient limits for nitrogen and phosphorus from agricultural nonpoint sources, there is no adequate remedy under the IAPA. An agency may only adopt a rule if it falls within the scope of powers delegated to the agency by the legislature. *See, e.g.*, *Litterer v. Judge*, 644 N.W.2d 357, 362 (Iowa 2002) (holding that Secretary of Agriculture did not have authority to promulgate rules relating to the percentage of ethanol in motor fuel absent specific legislative authorization). Because the agencies lack authority to limit agricultural nonpoint sources' nutrient pollution, Iowa Citizens have no duty to exhaust administrative remedies. *See Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 328-29 (Iowa 2015) (exhaustion only required when action or inaction is related to the authority of the agency); *Rowen v. LeMars Mutual Ins. Co. of Iowa*, 230 N.W.2d 905, 909 (Iowa 1975) (exhaustion only required when "the relief sought is within the jurisdiction of the [agency]").

c. Iowa Citizens Appropriately Pleaded Claims under the Substantive Due Process Clause and the Common Law

The State does not dispute that Iowa Citizens have stated a claim under the due process clause or at common law in equity. Review should therefore proceed under the substantive due process clause or in equity because the State concedes that the IAPA provides review for only discrete agency actions and not for the programmatic, systemic violations pleaded here. (State Br. at 78). Therefore, requiring Iowa Citizens to challenge a myriad of discrete agency actions under the IAPA does not provide an adequate remedy for the overriding problem in the Raccoon River watershed.

The State acknowledges that "the overall thrust of the petition is a broad programmatic attack" on water quality policies and that Count I and Count II do not challenge "*discrete* agency action[s]" which must be challenged under the IAPA. (State Br. at 78) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). The State correctly frames Count I and Count II as programmatic and systemic challenges because the State adopted a voluntary agricultural nutrient pollution control strategy and under-regulates AFOs. (Petition, ¶¶ 82, 94, pp.19-20, App. __). But this does not support the conclusion that Iowa Citizens' claims must be dismissed; it simply underscores that the claims are not IAPA claims. Iowa Citizens agree that the legislature does not authorize such review under the IAPA, and as such, the

legislature has not provided an adequate remedy for Iowa Citizens to protect their "'paramount' right" of use of the Raccoon River. *Pettijohn*, 899 N.W.2d at 35 (quoting *Witke*, 56 N.W.2d at 586).

This Court may appropriately adjudicate Count I and Count II of this Petition. The due process clause of the Iowa Constitution provides a right of action against the state for a violation of a constitutionally protected right. *See Godfrey*, 898 N.W.2d at 871 (holding that a claim for damages under the due process clause was self-executing when the legislature did not provide a remedy). And *Godfrey* also recognized the Court's own decisions allowing self-executing claims for injunctive relief. *Id*. (citing *Hensler*, 790 N.W.2d at 588–90). In *Varnum*, the Court granted injunctive relief in an action under the Iowa equal protection and substantive due process clauses to remedy an act of the legislature banning same-sex marriage. 763 N.W.2d at 906-907. Under *Godfrey*, *Hensler*, and *Varnum*, Iowa Citizens may seek injunctive relief here for their constitutional claim.[15]

[15] The Court may also proceed with Count II under its equitable authority to hear common law claims for injunctive relief because there is no other plain, speedy, and adequate remedy at law. *See Bushby*, 64 N.W.2d at 496, 497-498 (plaintiffs' action in equity for injunctive relief raised public trust common law claim).

d. Limiting Iowa Citizens' Constitutional Claims to Review under the Iowa Administrative Procedure Act would Violate their Right to Procedural Due Process

The State contends that the IAPA forecloses judicial review of Iowa Citizens' constitutional and common law claims because of the limitations it places on judicial review. (State Br. at 77-80). Because it insists upon case-by-case review of a multitude of discrete actions and inactions, and asserts that broad programmatic claims may not proceed under the IAPA, the State's argument necessarily violates Iowa Citizens' right to procedural due process.

Courts consider three factors when determining whether procedural limitations (like those governing agency conduct review under the IAPA) violate procedural due process: "(1) the nature of the interest involved; (2) 'the risk of erroneous deprivation of such interests through the procedures used'; and (3) 'the [g]overnment's interest, including the...burdens that additional or substitute safeguards would entail.'" *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 567 (Iowa 2019) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). Each of the *Eldridge* factors favor Iowa Citizens.

First, Iowa Citizens' right to use navigable waters is of the highest constitutional importance. It is an unenumerated right and a "'paramount' right," *Pettijohn*, 899 N.W.2d at 35 (quoting *Witke*, 56 N.W.2d at 586), for which any restriction or charge – except to improve use and access – amounts

to a deprivation of property without due process of law. *Witke*, 56 N.W.2d at 588-89. Second, there is an absolute risk of deprivation if Iowa Citizens are forced to challenge a multitude of individual agency actions rather than the policy of the legislature and the programmatic nature of its voluntary nutrient strategy. Exhausting administrative remedies and litigating each permit (or more likely, failure to require any permit), manure management plan, authorization to apply manure on frozen or snow covered ground, and petition for rulemaking would be astoundingly complex and, particularly considering the inadequacy of this remedy in light of Iowa DNR's very limited authority, raise an insurmountable bar for Iowa Citizens to protect their rights. These individual proceedings would render such deprivation inevitable. Third, the government's interest in administrative efficiency warrants review in a single action rather than a multitude of administrative appeals that would be immensely burdensome and costly for all parties, including the courts.

For these reasons, the *Eldridge* factors favor proceeding with Iowa Citizens' claims in order to avoid a procedural due process deprivation.

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X. CONCLUSION

For all of these reasons, Iowa Citizens urge this Court to affirm the District Court, and to hold that Iowa Citizens have standing, the claims are justiciable, and the Iowa Administrative Procedure Act does not compel dismissal of this action.

XI. REQUEST FOR ORAL ARGUMENT

Iowa Citizens hereby request oral argument.

Respectfully Submitted,

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Signature

January 13, 2020
Date